

FEDERAL COURT OF APPEAL

B E T W E E N:

*(Court Seal)***WESTJET, AN ALBERTA PARTNERSHIP**

FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE	
F I L E D	26-APR-2023 Manshu Li
TORONTO, ON	1

Applicant

- and -

**AIRCRAFT MECHANICS FRATERNAL ASSOCIATION and
CANADA INDUSTRIAL RELATIONS BOARD**

Respondents

NOTICE OF APPLICATION FOR JUDICIAL REVIEW

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Applicant. The relief claimed by the Applicant appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor or, if the Applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-996-6795) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date April 26, 2023 Issued by "Mavis Griffith"
(Registry Officer)
Address of
local office: 180 Queen Street West, Suite 200
Toronto, ON M5V 3L6

TO: **AIRCRAFT MECHANICS FRATERNAL ASSOCIATION**
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AND TO: **SAMUEL A. SEHAM & LEE R.A. SEHAM**
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Lawyers for the Respondent, Aircraft Mechanics Fraternal
Association

AND TO: **ATTORNEY GENERAL OF CANADA**
Ontario Regional Office
Department of Justice Canada
120 Adelaide Street West
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Toronto, Ontario M5H 1T1

AND TO: **CANADA INDUSTRIAL RELATIONS BOARD**
C.D. Howe Building
240 Sparks Street, 4th Floor West
Ottawa, ON K1A 0X8

APPLICATION

This is an application by WestJet, an Alberta Partnership (“WestJet”) for judicial review in respect of the decision of the Canada Industrial Relations Board (the “Board”) dated March 30, 2023 (the “Decision”), made under the *Canada Labour Code* (the “Code”), certifying the Respondent Aircraft Mechanics Fraternal Association (the “Union”) as the bargaining agent for a bargaining unit of WestJet employees.

THE APPLICANT MAKES APPLICATION FOR:

1. An Order quashing the Decision and remitting the matter back to the Board for rehearing by a different Board member;
2. Costs of this application; and
3. Such further and other relief as this Honourable Court may deem appropriate and just to grant.

THE GROUNDS FOR THIS APPLICATION ARE:

1. The Union, on January 31, 2023, filed an application under the *Code* to certify a bargaining unit of WestJet employees.
2. The Board’s process and decision with respect to that application are the basis for this judicial review application, and therefore the Board’s general process, and the process followed in this case, are described below to provide the necessary context for this application for judicial review.

The Certification Process under the Board's Rules of Procedure

3. The *Code* and the Board's Rules of Procedure and the Notice to the Employer and Employees set out strict timelines for the processing and determination of a certification application, including:

- (a) The Board gives notice of the application in writing to the employer.
- (b) The employer is required to post the Certification Application and the Board's Notice in the workplace so that affected employees in the proposed bargaining unit have notice that their legal rights may be impacted.
- (c) The employer has 5 calendar days from notice of the application to provide the Board with certain required information, including: a full list of employees affected by the application (including name, job classification/ position title, home address and telephone number); an organizational chart showing the relationship of the employees in the proposed bargaining unit to the other employees and also showing the lines of authority between management, supervisors, and subordinate employees; and detailed description of the nature of the employer's business and operations.

- (d) The employer has only 10 calendar days from notice of the application to file a response to the Board.
- (e) The applicant union has 5 calendar days from the receipt of the response to file a reply.

4. During the above-noted process, the Board also appoints one of its industrial relations officers to complete an investigation and oversee the conduct of the file, which can include contacting the parties to discuss issues relating to the application (including as to the scope and composition of the proposed bargaining unit) and contacting a subset of employees to verify the membership evidence.

5. Following meeting(s) with the parties, the industrial relations officer provides the parties with a letter of understanding (referred to as an “LOU”) setting out his or her understanding of the proposed bargaining unit and any disputed positions. Parties have only 1 day to provide their comments to the LOU – and for an employer, this is not a response to the certification application itself, but merely a response to the officer’s understanding as set out in the LOU.

6. The Union commences the certification process and it is the specific bargaining unit that is proposed in the union’s application that forms the basis from which all of the above steps flow.

7. The union's proposed bargaining unit is also the key basis from which the Board's discretion to certify a bargaining unit under section 27(2) of the *Code* flows.

8. Unions may withdraw a certification application (i.e., as opposed to having its application dismissed) where the union misjudged the size or proper scope of the bargaining unit, or where other issues raised in the employer's response cause the union to reassess its proposed bargaining unit or support for a successful application. A trade union may subsequently refile a fresh application (if it had the necessary basis to do so), which would provide the employer with a proper and full opportunity to respond to the proposed bargaining unit.

The Process Adopted by the Union and the Board in this Case

9. In the present case, the Union's certification application (filed on January 31, 2023) proposed a bargaining unit comprised of three job classifications (and the apprentices for these positions). The Union's application described its proposed bargaining unit as being comprised of "highly skilled, federally licensed job classifications".

10. WestJet provided the necessary employee and organization information to the Board and the Union on February 6, 2023 (as referred to in paragraphs 1-8 above). As required, this submission was based on the original bargaining unit proposed by the Union in its application.

11. The parties had a conference call with an industrial relations officer from the Board on February 8, 2023, discussing the employee list and job classifications. This discussion was based on the original bargaining unit proposed by the Union in its application.

12. WestJet filed its response to the certification application on February 10, 2023. WestJet's response was based on the original bargaining unit proposed by the Union in its application. Among other things, WestJet proposed a modified bargaining unit having regard to its actual job titles that was in keeping with the stated goal of the Union's original proposal.

13. In its Reply, on February 20, 2023, the Union proposed an entirely different bargaining unit. The Union's new proposed bargaining unit was a fundamental and material change to what was proposed in the application. The Union's original proposed bargaining unit, as described by the Union its application, was a "skill-based bargaining unit" of "highly skilled, federally licensed job classifications that engage in the repair, maintenance and *trade certification* of aircraft at WestJet Airlines". Whereas the bargaining unit proposed in the Union's Reply was much broader than the skill-based unit originally proposed, now focusing on positions that are "integral to the coordination and performance of aircraft maintenance work". By way of example, the Union's new bargaining unit description added 10 new job classifications as compared to the unit proposed in WestJet's response, and, contrary to the Union's original application, it was now seeking to include multiple unlicensed positions (including aircraft furnishing workers) in its

bargaining unit. The new bargaining unit proposed in the Reply also sought to include three positions that the Union had excluded in its original application.

14. WestJet provided an updated organizational chart and further information on February 22, 2023. WestJet indicated it believed that the application for certification had been fundamentally altered and ought be withdrawn and refiled to allow for a proper response.

15. That same day (February 22), the IRO held a further teleconference with the parties. Among other things, WestJet objected to the inclusion of all the additional positions proposed by the Union two days earlier.

16. Two days later, on Friday February 24, 2023, the industrial relations officer sent the parties her LOU, outlining her understanding of the parties' positions and the issues in dispute. As described in the Decision, the parties were given one business day "to provide any written comments they may have with respect to the accuracy of the [industrial relations officer's] LOU.

17. WestJet and the Union each filed responses to the LOU on Monday February 27, 2023. In its response, among other things, WestJet noted that it (and the potentially affected employees) was being denied procedural fairness and submitted that the Board ought not to consider the changed bargaining unit and ought only to consider the application as originally filed – suggesting in the alternative that the Union simply withdraw

its application and refile so that WestJet would have a proper opportunity to make responding submissions.

The Board's Decision

18. The Board issued a Decision rejecting WestJet's objection and certifying the Union's changed bargaining unit. Among other things, in the Decision, Board member Elizabeth Cameron:

- (a) mischaracterized WestJet's position as being "an issue over the Board's authority" to decide the bargaining unit – when WestJet's actual position was that the Union had unfairly materially changed its bargaining unit at the 11th hour;
- (b) held that the Union's changed bargaining unit was not "a material change" or a "substantive amendment";
- (c) determined that all of the new positions sought to be certified shared a "community of interest";
- (d) "acknowledge[d] the employer's frustration regarding the turnaround time the Board allowed it to provide the union with the job descriptions for the job classifications not originally included in the initial application"; and
- (e) concluded that "the amended bargaining unit proposed by the union is appropriate for collective bargaining".

The Decision is Unreasonable and in Breach of Procedural Fairness

19. The Decision is unreasonable, and the Board's process breached the rules of natural justice and procedural fairness, including as follows:

- (a) The Board unreasonably interpreted section 27(2) of the *Code*, which permits the Board to determine the appropriate bargaining unit *but* which also notes that the Board's decision is based on the starting point of "the unit proposed by the trade union";
- (b) The Board unreasonably mischaracterized WestJet's objection as being directed to the Board's powers, rather than being directed to the process followed in this case which denied the Board a proper basis to make its determinations and denied WestJet a fair opportunity to respond to the Union's proposed bargaining unit;
- (c) The Board unreasonably concluded that the Union had not materially changed or substantively amended its proposed bargaining unit;
- (d) The Board unreasonably permitted the Union to materially change its proposed bargaining unit description in its Reply – fundamentally altering the nature, character and membership of the proposed

bargaining unit – without giving WestJet a proper and appropriate opportunity to respond and made considered submissions on the bargaining unit, meaning that the Board's decision was not based on a complete or proper record;

- (e) The Board unreasonably concluded that the positions sought to be certified by the Union shared a “community of interest”;
- (f) The Board unreasonably certified this materially changed bargaining unit; and
- (g) The Board, contrary to principles of natural justice and procedural fairness, decided the certification application without giving WestJet a fair opportunity to respond to the materially new bargaining unit proposed by the Union in its Reply.

20. Sections 8, 24, 27 and 28 of the Canada Labour Code;

21. Sections 18 to 18.5 and 28 of the Federal Courts Act;

22. Rules 300 to 319 of the Federal Courts Rules;

23. Rule #1 of the Board's Rules of Procedure, and sections 30 to 38 of the Canada Industrial Relations Board Regulations, 2012.

24. Such further grounds as counsel may advise and this Court may accept.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

- 25. The Applicant's affidavit, to be filed.
- 26. The certified record before the Board in the proceeding below.
- 27. Such further evidence as counsel may advise, and this Court may accept.

THE APPLICANT REQUESTS, pursuant to Rule 317 of the *Federal Courts Rules*, that the Board send a certified copy of the Board's record of the following material that is not in the possession of the Applicant but is in the possession of the Board to the Applicant and to the Registry:

- 1. The full documentary record that was before the Board on the Union's certification application below.



April 26, 2023

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Solicitors for the Applicant

Court File No.:

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