The Labour Relations Board
Saskatchewan

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant v. SOBEY'S CAPITAL INC. operating as VARSITY COMMON GARDEN MARKET, Respondent

MICHELLE BRESSERS, Applicant v. UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400 and SOBEY'S CAPITAL INC. operating as VARSITY COMMON GARDEN MARKET, Respondents

LRB File Nos. 181-04 & 227-04, September 14, 2005
Vice-Chairperson, Wally Matkowski; Members: Duane Siemens and Clare Gitzel

For Michelle Bressers: Larry Seiferling, Q.C.
For the Union: Drew Plaxton
For the Employer: Kevin Wilson

> **Reconsideration – Criteria – Board reviews grounds on which applications for reconsideration may be granted – Board concludes that criteria not met and dismisses application for reconsideration.**
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> **Reconsideration – Practice and procedure – Party applying for reconsideration must first establish sufficient grounds to warrant reconsideration before Board will proceed to hear and determine reconsideration application – Reconsideration not to be used as appeal – Board determines that not sufficient grounds to warrant reconsideration and dismisses application for reconsideration.**
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> **Reconsideration – Practice and procedure – Original Board decision on first contract application followed most recent Board precedents on interpretation of s. 26.5 of *The Trade Union Act* – Board dismisses application for reconsideration.**
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> ***The Trade Union Act*, s. 13.**

REASONS FOR DECISION

Background:

[1] United Food and Commercial Workers, Local 1400, (the "Union") applied to the Board for reconsideration of the Board's decision in *United Food and Commercial Workers, Local 1400 v. Sobey's Capital Inc. operating as Varsity Common Garden Market; Michelle Bressers v. United Food and Commercial Workers, Local 1400 and Sobey's Capital Inc. operating as Varsity Common Garden Market*, [2005] Sask. L.R.B.R. 68, LRB File Nos. 181-04, 227-04, 255-04, 256-04 & 257-04 (the "original decision"). The original decision was a ruling

dated April 6, 2005, provided by a panel consisting of Vice-Chairperson Matkowski and Board Members White and Siemens (the "original panel"). Board Member White became unavailable for the reconsideration hearing and was replaced by Board Member Gitzel (the "revised panel").

[2] In LRB File No. 181-04, the Union filed an application for first collective agreement assistance (the "first contract application"). In the original decision, the Board ruled that the Union had not met the requirements of s. 26.5 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") and therefore did not delay ordering a vote in LRB File No. 227-04 (the "rescission application"). In the rescission application, the Board ruled that there had been no employer influence, pursuant to s. 9 of the *Act* that would cause the Board to dismiss the application.

[3] The Union made the reconsideration application on the following grounds:

a) The decision turns on conclusions of law and general policy, which were not properly interpreted by the original panel.

b) The decision is precedential and amounts to a significant policy adjudication, which the Board may wish to change.

c) The same constitutes a significant error of law.

d) The same constitutes a significant and unwarranted departure from previous jurisprudence of the Board.

e) The same is made upon a misapprehension and misinterpretation of the evidence lead, inferences from same and the law applicable to the matters at hand.

f) Such further and other grounds as counsel may advise and the Board allow.

[4] The Union also requested in its reconsideration application that "the matter within be heard by an expanded and/or alternate Panel of the Labour Relations Board as determined by the Labour Relations Board or the Minister of Labour." At the hearing, counsel for the Union argued that the revised panel should "step aside, and/or refer this matter back to the Chair of the Board for submissions as to the composition of the panel." Counsel for the Union argued that

stakeholders were entitled to know what the rules are when the Chairperson of the Board assigns panels for reconsiderations.

[5] The revised panel rejected the Union's argument that the matter of the composition of the Board should be referred back to the Chairperson of the Board and advised the parties that the revised panel would hear the reconsideration application. While the assignment of a panel to hear a case is an administrative decision, the Board's normal policy is that a reconsideration hearing is dealt with by the original panel when possible.

[6] The revised panel verbally ruled that the Union had failed to establish that reconsideration was warranted in the circumstances and dismissed the reconsideration application as it related to the rescission application. The revised panel heard full reconsideration arguments in the first contract application.

Reconsideration Criteria:

[7] The Board has dealt with a number of reconsideration applications over the last two years and has consistently applied the same stringent test in determining whether or not a reconsideration application should be allowed. As set out by the Board in *Grain Services Union v. Saskatchewan Wheat Pool et al.*, [2003] Sask. L.R.B.R. 454, LRB File No. 003-02, at 456:

> *A request for reconsideration is not an appeal or a hearing de novo, nor is it an opportunity to reargue a case, raise new arguments or present new evidence, but rather, it generally allows important policy issues to be addressed, such as evidence to be presented that was not previously available, or errors to be corrected.*

(See also: *United Brotherhood of Carpenters and Joiners of America, Local 1985 et al v. Graham Construction and Engineering Ltd. et al*, [2004] Sask. L.R.B.R. 142, LRB File Nos. 014-98 & 227-00.)

[8] The Board, in *Rattray v. Saskatchewan Government and General Employees' Union*, [2003] Sask. L.R.B.R. 528, LRB File No. 011-03, stated that there must be some solid grounds to persuade the Board to exercise its discretion to embark upon reconsideration of an original Board decision.

[9] The reason why such a stringent test is applied by the Board was set out in *City of North Battleford v. Canadian Union of Public Employees, Local 287*, [2003] Sask. L.R.B.R. 288, LRB File No. 054-01 at 291:

> *…the policy behind such a restrictive approach to reconsideration is to accord a serious measure of certainty and finality to the decisions of the Board, while affording "a fulsome degree of flexibility to respond to exigencies of fact and circumstance which may militate against the continued governance of determinations earlier made."*

[10] The criteria consistently reviewed and applied by the Board on an application for reconsideration are set out in *Remai Investment Corporation, operating as Imperial 400 Motel v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union et al.*, [1993] 3rd Quarter Sask. Labour Rep. 103, LRB File No. 132-93, at 107-108:

> *Though the Board has the power under Section 5(i) to reopen decisions it has arrived at, this power must be exercised sparingly, in our view, and in a way which will not undermine the coherence and stability of the relationships which the Board seeks to foster. In a comment on an application for reconsideration of a decision of the British Columbia Labour Relations Board in Corporation of the District of Burnaby v. Canadian Union of Public Employees, [1974] 1 Can. L.B.R. 128, at 130, the Board asserted that "speed and finality of decisions are especially imperative in labour relations. Of no area of law is it truer to say that justice delayed is justice denied.*
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> *In the three jurisdictions we have alluded to above - Canada, British Columbia and Ontario - the recognition of the need to balance the claim for reconsideration against the value of finality and stability in decision-making is reflected in the procedures adopted by labour relations tribunals. In all of them, the procedure followed in connection with an application for reconsideration departs from the procedure employed for other kinds of applications. In all three cases, the applicant is required to establish grounds for reconsideration before a decision is made whether a rehearing or some other disposition of the matter is appropriate.*
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> *We have concluded that such a two-step approach is appropriate in cases of this kind. We do not agree with counsel for the Employer that we were mistaken in requiring that an applicant who seeks reconsideration of a decision of the Board must persuade us that there are solid grounds for embarking upon that course.*
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> *Counsel for the Employer argued that we should adopt the alternative of entertaining a full rehearing of the case, rather than establishing this intermediate stage. He predicted that this would not have the effect of an uncontrolled increase in the number of such applications. It is difficult to*

see, however, why allowing an automatic trial de novo to a disappointed applicant would not expose the Board to a growing number of applications to rehear cases in which the contest is serious or the stakes high.

In other jurisdictions, particularly in British Columbia, there has been extensive discussion of the criteria which labour relations boards might use to determine whether an applicant has been able to establish that there are grounds which justify the reopening of a decision. In their decision in the case of Overwaitea Foods v. United Food and Commercial Workers, No. C86/90, the British Columbia Industrial Relations Council set out the following criteria:

> *In [Western Cash Register v. International Brotherhood of Electrical Workers, [1978] 2 CLRBR 532], the Board articulated four criteria in which it would give favourable consideration to an application for reconsideration. Subsequent decisions (Construction Labour Relations Association of British Columbia, BCLRB No. 315/84, and Commonwealth Construction Co. Ltd., BCLRB No. 61/79, [1979] 3 Can LRBR 153), added a fifth and sixth ground:*
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> 1. *If there was no hearing in the first instance and a party subsequently finds that the decision turns on a finding of fact which is in controversy and on which the party wishes to adduce evidence; or,*
> 2. *if a hearing was held, but certain crucial evidence was not adduced for good and sufficient reasons; or,*
> 3. *if the order made by the Board in the first instance has operated in an unanticipated way, that is, has had an unintended effect on its particular application; or,*
> 4. *if the original decision turned on a conclusion of law or general policy under the Code which law or policy was not properly interpreted by the original panel; or,*
> 5. *if the original decision is tainted by a breach of natural justice; or,*
> 6. *if the original decision is precedential and amounts to a significant policy adjudication which the Council may wish to refine, expand upon, or otherwise change.*

Arguments:

[11] Counsel for the Union primarily argued that grounds 4 and 6 from the test set out in *Remai, supra,* were applicable in the case at hand and that the Union had established that there were sufficient grounds to warrant reconsideration for both the first contract application and the rescission application.

[12] Counsel for Sobey's Capital Inc. operating as Varsity Common Garden Market (the "Employer") argued that the reconsideration application relating to the first contract application was totally without merit and should be dismissed accordingly.

[13] Counsel for Ms. Bressers argued that the original panel's findings were justified given the evidence presented in the rescission application and that the original decision should not be overturned.

Analysis:

The Rescission Application

[14] As set out in *Remai*, *supra*, the party applying for reconsideration must first establish that there are sufficient grounds to warrant reconsideration before the Board will proceed to hear and determine the application. In the rescission application, the Board dismissed the application for reconsideration with written reasons to follow after the threshold arguments with respect to the sufficiency of the grounds for reconsideration were heard by the Board.

[15] Counsel for the Union attempted to transform the reconsideration application into an appeal. Transcripts of evidence from three witnesses were filed and in its Particulars Re Application For Reconsideration, the Union contended that the original panel "erred in misapprehending, misinterpreting evidence lead in relation to management interference and drawing incorrect interferences (should be inferences) from same." As set out earlier herein, the Board has rejected the approach that a reconsideration application should be turned into an appeal. The original panel is best able to observe the demeanor of witnesses and assess the credibility of their testimony.

[16] In our view, this is not an appropriate case to exercise our discretion to embark upon a reconsideration of the original decision with respect to any of the grounds raised. Based

on the evidence presented before it, the original panel determined that there had been no employer influence pursuant to s. 9 of the *Act* that would justify a decision to deny the employees the opportunity to have a representation vote.

[17] Counsel for the Union also argued that the original panel had pre-determined the credibility of a witness for the Employer, Mr. Marquis. Counsel made this argument based on a discussion during his oral argument with the chairperson of the original panel, when the chairperson advised counsel that Mr. Marquis struck the Board as a credible witness.

[18] The chairperson's comment to counsel for the Union allowed the Union a further opportunity to convince the original panel that Mr. Marquis was being untruthful before the Board. Though he was unsuccessful in his attempts, counsel for the Union took full advantage of this opportunity and there was nothing improper about the chairperson's comments.

The First Contract Application

[19] The Board heard full arguments on the application for reconsideration relating to the first contract application. These arguments, for the most part, were identical to the arguments heard by the original panel. In our opinion, the Union has not adduced solid grounds to persuade us to exercise our discretion to embark upon reconsideration of the original decision. The original decision followed the most recent Board precedents on the interpretation of s. 26.5 of the *Act*.

[20] In conclusion, the Union has failed to establish that reconsideration is warranted in the circumstances of this case and the application for reconsideration relating to both the rescission application and the first contract application is accordingly dismissed.

DATED at Saskatoon, Saskatchewan, this **14th** day of **September**, **2005.**

LABOUR RELATIONS BOARD

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Wally Matkowski,
Vice-Chairperson