BRITISH COLUMBIA LABOUR RELATIONS BOARD

RCL SOUTH BURNABY BRANCH 83 HOUSING
SOCIETY DOING BUSINESS AS THE POPPY RESIDENCES

(the "Employer")

-and-

UNITE HERE, LOCAL 40

(the "Union")

PANEL:	James Carwana, Vice-Chair
APPEARANCES:	Dave Moffatt, for the Employer Michael J. Prokosh, for the Union
CASE NO.:	67793
DATE OF DECISION:	December 18, 2014

DECISION OF THE BOARD

I. INTRODUCTION

1 This is an application by the Employer alleging a breach of Section 39 of the *Labour Relations Code* (the "Code") and Section 8 of the *Labour Relations Regulation*, B.C. Reg. 7/93 (the "Regulation"). As a remedy, the Employer seeks to have the Board declare "null and void" the certification vote which was conducted, and "order that a new vote be conducted".

2 I find that I am able to decide the Employer's application (the "Application") based on the submissions of the parties.

II. BACKGROUND

3 On October 17, 2014, a hearing was conducted with respect to a certification application by the Union. A Settlement Agreement was arrived at between the parties relating to various items, including matters relating to the certification vote. The Settlement Agreement provided, *inter alia*, that three employees would be "included on the voters list, and their ballots will not be challenged by either party". A fourth employee (TG) was not one of the employees to be added to the voters list, and other matters regarding TG were also resolved by the Settlement Agreement.

4 The vote relating to the certification application was held on October 20, 2014 between the hours of 3:00 p.m. and 5:00 p.m. There were 29 eligible voters listed on the voters list. The 3 employees who were added to the voters list under the Settlement Agreement voted. The fourth employee TG also voted.

5 At the vote there were two challenged ballots. The Employer challenged the ballot of TG, and the Union challenged the ballot of a different individual. The Employer's challenge was made by the scrutineer on behalf of the Employer and the Union's challenge was made by the scrutineer on behalf of the Union. Both challenged ballots were double sealed.

6 When the voting period was completed, the Returning Officer, with the two scrutineers present, counted all of the unchallenged ballots. This did not include the 2 sealed ballots which had been challenged. The counting of the unchallenged ballots demonstrated that the Union had won the vote 13 to 9. Turning to the status of the two challenged ballots, the Union did not object to the Employer's challenge of TG's ballot and it was not counted. With respect to the ballot challenged by the Union (the "Challenged Ballot"), the Union scrutineer indicated to the Returning Officer that it also should not be counted. However, the Employer scrutineer sought to have the Challenged Ballot counted, even though it would not affect the result. In this respect, the Union specifically says the Employer scrutineer "insisted" on the Challenged Ballot being counted, and the Employer does not specifically deny this statement in its reply.

The response of the Union scrutineer at that point is not clear, although the Employer generally says that there was agreement prior to the counting of the Challenged Ballot, and this is not specifically denied by the Union. It is clear that the Challenged Ballot was subsequently unsealed by the Returning Officer and counted.

7 The Return of Poll was completed afterwards taking into account the Challenged Ballot. The final vote count noted on the Return of Poll was 13 to 10 in favour of the Union. The Board issued a certification to the Union on October 21, 2014. The Employer filed the Application in this matter on October 27, 2014.

III. POSITIONS OF THE PARTIES

8 The Employer says its "complaint is three-fold". First, it claims the "vote was flawed because The Code and The Regulations were not followed". Second, the Employer asserts that TG "was in violation of the Settlement terms determined at the vote with her continued presence, campaigning, and subsequently voting". The third item relates to "the three employees who were reinstated so that they could, by returning to work, be entitled to vote" under the Settlement Agreement. The Employer argues that those three employees "have declined all recalls prior to and subsequent to the vote" and it was "in violation of the Settlement Agreement" for them to vote.

9 On the first issue, the Employer asserts that, "contrary to Section 39 of *The Code* and Section 8 of its Regulations", privacy was not maintained for the employee involved with the Challenged Ballot. In this respect, the manner in which that person's vote was counted revealed how the person voted.

10 Regarding the second issue raised in the Application, the allegation is that TG knew she was no longer an employee but engaged in activity, including voting, which was in "breach of the Agreement".

11 With respect to the third issue raised by the Employer, it argues that the fact the three individuals had not returned to work indicates "there was no intention for any return to work" and therefore they should not have been included in the voting constituency.

12 The Union raises a number of matters in response. First, the Union argues that the application is untimely. The Union notes that the Return of Poll was signed by the Returning Officer and both scrutineers on October 20, 2014 and the Board issued the certification on October 21, 2014. It was not until October 27, 2014 that the Application was filed by the Employer. The Union argues that the "Board has repeatedly emphasized the need for challenges to be made by a party/scrutineer, **before** the votes are counted" (emphasis in original).

13 Next, the Union relies on "a number of other important policy considerations under the *Code*". The Union argues that "the ballot in question would not have in any way impacted the final result of the vote" and "the true wishes of the employees" are clearly reflected in the vote. The Union says that the "unfortunate error by the Returning

Officer is not a sufficient reason to invalidate the results of the entire vote". The Union cites case law where, in a voting matter, the Board has noted placing "the most weight on the policy considerations of allowing employees to participate in freely choosing trade union representation and of determining the true wishes of the employees", rather than on "strict compliance with directions of the Returning Officer" (*Blue Horizon Contracting a division of Blue Horizon Energy Inc.,* BCLRB No. B50/2013, 224 C.L.R.B.R. (2d) 1 at para. 60). The Union submits that the policy considerations "of determining the true wishes of the employees" and "allowing employees to participate in freely choosing trade union representation" are supportive of "the Union's argument that the Application should be dismissed".

14 The Union argues in the further alternative that the Employer does not have "clean hands" in this matter and that "the Application should be dismissed pursuant to s. 133(1)(c) of the *Code*". The Union says:

> It is especially absurd for the Employer to advance its Application, in that it was the **Employer's scrutineer** that insisted that the Challenged Ballot be unsealed and counted. Despite that, it is now the Employer that objects to the counting of the ballot; the very ballot that its own scrutineer insisted be counted. (emphasis in original)

15 The Union further relies on Section 156 of the Code and Section 20 of the Regulation and says that the error of procedure relating to the count ought to be cured.

16 Turning to the other aspects of the application involving TG and the other three employees, the Union asserts there is no merit to the Employer's submissions. With respect to TG, the Union says that it did not oppose the Employer's challenge of her ballot and it was never counted. With respect to the other three employees, the Union says that the Settlement Agreement specifically provided for such individuals to vote and the votes not to be challenged. The Union says that it was not a breach of the Settlement Agreement at all for such persons to vote, but in fact was specifically provided for in the Settlement Agreement.

17 In reply, the Employer says that the Employer scrutineer "did not know the process" involved with the vote, but the Union scrutineer was familiar with such matters. Therefore, the Employer argues, the Union scrutineer could have interjected to ensure the process was conducted properly.

18 In terms of the specific matters raised by the Union, the Employer says that its Application "was made without delay and as soon as all the process facts were confirmed". With respect to the Union's argument that only one ballot was exposed, the Employer says that it "does not matter whether it be one or more voters who were identified". The Employer argues "the voting process did not comply with Section 39" of the Code as well as Section 8 of the Regulation and as a result the vote should be "declared invalid". Regarding the clean hands argument of the Union, the Employer says "the Union scrutineer could have interrupted the process" and "any unclean hands rests with the Union". In terms of the question of technicalities and Section 156 of the

Code, the Employer says that the "Board has been very technical on how votes are to be conducted" and the result of the breach of process here is "that one employee is identified and may be subjected to discomfort or coercion". The Employer says that "to maintain the integrity of the voting procedure, this vote should be declared null and void" and further says that there should be a new vote ordered.

IV. ANALYSIS AND DECISION

19 The first issue raised by the Employer concerns the vote. Section 39 of the Code and Section 8(2)(k) through (n) of the Regulation provide as follows:

> 39 (1) All voting directed by the board or by the minister under this Code and other votes held by a trade union or employers' organization of their respective members on a question of whether to strike or lock out, or whether to accept or ratify a proposed collective agreement, must be by secret ballot **cast** in such a manner that the person expressing a choice cannot be identified with the choice expressed. (emphasis added)
>
> (2) The results of a vote referred to in subsection (1), including the number of ballots cast and the number of votes for, against or spoiled, must be made available to both
>
> (a) the members, and
>
> (b) the trade union and employer affected.
>
> (3) A vote referred to in subsection (1) must be conducted in accordance with the regulations.
>
> (4) If the board in its discretion directs that they may vote, the following persons are eligible to vote in a representation vote:
>
> (a) persons who at the time an application for certification was received by the board were not employees in the proposed unit but are employees in the unit at the time of the vote;
>
> (b) persons who at the time an application for decertification was received by the board were employees in the unit, but are not employees in the unit at the time of the vote.
>
> Duties of returning officer
>
> 8 (2) Subject to the Code and this regulation, the returning officer must
>
> (k) provide for the deposit, in a sealed envelope identified by name of the voter, of a ballot cast by a person whose eligibility to vote has been contested,

> (l) ensure that the vote is conducted in accordance with the Code to ensure the privacy of the voter, the secrecy of the ballot and maintenance of the general rules of voting set out in Schedule 1,
>
> (m) at the close of the poll but prior to opening the ballot box, refer any contested ballot to the board for decision,
>
> (n) following the board's decision with respect to any contested ballot, open the ballot box and count the ballots in the presence of the scrutineers, if any,

20 The issue raised here does not relate to the **casting** of the ballots, and no impropriety is alleged regarding how the voting was conducted. Rather, the issue here is the conduct of the count after the ballots were cast. The Employer argues that what occurred in respect of the count led to the disclosure of how the employee voted whose ballot was the Challenged Ballot, and the "privacy of this employee was not maintained".

21 There is no dispute the counting of the Challenged Ballot revealed how the person voted. As the Union concedes, this was an "unfortunate error" and should not have occurred. However, the counting of the Challenged Ballot was at the behest of the Employer scrutineer, after the result of the vote was already clear based on the count which had taken place. In the circumstances, counting the Challenged Ballot would not have affected the result and the Employer scrutineer should not have sought to have the Challenged Ballot counted.

22 The Employer has raised the lack of familiarity that its scrutineer had with the process and procedures relating to such votes. I find, however, that ignorance of such matters is not an excuse. Under Section 9 of the Regulation every scrutineer has a duty to "assist the returning officer or deputy returning officer in counting the ballots". A party which does not provide its scrutineer with the necessary advice regarding the process and procedures to be used in carrying out the scrutineer's duty cannot subsequently rely on the scrutineer's unfamiliarity with such matters. The fact that the Employer scrutineer did not know the process and procedures relating to such matters does not relieve the scrutineer of this duty.

23 This applies to the counting of the unchallenged votes before dealing with the challenged ballots, as well as the counting of the Challenged Ballot. It was incumbent upon the scrutineers to have raised any issues regarding the manner of how the count was to be conducted prior to the actual count. This is consistent with recognizing the obligations of employers and trade unions as provided for under Section 2(a) of the Code.

24 Where the scrutineer of a party has remained silent regarding the counting of the ballots, whether through ignorance or otherwise, I would deny to that party the type of relief requested in the Application. It is the Employer seeking to set aside the vote, but the same would apply if the Union was seeking to do so. Such an approach assists in

fostering good labour relations, encourages the parties to participate in ensuring appropriate counting procedures, and promotes the orderly, constructive and expeditious settlement of disputes under Section 2(e) of the Code.

25 Here the Employer scrutineer specifically requested that the Returning Officer count the Challenged Ballot. However, the Employer is now seeking to use the counting of that ballot to have the vote set aside due to the consequent identification of how that person voted. In my view, having taken the position with the Returning Officer that the Challenged Ballot should be counted, the Employer cannot now effectively take the position before the Board that it was wrong to count the Challenged Ballot. The conduct of a party in a labour relations matter is a relevant consideration for the Board, and legal concepts such as waiver prevent the Employer from maintaining such inconsistent positions (see *B.C. Rail Ltd*., BCLRB No. B128/93 at p. 25; and *Certain Employees of Vogue Theatre Inc*., BCLRB No. B370/2004, in particular at para. 62).

26 While it is unfortunate that counting the Challenged Ballot led to the parties knowing how the person voted, circumstances arise from time-to-time where the parties can tell how persons voted (e.g., in applications under Section 18 or Section 142 involving one person bargaining units or amendments, or in situations where all the employees in a small setting vote the same way). The fact that it can be determined how such people voted does not in and of itself automatically invalidate the vote. I further note that the Board has not invalidated a vote in similar circumstances where the ballots of ineligible voters did not affect the outcome (see *Hertco Kitchens MFG. Ltd*., BCLRB No. B416/95 at para. 55 and *Ventur Steel (1990) Ltd*., BCLRB No. B93/97, at para. 10). And although the Employer has raised the potential for the individual involved with the Challenged Ballot to be subject to coercion, the Code contains protections against such conduct if it occurs.

27 In the case before me, I am satisfied that the vote reflected the true wishes of the employees, and the counting of the Challenged Ballot did not affect the result. Taking all of the circumstances into account, I would not exercise my discretion to set aside the vote.

28 The Union has raised Section 133(1)(c) of the Code. In my view, the conduct of the Employer as set out herein, including the inconsistent position now being maintained by the Employer before the Board, is such as to invoke Section 133(1)(c). I find it would be just and equitable, pursuant to Section 133(1)(c) of the Code, to refuse to make the order requested here, and the error of the Returning Officer and the scrutineers in the counting procedure ought not to nullify the choice made by the employees in the circumstances. Further, to the extent what occurred may be seen as an error in the procedure of counting the votes, I would also exercise my discretion under Section 156 to relieve against such an error.

29 In the result, and taking into account all of the foregoing, I dismiss the first ground of the Employer's Application.

30 With respect to the second ground raised in the Application, the allegation is that TG "was in violation of the Settlement terms". I note, however, that the conduct which is complained of by the Employer is not specifically excluded under the Settlement Agreement, and in my view the Employer has not demonstrated a breach of the Settlement Agreement by TG. Furthermore, the Employer's challenge to TG's vote was accepted by the Union and TG's vote was not, in fact, counted. Even if there was some breach by TG herself in casting a ballot, I would not award the remedy sought by the Employer in the circumstances. I dismiss this ground of the Employer's Application.

31 Dealing with the third ground raised by the Employer, I agree with the Union that the Settlement Agreement specifically provided for the three employees involved to vote. The Settlement Agreement does not require that those employees will work prior to the vote or for a certain time period after the vote in order for their votes to be counted. I dismiss the third ground of the Employer's Application.

V. CONCLUSION

32 For the reasons given, the Employer's Application is dismissed.

LABOUR RELATIONS BOARD

"JAMES CARWANA"

JAMES CARWANA
VICE-CHAIR