ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **1857-19-R**

Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, Applicant v **Honey Construction Limited** Honey Glass & Window Ltd and Honey Construction Management Ltd., Responding Parties

BEFORE: Jack J. Slaughter, Vice-Chair

APPEARANCES: Raymond Seelen and Jim Congdon appearing for the applicant; Jason Mercier appearing for the responding party

DECISION OF THE BOARD: June 16, 2020

1. This is an application for certification filed under the construction industry provisions of the *Labour Relations Act, 1995,* S.O. 1995, c.1, as amended (the "Act") that the applicant elected to have dealt with under section 128.1 of the Act. The application was filed on September 21, 2019 by Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (the "Union" or the "Carpenters") with respect to Honey Construction Limited, Honey Glass & Window Ltd. and Honey Construction Management Ltd. (collectively "Honey" or the "Employer").

2. The Board held a Zoom Videoconference Hearing in these matters on June 3, 2020. Pursuant to the agreement of the parties and the prior ruling of the Board, the hearing was limited to two related issues: (a) does the Board have the discretion to extend the time limit for the Union to deliver the application to the Employer; and (b) if the Board does possess such discretion, whether the Board should exercise it in the Union's favour on the facts of this case.

Case Overview

3. This case presents very unusual, and perhaps unique, facts. The Union maintains that it successfully faxed the application materials to the Employer on September 23, 2019, within the time limit prescribed by the Board's Rules of Procedure. There is no question that the fax went through and that the Union received a "complete" fax transmission report. There is equally no question that the fax number used by the Union did belong to the Employer at one time. However, the Employer asserts that it gave up that fax number in 2015 and did not receive the Union's application materials on September 23, 2019. As will be explained in more detail below, the Employer learned of the fact an application had been made via an email communication from the Board on September 24, 2019, and subsequently in early October 2019, the Board directed the Union to deliver the application materials to the Employer anew. The Union then promptly sent the application materials to the Employer's counsel. In turn a response was filed, and then the usual case management submissions, which takes us to where we are today.

4. The primary position of the Union is that the fax number in question still belongs to the Employer and that it did make timely delivery of the application materials. The Employer denies that the fax number still belongs to it, and denies receiving the application materials via that fax number.

5. The Union's alternative position is that if its first delivery of the materials to the Employer was ineffective, nevertheless its second delivery was effective and that the Board should exercise its discretion to extend the time for delivery to make the second delivery timely. The Employer agrees it received the second delivery but argues that the Board does not have the discretion to extend the time for delivery of the application materials, and in the alternative, if the Board does have such discretion it should not be exercised on all the facts of this case.

6. For the sake of expedition, the parties agreed that the Board should hear and determine the Union's alternative position first. They also agreed that the Union could argue its primary position later if the Union was unsuccessful with its alternative position.

7. For the purposes of this motion, the Board will assume that the Union did not successfully deliver the application materials to the Employer in a timely fashion because the facsimile number to which the

Union successfully faxed the application materials no longer belonged to the Employer, but instead as of September 23, 2019 belonged to a third party.

Summary of the Relevant Facts

8. Further to the prior direction of the Board, the parties attempted to arrive at a Statement of Agreed Facts. Commendably they were able to agree on the vast majority of facts, but not all of them. The following summary draws upon the agreed facts, as well as the Union's proposed testimony from Business Representative Jim Congdon and a representative of the Better Business Bureau (the "BBB"). The Board will consider the proposed testimony of Mr. Congdon and the BBB Representative because counsel for the Employer frankly acknowledged that while he could not agree to it, the Employer had no knowledge to the contrary and was in no position to contest it. As will be shown below, this proposed testimony is essentially not controversial and is consistent with other agreed facts. However, the Board will not consider the proposed testimony of Lisa Pittari of the Union and Doug Assaly of the Employer. This latter proposed testimony presents direct conflicts that cannot be resolved without an assessment of credibility. Therefore, the Board will not consider their proposed testimony in coming to its decision herein.

9. The Board will do its best to describe the relevant facts in chronological order. There may be some skipping back and forth as circumstances warrant, but the Board will strive to keep "flashbacks" to a minimum.

10. The Employer has been in business for over ten years. From April 28, 2010 to April 1, 2019, the Employer was "accredited" by the BBB. In other words, the Employer paid a fee to the BBB to list its contact information and to confirm its credibility as a business to the public. The Employer at some point in time supplied the fax number in question, 613-249-7315, to the BBB. In fact, that fax number still appears on the BBB's website.

11. The BBB will change an employer's information upon request, and upon the submission of a form. In November 2013, the BBB did change the Employer's address upon the Employer's request.

12. The Employer did not obtain the fax number in question directly from Bell Canada or any of other the well-known Canadian

telecommunications providers. Rather it obtained the use of the fax number on a "pay as you go" basis from MyFax, a corporation based in the United Kingdom. The Employer asserts that closed its account with MyFax in March 2015, but there is no record of any contemporaneous communication to confirm that. According to the Employer, the relevant communication was contained in email correspondence that has been destroyed, or is inaccessible to the Employer. A recent email from MyFax does support the Employer's version of what happened. The Board will assume the Employer's account to be true for the purposes of this decision.

13. Despite the closure of the MyFax account, the Employer continued to list the fax number in question as part of its contact information on its website as late as May 14, 2016. However, the fax number had disappeared from the website as of August 22, 2016.

14. Prior to filing the application for certification and attempting to deliver the application materials to the Employer, the Union did four things. Firstly, the Union performed corporate searches. They listed significant information about the Employer's Directors, Officers and corporate address, but were silent on the issue of any fax number. Secondly, the Union did a BBB search, where it found the fax number in question. Thirdly, the Union did a search with a company well known for providing detailed information about the creditworthiness of companies operating in the construction industry, Lumberman's. The Lumberman's search disclosed the same fax number as the BBB search. Finally, Mr. Congdon telephoned the fax number in question and heard the distinctive tone of a fax connection, thereby confirming to him that the fax number was operational. Of course, this call did not tell Mr. Congdon to whom the fax number belonged. It merely demonstrated that the fax was working.

15. The Union filed the instant application for certification on Saturday, September 21, 2019. On the application, the Union provided an address, telephone and fax numbers, and an email address for the Employer.

16. On Monday, September 23, 2019, the Union sent the application materials to the Employer by facsimile transmission to the fax number in question. The Union received a "complete" fax transmission report at 11:17 a.m. that morning. Later that day the Union filed a completed Certificate of Delivery form with the Board.

17. On September 24, 2019, the Board sent a Confirmation of Filing Form in respect of this application to the Employer by fax and email. The Employer says that it did not receive the Board's fax but did receive its email.

18. On September 27, 2019, Mr. Congdon performed a "People By Name" search that showed 613-249-7315 as a "land line" registered to Doug Assaly of Honey Construction Ltd.

19. On September 30, 2019, counsel for the Employer wrote to the Board, acknowledged receipt of the Board's September 24, 2019 correspondence, and asked the Board to dismiss this application for lack of timely delivery. This letter was not copied to the Union.

20. On Thursday, October 3, 2019, the Board issued a decision directing the Union to deliver a copy of the application materials to the Employer. The Union sent the application materials to the Employer's counsel that day. The Employer filed its response within two business days thereafter on Monday, October 7, 2019.

Brief Summary of Legal Argument

21. The Employer's primary position is that the Board has no discretion to extend the time period for the delivery of an application for certification. The Employer says that while the Board can extend a time period under the Board's Rules of Procedure, it cannot extend a time period prescribed by the Act. In support of this position, the Employer relies upon subsection 7(11) of the Act and the Board's decisions in *Tormina Homes,* 2002 CanLII 39856 (ON LRB) (June 3, 2002) and *Craig Ross,* 2004 CanLII 49823 (ON LRB) (December 17, 2004), as well as two other cases cited in *Tormina Homes*, namely *Union Carbide Canada Ltd. v. Weiler,* 1968 CanLII 26 (SCC), 70 D.L.R. (2d) 333 and *Sarnia Construction Association,* [1999] OLRB Rep. November/December 1091.

22. The Employer's alternative position is that if the Board does have the discretion to extend the time limit for delivery of the application, it should not do so on the facts of this case. For the factors the Board examines in determining whether to extend a time period, the Employer refers to the Board's decisions in *Jay-Dee Concrete Forming,* 2009 CanLII 64533 (ON LRB) (November 18, 2009) and *Dunn Paving Limited,* 2010 CanLII 17804 (ON LRB) (April 13, 2010). Those cases list the following factors as being relevant to the Board's exercise of discretion: the length of the delay; the explanation for the delay; the

basis for seeking relief; the exercise of due diligence or demonstration of carelessness or untruthfulness; the seriousness of the issue; and the prejudice to the affected parties.

23. The Employer says that the applicant did not act *bona fide* and did not make reasonable efforts to deliver the application to it in a timely manner. The Employer also provided the Board with the following cases that indicate how the Board has exercised its discretion with respect to the extension of time limits in various circumstances: *6364144 Canada Inc. carrying on business as ICI Construction Management,* 2006 CanLII 973 (ON LRB) (January 17, 2006); *Kool Fab Mechanical Inc.,* 2005 CanLII 42979 (ON LRB) *(*November 16, 2005); *Kralik Electrical Services Inc.,* 2007 CanLII 13228 (ON LRB) (April 13, 2007); *DH General Contracting Incorporated,* 2012 CanLII 80011 (ON LRB) (December 7, 2012); *Wave Comm.,* 2013 CanLII 56846 (ON LRB) (August 16, 2013).

24. The Union asserts both that the Board has the discretion to extend the time period for the delivery of the application and that this is an appropriate case for the Board to exercise such discretion. The Union says the Board should take into account considerations of expediency, flexibility and a concern that substantive justice is done. In addition to subsection 7(11) of the Act, the Union relies upon Rules 3.2 and 40.7 of the Board's Rules of Procedure and subsections 110(17) and section 123 of the Act.

25. The Union says that both *Tormina Homes* and *Manners Glass, supra* are distinguishable on their facts, and furthermore are wrong on the law.

26. Instead, the Union says that the Board should look to its decision in *Thorium Contracting Ltd.,* [2002] OLRB Rep. November/December 1179, which considered *Tormina Homes, supra,* but found that the language of the Act, coupled with Board's Rules of Procedure and relevant policy considerations, did endow the Board with the discretion to extend the time for the delivery of an application for certification. In so concluding, the Board drew on the reasoning of a prior decision in *Associated Contracting Inc.,* [1998] OLRB Rep. November/December 903. The Union adds that in the following subsequent decisions the Board also extended the time period for the delivery of an application for certification: *Kralik, supra; Jay-Dee, supra; Fresco Enterprises Inc.,* 2012 CanLII 81255 (ON LRB) (December 14, 2012). The Union also provided two cases dealing with the late provision

of a Certificate of Delivery, namely *Fieldgate Homes Limited,* 2012 CanLII 42207 (ON LRB) (*July* 26, 2012); *Dunn Paving, supra.*

27. The Union went on to argue why the Board's discretion should be exercised in its favour to extend the time limit for the delivery of the application materials herein. The Union does not dispute the Employer's list of the relevant factors, but does assert it acted reasonably in relying upon information gleaned from two generally reliable "consumer protection organizations". Both yielded the same fax number for the Employer. Mr. Congdon tested it and found it was working. A third information source, "People By Name", also attributed the same fax number to the Employer, albeit in a search done after the application materials were delivered to the Employer.

28. The Union also addressed the issues of the length of the delay and the reasons for the delay. The Union says it believed in good faith that it had successfully delivered the application materials to the Employer by fax at 11:17 a.m. on September 23, 2019, although under the Board's Rules of Procedure it has until 5:00 p.m. on September 24, 2019 to do so. The Employer knew on September 24, 2019 that an application for certification had been made, although it did not know the details. Then the Employer waited until September 30, 2019 to advise the Board it has not received the application materials, but did not notify the Union of the problem at that time. The Union only learned of the problem with delivery by means of the Board's decision on October 3, 2019 and promptly delivered the application materials to counsel for the Employer the same day. Therefore, the Union argues that that very little, if any delay, should be attributed to it.

29. As for considerations of prejudice, the Union says that it would suffer the ultimate prejudice if the Board were to dismiss this application and thereby frustrate the ability of the Employer's employees to exercise their rights under the Act to seek Union representation. The Union avers that the Employer can and has mounted an effective defence on the merits and is not prejudiced in that regard.

30. In brief reply, the Employer addressed an issue raised in a question posed by the panel concerning commentaries made in Ontario labour relations cases such as *Maystar General Contractors v. International Union of Painters and Allied Trades, Local Union 1819,* 2007 CanLII 8928 (ON SCDC) and *Weathertech Restoration Services Inc.,* 2008 CanLII 65327 (ON LRB) (November 20, 2008) that depending upon the statutory context "shall" may mean "may" and "may" may

mean "shall". Employer counsel posits that "shall" is always presumed to be imperative, and upon review of the statutory context of the instant case, the Board should interpret the language of subsection 7(11) as imperative herein.

Analysis and Decision

31. The relevant provisions of the Act are subsection 7(11), subsection 110(17) and section 123 which read as follows:

> **Notice to Employer**
>
> 7(11) The trade union shall deliver a copy of the application for certification to the employer by such time as is required under the rules made by the Board and, if there is no rule, not later than the day on which the application is filed with the Board.
>
> **Rules of Practice**
>
> 110(17) The chair may make rules governing the Board's practice and procedure and the exercise of its powers and prescribing such forms as the chair considers advisable.
>
> **Defects in form; technical irregularities**
>
> 123 No proceeding under this Act is invalid by reason of any defect of form or any technical irregularity and no proceeding shall be quashed or set aside if no substantial wrong or miscarriage of justice has occurred.

32. The relevant provisions from the Board's Rules of Procedure are Rules 3.2, 24.3 and 40.7, which read as follows:

> 3.2 The Board or the Registrar may shorten or lengthen any time period set out in or under these Rules, as either considers advisable.
>
> 24.3 An applicant must verify in writing that it has delivered the application and other material as required by these Rules by filing a Certificate of Delivery not later than two (2) days after filing the application with the Board. The Board will not process an application that fails to comply with this Rule and the matter will be terminated.

> 40.7 The Board may relieve against the strict application of these Rules where it considers it advisable.

(i) Does the Board have the discretion to extend the time period for the delivery of the application?

33. The Board finds that this question must be answered in the affirmative. This conclusion emerges from a plain reading of the relevant provisions of the Act and the Board's Rules of Procedure, which is supported by labour relations policy considerations and the vast majority of the Board's case law. The two cases cited by the Employer to the contrary are factually distinguishable, and to the extent they are inconsistent with the prevailing Board case law, the Board finds they were wrongly decided.

34. The Board will begin with the plain language of subsection 7(11) of the Act. The mandatory language in the section simply requires that an application for certification be delivered to the affected employer. That is nothing more than common sense. That is why the heading to the section is titled "Notice to Employer". An employer must know if an application for certification has been filed against it. No one, including the Union, disputes that proposition.

35. How and when the application gets delivered to the employer is a different matter. The clear language of subsection 7(11) delegates those questions to the Board in the following words "by such time as is required under the Rules made by the Board". The Board has made very specific and unique rules about how and when construction industry certification applications such as this one are to be delivered by construction industry trade unions to employers, including the use of Priority Courier, although that aspect is not in issue here.

36. Therefore, the manner of delivery of an application for certification in the construction industry is subject to the Board's Rules, and Rules 3.2 and 40.7 clearly give the Board the power to extend any time limit prescribed by the Board's Rules of Procedure. Therefore, the Board has the discretion to extend the time limit for the delivery of the application herein.

37. The Board notes that the endowment of the Board with such discretion is consonant with the statutory objective set out at section 2 of the Act "to facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees". The Board can illustrate this point with two examples.

38. In the first example, the union attempts to deliver the application materials by facsimile transmission to the employer late on the final day upon which delivery is permitted. The application materials might extend to 79 pages as in this case. The employer sees what is coming in and pulls the plug on the fax machine to vitiate delivery. The employer then asks for dismissal of the application under Rule 24.3.

39. In the second example, the union gives the application materials to Priority Courier marked with employer's correct address in Goderich. A rogue Priority Courier delivery driver decides not to complete his route and throws the application materials and the rest of his packages into Lake Huron. The application materials do not arrive at the employer's offices within the required time. Then the employer brings a dismissal motion under Rule 24.3.

40. In neither of these scenarios can the failure to make timely delivery be attributed to negligence, sloppiness, or a lack of *bona fide* efforts to deliver the application materials in a timely way on the part of the union. Yet the strict reading of subsection 7(11) urged on the Board by the employer would not permit the union's application to proceed and would frustrate the wishes of the affected employees. Such an interpretation would not be in keeping with the language of sections 2 and 123 of the Act and would not promote harmonious labour relations. It would result in a proceeding before the Board being quashed due to a technical irregularity and would allow form to prevail over substance. Such an approach is in fact inimical to good labour relations and has been rejected by the Supreme Court of Canada: see *Parry Sound (District) Social Services Administration Board* v. *OPSEU, Local 324,* [2003] 2 S.C.R. 157. Therefore, the Board rejects it here, and finds that it has the discretion to extend the time limit for the delivery of an application for certification.

41. In a comprehensively reasoned decision in *Thorium, supra,* Vice-Chair Freedman came to the same conclusion, reversing his earlier ruling to the contrary. It is worth repeating what he said here (noting the rule numbers in the Board's Rules of Procedure have changed, but not the underlying concepts):

> 4. Where the Board has made a decision which is incorrect or where the matter in issue is significant to the Board's practices, then it is appropriate to reconsider that decision. In this case, the issue is whether the Board has the discretion to extend the time for service of an application for certification on a responding party. That issue does, in my

view, raise important matters of Board policy and procedures.

5. The Board did not receive argument about whether it had the discretion to extend the time for service of an application in either PROFESSIONAL MASONRY SERVICE, SUPRA OR CITY OF KAWARTHA LAKES-TRANSIT, SUPRA. The Board in those two cases focussed on the statutory requirement that the application be served within the time fixed by the Rules. In TORMINA HOMES, SUPRA, as the applicant points out in its reconsideration application, the responding party had never been served with the application.

6. In ASSOCIATED CONTRACTING INC., SUPRA the Board specifically addressed whether it had the discretion to extend the time for delivery of the application on the responding party. The Board wrote at pages 908-909:

> Section 63(3) explicitly addresses the requirement to deliver the application to the employer and to the union, and states that such delivery must be effectuated no later than the day on which the application is filed with the Board, unless the Board has made Rules otherwise. The statutory intention is clear. Delivery of the application is to be made by the applicant directly upon the employer and the union, and is to be done so quickly. The Legislature has also agreed, through section 63(3), to defer to the Board's rule-making powers with respect to allowing a time for delivery later than the date on which the application is filed. Such a deferral does not, however, minimize the legislatively expressed concern for expedition in delivery of the application. It would hardly be consistent with the statutory intention that delivery be prompt were the Board to make a rule requiring delivery, in a less than expeditious time. Although a discretion is given to the Board, it must be exercised with reference to the need for expedition expressed throughout section 63, of which section 63(3) is only one example.

The language of section 63(3) of the Act parallels section 7(11) of the Act. Section 7(11) provides:

> The trade union shall deliver a copy of the application for certification to the employer by such time as is required under the rules made by the Board and, if there is no

> rule, not later than the day on which the application is filed with the Board.

The basis for the Board's discretion was described in ASSOCIATED CONTRACTING INC., SUPRA at page 909:

> I am satisfied that the Board can exercise a discretion under Rules 22 or 27, and when it does so, it is acting in a manner authorized by and consistent with the provisions of subsection 63(3). This subsection allows the Board to determine when delivery "is required under the Rules made by the Board". The reference is to the "Rules" of the Board, and this refers to the Rules in their entirety, not only the rule that deals particularly with delivery times. Section 63(3) reflects a legislative recognition of the Board's expertise in determining appropriate delivery times for the application and a willingness to defer to that expertise as long as there are rules delineating delivery times. The expression of the Board's expertise in this respect is manifested not only through the provisions of Rule 43cc, but as well with reference to the Rules which allow the Board to make exceptions, to consider whether to relieve from the requirements of Rule 43cc (or any other Rule) in appropriate circumstances. Of course, when considering whether there is good reason to grant such relief, the Board will have a continuing regard for the need for expedition in termination applications, a need legislatively acknowledged in the numerous provisions of section 63 referred to earlier.

7. As the applicant submits in its application for reconsideration and as the Board pointed out in the above passage from ASSOCIATED CONTRACTING INC., the Act provides that the an application for certification must be delivered by such time as is required under the Board's Rules. Rules 67 and 133 explicitly prescribe the time within which an application for certification must be delivered to the responding party. Rule 44 permits the Board to relieve against the strict application of the Rules while Rule 49 permits the Board to shorten or lengthen any time period set out in the Board's Rules. Thus, the Board, in exercising its discretion to extend the time for delivery of an application for certification on a responding party, is not extending a time period prescribed by the Act (which the Board cannot do; see SARNIA CONSTRUCTION ASSOCIATION, [1999] OLRB Rep. Sept./Oct. 884 at 892; application for reconsideration dismissed; [1999] OLRB Rep. Nov./Dec.

> 1091 at 1095), but rather is extending the time prescribed by the Board's Rules.

42. Subsequent to the Board's ruling in *Thorium, supra,* the Board has found it has the discretion to extend the time limit for the delivery of an application for certification and exercised it in *Kralik, Jay-Dee* and *Fresco supra.* As noted in *Thorium, supra,* the Board also did so in the prior case of *Banait Pharmacy Ltd.* Board File No. 3394-97-R, decision dated January 12, 1998.

43. The two cases relied on by the Employer are factually distinguishable, and to the extent they are not, were wrongly decided.

44. In *Tormina Homes, supra,* the Union never delivered the application to the Employer. Instead, it inadvertently delivered it to its own counsel. Therefore, there was no delivery of the application to the employer so the result is not wrong. On the other hand, to the extent this decision suggests the Board has no discretion to extend the time limit for the delivery of an application, it relies on cursory reasoning that does not consider the principles of interpretation and labour relations considerations taken into account in *Thorium, supra,* and this decision. Therefore, the reasoning in *Tormina Homes, supra,* should not be followed.

45. With respect to *Ross, supra,* this case dealt with a different issue concerning the timing of the delivery of a termination application, so it is factually distinguishable, The panel in that case found that the applicant therein was effectively asking it to create a new rule rather than extend a time limit under an existing Rule of Procedure, doubted whether it had the discretion to do so, and decided not to grant the applicant relief. At the end of the day, there are four things to say about this case: the facts are much different; the applicant provided no evidence of the date of delivery; to the extent this decision suggests the Board does not have a discretion to extend a time limit for delivery of an application for certification it is inconsistent with sound principles of interpretation and *Thorium supra;* and the author of *Ross, supra,* did exercise a discretion to extend the time limit for the delivery of an application for certification in *Fresco, supra,* so he implicitly found the two cases could stand together and not contradict one another. Therefore, *Ross, supra,* is not a barrier to the relief the applicant seeks in this case.

46. For all the foregoing reasons, the Board finds it does have the discretion to extend the time limit for the delivery of an application for certification.

(ii) Should the Board exercise its discretion to extend the time limit for the delivery of the application in this case?

47. The Board finds that the parties have correctly identified the factors that the Board should consider in determining this issue: the length of the delay; the explanation for the delay; the basis for seeking relief; the exercise of due diligence or demonstration of carelessness or untruthfulness; the seriousness of the issue; and the prejudice to the affected parties.

48. The Board will deal with each factor in turn.

49. The length of the delay can be assessed in several ways. At most, it is 12 calendar days. However, under the Board's Rules of Procedure, days upon which the Board is not open do not count, so the delay must immediately be reduced accordingly. Furthermore, the Union had until September 24, 2019 to deliver the application materials. Therefore, the actual period of delay is seven days. This is certainly longer than in most of the "delivery cases" but how and why the delay arose is important and will be discussed next.

50. The second factor is the explanation for the delay. As will be discussed in more detail below, the Union believed it had an accurate facsimile number for the Employer. The Union sent its application materials to that fax number at 11:17 a.m. on the morning of Monday September 23, 2019 and received a "complete" fax report. The Union did not know there was any problem with delivery of the application materials to the employer until it received the Board's decision of October 3, 2019, and thereafter promptly delivered the application materials to the Employer's counsel that day. Therefore, apart from using an incorrect fax number, the Union did nothing culpable in its manner of delivery of the application. The length of delay would have been shorter had the Employer acted promptly upon learning from the Board's Confirmation of Filing Form (which it received on September 24, 2019 by email) that an application for certification had been made against it instead of delaying until September 30, 2019 to notify the Board. So the responsibility for the length of the delay rests in part on the Employer.

51. The Board will deal with the basis for seeking relief and the exercise of due diligence or demonstration of carelessness and or untruthfulness considerations together. Prior to deciding to send the application materials to the Employer by fax, the Union did three things to ascertain if it had a valid fax number for the Employer: it did a BBB search; it did a Lumberman's search; and it had Mr. Congdon test the fax line. It then sent the fax and received a "complete' transmission report. Nothing in any of these steps connotes careless or untruthful behaviour on the part of the Union in the Board's view. Both BBB and Lumberman's are well known as accurate sources of information in the construction community and their searches yielded the same fax number. Mr. Congdon tested it. The fax went through. In virtually every case, life would calmly proceed to the next step.

52. Not in this one, however. The Employer asserts, and the Board accepts as true for the purposes of this decision, that the Employer discontinued use of the fax number in March 2015. The Employer says the Union was careless or reckless and not acting in a *bona fide* manner by using "third party" sources to find a non-existent fax number for the Employer.

53. The Board does not agree with any of the Employer's arguments in this regard. The Union included a correct email address for the Employer in its application, which is how the Employer learned of this application in the first place when the Board emailed the Employer the Board's Confirmation of Filing form. This surely demonstrates that the Union was acting in good faith and not trying in any way to keep the Employer from learning of its application for certification. Furthermore, the Employer concedes that the fax number in question did belong to it from at least 2010 to 2015, and that it supplied that fax number to the BBB for publication. The Employer remained an accredited member of the BBB until April 2019 and never removed the fax number from its BBB contact information although it clearly knew how to change its BBB contact information and did so with respect to its physical address on one occasion. Similarly, the Employer allowed the fax number to remain on its website for over a year after it was no longer operational. Therefore, the Board is satisfied that the Employer held out the fax number to the public as a valid means of contact for it for literally years after it ceased to be operational. That does not mean the fax number was operational on September 23, 2019, but certainly does speak to the reasonableness of the Union's conduct. The Employer did nothing to inform BBB or anyone else that it could not be contacted by means of the fax number it had used for many years. In conclusion on this point,

the Board finds that while the Union ended up using an incorrect fax number, it did not act carelessly, recklessly or in bad faith, but took reasonable steps to obtain a valid fax number for the Employer. Although obtained after the fact, the "People By Name" search is a third source that disclosed the same fax number, reinforcing the reasonableness of the Union's conduct.

54. Both parties agree the delivery of an application for certification is a serious issue, and the Board will treat it accordingly.

55. With respect to the issue of prejudice to the affected parties, as the Board noted in *Kralik, supra,* the impact on the Union of a refusal by the Board to exercise its discretion in circumstances like this must be considered to be "severe" because the result is that the application will be dismissed. On the other hand, to exercise the discretion in the Union's favour will work some prejudice to the Employer in the sense that it must defend against the application. However, from a review of the Employer's response and employee status submissions, the Employer is able to and has mounted a vigorous defence. The Employer has not identified any witnesses or material documents that have become unavailable due to the delay period. The relative prejudice factor favours the Union.

56. The Board must now weigh all the factors together. As a result of the Union's use of an incorrect fax number for the Employer, there has been some delay in this matter. However, the Employer's actions also contributed to that delay. The Union's reliance on what turned out to be an incorrect fax number was not due to carelessness, recklessness or the failure to act in a *bona fide* manner. The Union acted reasonably and in a way that would have turned out fine in almost all circumstances, although not this one. The most important factor in this case, prejudice to the affected parties, tolls in the Union's favour. It would not be a fair or sound labour relations outcome to punish the Union with the ultimate sanction of the dismissal of its application in these circumstances, where the Employer has significantly contributed to the delay, has been able to mount a substantive defence, and has not lost material witnesses or documents due to the delay. Therefore, the Board's weighing of all the relevant considerations comes own on the side of exercising its discretion in the Union's favour.

57. For all the foregoing reasons, the Board will exercise its discretion to find that the Union's delivery of the application materials to the Employer on October 3, 2019 is timely. The Board will similarly

exercise its discretion to find that the Employer's response filed on October 7, 2019 is timely (a result wisely not challenged by the Union in all the circumstances of this case).

58. Before moving on, the Board wishes to compliment counsel on their co-operation and the quality of their argument in respect of the issues determined by the Board in this decision.

59. This matter is hereby referred to the Registrar for the purpose of scheduling hearing dates to deal with the remaining issues herein.

60. This panel is seized.

Jack J. Slaughter"
for the Board