

**The Labour Relations Board
Saskatchewan**

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4612, Applicant v. BOARD OF EDUCATION OF THE ESTEVAN COMPREHENSIVE SCHOOL BOARD OF SASKATCHEWAN and SERVICE EMPLOYEES' INTERNATIONAL UNION, LOCAL 299, Respondents

LRB File No. 092-03; September 24, 2003

Vice-Chairperson, Wally Matkowski; Members: Gloria Cymbalisty and Don Bell

For the Applicant: Eden Guidroz
For the Respondent Employer: LaVonne Black
For the Respondent Union: Maureen Fryett

Bargaining unit – Appropriate bargaining unit – Board policy – Union with predominant presence in school division sector in Saskatchewan applies for under-inclusive unit in school division where another union already represents different under-inclusive unit – Incumbent union has no interest in representing new unit and supports application – Board has historically permitted incremental organizing in sector – Board grants certification Order for second under-inclusive unit.

The Trade Union Act, ss. 5(a), 5(b) and 5(c).

REASONS FOR DECISION

Background:

[1] This is an application by Canadian Union of Public Employees, Local 4612 (“CUPE”) for certification of the teacher assistants employed by the Board of Education of the Estevan Comprehensive School Board of Saskatchewan (the “Employer”). The application was filed with the Board on May 15, 2003 and was accompanied by evidence of majority support from the affected teacher assistants. Service Employees’ International Union, Local 299 (“SEIU”) was provided with notice of CUPE’s application and participated at the hearing due to the fact that SEIU holds a certification Order relating to the Employer, dated January 4, 1966, which covers “all caretakers, cleaners, janitors, maintenance men, firemen, and engineers employed by the Estevan Collegiate Institute Board.” The Estevan Collegiate Institute Board is now the Board of Education of the Estevan Comprehensive School Board of Saskatchewan. SEIU called no witnesses and took the position before the Board that it supported CUPE’s application and that the proposed unit was an appropriate unit.

Facts:

[2] The Employer's reply, signed by Holley McFadden, secretary-treasurer, sets out the Employer's position that the Board should certify one bargaining unit, described as "all permanent Teacher Assistants, Chief Engineers, Maintenance, Head Caretakers, Fireman-Caretakers and Caretakers employed by the Board of Education of the Estevan Comprehensive School Board of Saskatchewan."

[3] Ms. McFadden also testified before the Board that there is one school within the Employer's division, covering grades 9 through 12, and composed of approximately 875 students. There are 52 full time teaching or equivalent positions. The Employer presently negotiates contracts with teachers (local teachers agreement) and SEIU, however, it informally negotiates a working agreement with teacher assistants, cafeteria staff and clerical staff. At present, there are 9.5 positions in the SEIU bargaining unit, filled by eleven employees. These positions include the chief engineer, the head maintenance person and the fireman caretaker, all of whom are required to possess fireman papers. Caretakers are not required to possess fireman papers. Ms. McFadden testified that the Employer and SEIU have enjoyed a successful collective bargaining relationship over the years.

[4] At present there are nine teacher assistant positions, four cafeteria staff and five clerical staff employed at the school and all staff work within the school except for one teacher assistant.

[5] There are no minimum requirements for teacher assistants, though the Employer has a preference for hiring teacher assistants who possess either a degree or a social work diploma. However, Ms. McFadden was unaware of any teacher assistants who presently hold either a degree or diploma. The teacher assistants earn about \$13 per hour on average.

[6] There are no minimum requirements for cafeteria staff or clerical staff, though Ms. McFadden believed some type of business college diploma would be preferred for the clerical staff. Teachers supervise the teacher assistants and cafeteria staff. The clerical staff is supervised by either the principal or the vice-principal.

[7] Patty Brockman, CUPE's Saskatchewan regional office secretary and William Wells, employee relations consultant for the Saskatchewan School Trustees Association testified in regard to which union has typically represented employees in school divisions across Saskatchewan. Approximately two thirds of the school divisions in Saskatchewan have unionized staff (excluding teachers). The vast majority of the unionized staff in the various school divisions is represented by CUPE. SEIU represents employees in a few school divisions (Swift Current, Weyburn and Estevan), the United Steelworkers of America represent one group in the province and there are two independent locals. Mr. Wells was also of the belief that Saskatchewan Government and General Employees' Union had a presence in the Regina Public School Division. Typically, the individual school divisions who have unionized staff have dealt with one union (again excluding teachers), and the union has had a number of classifications within its unit. Mr. Wells was unable to give an example where CUPE and SEIU both had a presence in a school division.

[8] Of the approximately 56 school divisions where CUPE has a presence, there is no standard bargaining unit which has been described by the Board. Rather, the Board has allowed incremental organizing in the school division sector. Exhibit U-1 prepared by CUPE illustrates the vast number of combinations of bargaining units the Board has certified for CUPE in the school division sector. The Board has certified bus driver units, caretaker units, caretaker/maintenance units and all employee units. At present, a certified bargaining unit does not exist which is made up solely of teacher assistants. Rather, teacher assistants are included in bargaining units composed of various combinations of clerical staff, library staff, cafeteria staff, security staff, caretaker and maintenance staff. In approximately 35 of the CUPE bargaining units, clerical staff and/or school secretaries are included with teacher assistants in a unit. In at least four of those bargaining units, cafeteria staff are included. As an example of this situation, CUPE, Local 2520's bargaining unit includes the classifications of caretaker, maintenance, teacher assistants, cafeteria, security, clerical and library technician at Yorkton Regional High School.

Relevant statutory provisions:

[9] Relevant provisions of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "Act") include the following:

3. *Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively.*

...

5 *The board may make orders:*

(a) *determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit or a subdivision thereof or some other unit;*

(b) *determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, but no order under this clause shall be made in respect of an application made within a period of six months from the date of the dismissal of an application for certification by the same trade union in respect of the same or a substantially similar unit of employees, unless the board, on the application of that trade union, considers it advisable to abridge that period;*

(c) *requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;*

Employer's arguments:

[10] The Employer argued that the bargaining unit sought by CUPE, composed solely of teacher assistants is not appropriate and does not exist in any other school division in the province. The Employer argued that CUPE and SEIU do not co-exist in any other school division in the province and that the appropriate bargaining unit should be a combination of the SEIU unit and the proposed CUPE unit. The Employer's position is that it does not care which union represents the employees. Its only concern is that there only be one union as between SEIU and CUPE which it has to deal with.

CUPE's arguments:

[11] CUPE argued that, while the proposed unit is not the most appropriate unit, it is "an appropriate unit." CUPE argued that the teacher assistants had made a choice, pursuant to s. 3 of the *Act*, to be represented by CUPE and that this Board should respect that choice. CUPE argued that it is an experienced union in the school division sector with extensive

experience representing teacher assistants and that, if the certification is granted, there will be no industrial instability at the workplace. CUPE argued that the proposed bargaining unit is viable, there is no intermingling among the non-teacher staff and no crossover in duties. CUPE asked that, in the event the Board is inclined to order a vote as between CUPE and SEIU, the parties be given the opportunity to make representations on that point.

SEIU's arguments:

[12] SEIU argued that CUPE'S proposed bargaining unit is an appropriate one and that it has never been the Board's position in the school division sector that the first union in at a workplace gets everything else, in other words, the rest of the potential unionized workforce. SEIU argued that employers traditionally bargain or negotiate contracts with more than one organization, entity or group, and that this should not be a reason for the Board to refuse to grant CUPE's application for certification.

Analysis:

[13] The case before the Board is certainly unique in that, in the school division sector, there are no cases where the Board has certified both CUPE and SEIU in the same school division. In addition, there exists no CUPE or SEIU bargaining unit composed solely of teacher assistants. To further complicate the matter, SEIU's position is that a separate unit of teacher assistants does constitute an appropriate bargaining unit.

[14] CUPE is seeking a certification order for an under-inclusive bargaining unit at a workplace that presently has a union, SEIU, which holds a certification Order for an under-inclusive bargaining unit. SEIU has held this certification Order since 1966 and, since that time, it has not sought to expand its scope.

[15] In *Graphic Communications International Union, Local 75M v. Sterling Newspapers Group, a Division of Hollinger Inc.*, [1998] Sask. L.R.B.R. 770, LRB File No. 174-98, the Board describes an under-inclusive bargaining unit as follows at 782:

We would add that we use the term "under-inclusive" as a method of describing a bargaining unit that includes only a portion of the employees of an employer in order to distinguish it from an "all employee" bargaining unit. The term is not intended to reflect on the appropriateness of the bargaining unit, but only to describe such units.

[16] While the Board has endorsed a preference for all employee units, the Board has not held that the first union to organize in a workplace is the preferred agent for all employees. In the *Sterling Newspapers Group* decision, *supra*, the Board states at 781:

These cases, however, do not establish the principle that the first union to organize in a workplace is the preferred agent for all other employees. If an under-inclusive bargaining unit is sought, such as in the present case, there is no presumption that other bargaining agents will be prevented from organizing the remaining employees.

[17] SEIU has not expanded its existing bargaining unit, which was originally certified in 1966. The expectation would be that a union holding a certification order for an under-inclusive bargaining unit at a workplace would normally expand the bargaining unit. SEIU's position before the Board was that teacher assistants would constitute an appropriate CUPE bargaining unit. This Board therefore concludes that SEIU has no interest in representing the teacher assistants.

[18] Given this conclusion, coupled with the Board's finding in the *Sterling Newspapers Group* case, *supra*, that there is no presumption that other bargaining agents will be prevented from organizing the remaining employees, this Board will not prevent SEIU and CUPE from both having separate bargaining units within the same school division if the conditions warrant it.

[19] The Board is comforted by the fact that CUPE is the union that has the predominant presence in the school division sector in Saskatchewan. In addition, in Saskatchewan, CUPE negotiates on behalf of numerous bargaining units that include the classification of teacher assistant. Likewise, the Employer negotiates with multiple bargaining units or entities within this school division and having another union to negotiate with, instead of directly negotiating with non-union employees, will not result in any degree of hardship for the Employer.

[20] The case before the Board is similar in some aspects with the case *Canadian Union of Public Employees, Local No. 3926 v. Board of Education of Deer Park School Division of Saskatchewan and Deer Park Employees Association*, [2000] Sask. L.R.B.R. 349, LRB File No. 292-99. In *Board of Education of Deer Park School Division, supra*, the Board states at 354:

[13] *In this very unusual situation, where the incumbent bargaining agent acknowledges its inability to effectively represent a group of employees and consents to their inclusion in a different bargaining unit, the Board will stray from its policy of preferring "all employee" bargaining units and will allow the creation of a second bargaining unit. In school divisions, the existence of a separate bargaining unit for bus drivers is not unusual and the configuration of employees which results from the creation of the new bargaining unit will not create an unnatural or unknown bargaining structure. We do acknowledge that the creation of the new bargaining unit will impose additional burdens on the Employer. However, we are hopeful that the parties can adapt the existing voluntary multi-employer structure to facilitate collective bargaining for the new bargaining unit.*

[21] As in the *Board of Education of Deer Park School Division* decision, *supra*, where the Deer Park Employees Association acknowledged its inability to effectively represent a group of employees and consented to their inclusion in a different bargaining unit, SEIU is consenting to the creation of a new bargaining unit by supporting CUPE's application. While there was no evidence that SEIU could not effectively represent the teacher assistants, the Board concludes from both the facts and SEIU's position before the Board that SEIU does not want to represent the teacher assistants.

[22] Therefore, the Board is left in a quandary as to what course of action to take. While the Board has no desire to deviate from larger, all employee units, as stated earlier, the Board has allowed incremental organizing in the school division sector.

[23] The Board considered asking the parties to make further representations relating to a vote between SEIU and CUPE but rejected this approach. The true losers in a vote scenario, given SEIU's position that it did not want to represent the teacher assistants, could be the teacher assistants.

[24] Given these unique circumstances, the Board will grant the certification Order requested by CUPE. CUPE has the predominant presence in the school division sector and will have the ability to properly represent the teacher assistants. Much as in the *Board of Education of Deer Park School Division* decision, *supra*, where the Board strayed from its policy of preferring all employee bargaining units, the Board recognizes that additional burdens may be placed on the Employer. However, given SEIU's position and the current number of entities which the Employer negotiates with, any additional burdens should be minimal.

[25] Given that CUPE has filed evidence of majority support, the application for certification is granted. An Order will issue in the usual form.

DATED at Regina, Saskatchewan this **24th** day of **September, 2003**.

LABOUR RELATIONS BOARD

Wally Matkowski,
Vice-Chairperson