Labour Relations Board
Saskatchewan

SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant v. SASKATCHEWAN GAMING CORPORATION, o/a CASINO REGINA, Respondent

- and -

SASKATCHEWAN GAMING CORPORATION, o/a CASINO REGINA Applicant v. SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Respondent

LRB File Nos. 250-03 & 252-03; July 13, 2004
Chairperson, James Seibel; Members: Don Bell and Bruce McDonald

For the Union: Larry Kowalchuk
For the Employer: Brian Kenny, Q.C.

Certification – Amendment – New position – Application as to scope of new position that requires amendment of certification order to exclude position should be made during open period, except in unusual or urgent circumstances – Board dismisses application filed outside open period.

Duty to bargain in good faith – Refusal to bargain – Employer must negotiate scope of new position and ensure that matters of scope resolved within parameters of *The Trade Union Act* – Where employer created and filled new position as out-of-scope before attempting to bargain issue with union, Board finds violation of s. 11(1)(c) of *The Trade Union Act*.

***The Trade Union Act*, ss. 5(j), 5(k), 5(m) and 11(1)(c).**

REASONS FOR DECISION

Background:

[1] Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union") is designated as the bargaining agent for a unit of employees of Saskatchewan Gaming Corporation operating as Casino Regina (the "Employer"), essentially comprising food and beverage workers. The Union filed an application with the Board on November 26, 2003 (LRB File No. 250-03), alleging that the Employer committed an unfair labour practice in violation of s. 11(1)(c) of *The Trade Union Act*,

R.S.S. 1978, c. T-17 (the "*Act*"), by creating a new position – assistant function services manager – without negotiating with the Union and by filling the position and declaring it to be out of the scope of the Union's bargaining unit. The Employer filed an application with the Board later that same day (LRB File No. 252-03), pursuant to s. 5(m) of the *Act*, seeking to have the Board determine whether the assistant function services manager position is within the scope of the Union's bargaining unit.

[2] The Board heard the applications on March 8 and 9, 2004. At the commencement of the hearing, counsel on behalf of the Union advised that he intended to argue that the application by the Employer ought to be dismissed as it was not filed within the open period specified pursuant to s. 5(k) of the *Act* for making application to amend a certification order, the collective agreement between the parties being effective March 1, 2002. Counsel on behalf of the Employer advised that, if it were necessary, the application could be granted pursuant to s. 5(j) of the *Act* in that it was necessary that the Employer create and fill the position on an urgent basis.

[3] Also at the commencement of the hearing, the parties agreed that the evidence adduced should be applied to both applications. The Union agreed to proceed with its case first.

[4] Because we are of the view that the Employer's application for a determination pursuant to s. 5(m) as to whether the disputed position is within the scope of the Union's bargaining unit (LRB File No. 252-03) should be dismissed on the basis of the timeliness of the application, it is not necessary for these Reasons for Decision to summarize the evidence with respect to that issue.

Evidence:

[5] Kelly Miner has been a staff representative of the Union for many years. Her duties include servicing the Union's unit of food and beverage workers at Casino Regina, operated by the Employer. She is also a member of the joint job evaluation process steering and evaluation committees at Casino Regina, which committees are part of a process to evaluate each job within a two or three year timeframe pursuant to the province's pay equity initiative.

[6] Ms. Miner testified that the collective bargaining agreement between the parties provided for the classification of food and beverage shift supervisor ("f&b shift supervisor"), incumbents of which work on the gaming floor in the restaurant and bars. They report to the food and beverage service manager. When the Employer opened the Show Lounge at Casino Regina in November, 2001, a f&b shift supervisor, Wanda Beddell, was assigned to work in the area. Because the Show Lounge was a new endeavour, it was not known what to expect – that is, whether the f&b shift supervisor duties in the Show Lounge would be similar to or different from those in the rest of the Casino – and the parties envisioned that each f&b shift supervisor would train in the Show Lounge for six months at a time so that they then could be assigned to work anywhere in the Casino. However, if the position were to be made permanent, it would have to go through the parties' joint job evaluation process.

[7] When it first opened in November, 2001, usage of the Show Lounge was irregular and unpredictable. When the Union learned in June, 2002 that the f&b shift supervisors would not be rotated to work in the Show Lounge and Ms. Beddell was working there regularly, the Union flagged the position for the joint job evaluation process and Ms. Beddell made a formal application for such evaluation. Although there was no separate position description for the duties Ms. Beddell performed in the Show Lounge, the parties referred to her as the "show lounge supervisor." Ms. Beddell continued to work in the Show Lounge in that capacity until October, 2003. Other f&b shift supervisors also worked temporarily in the Show Lounge during the busy holiday season from approximately November 2002 to January 2003.

[8] The Employer's manager of labour relations, Kevin Sawicki, sent a letter to the Union dated October 20, 2003, advising that, effective October 24, 2003, the Employer was creating a new out-of-scope full-time term position called assistant function services manager ("afs manager") to work in the Show Lounge under the function services manager, Joanne Guay, and that it intended to offer the position to Ms. Beddell. The letter provided, in part, as follows:

> *This letter is to formally advise you that the Saskatchewan Gaming Corporation has taken the decision to temporarily add an additional fulltime (term), out of scope position to the Food and*

> *Beverage Department effective October 24, 2003 to February 24, 2004.*
>
> *The position, Assistant Function Services Manager (job description attached) will report directly to the Function Services Manager (organizational chart attached) and has been classified by the Out of Scope Job Evaluation process at an SGC Level 4 ($1,388.54-$1,735.65 bi-weekly).*
>
> *Traditionally this area (Show Room) has operated with one full time manager and one full time dedicated Food and Beverage Supervisor. This arrangement has proven its self (sic) to be insufficient during the Holiday season. The employer has already increased the shift supervisor FTE from 1 to 2 during this period.*
>
> *It is the employer's intent to offer the term position to the current Food and Beverage Shift Supervisor and back fill their position in the Show Room by utilizing employees from the pool of cross trained Food and Beverage Shift Supervisors who currently access hours through temporary assignments of higher duties.*
>
> *Furthermore both the employer and the union have agreed to reevaluate the Food and Beverage Shift Supervisor position and the Shipper/Receiver position, as the union believes the core duties and responsibilities have changed substantially since the last evaluation period.*
>
> *….*
>
> *Please do not hesitate to call me if you have any questions on this matter.*

A job description for the asf manager was attached to the letter.

[9] The Employer filled the position with Ms. Beddell effective October 24, 2003.

[10] By letter dated October 27, 2003 the Union responded that it had not agreed to the afs manager position being excluded from the bargaining unit and intimated that it was of the opinion that the Employer had acted unlawfully. The letter provided as follows:

> *I received your letter advising of the temporary creation of this excluded position … the Union has not agreed to have such a position.*

> *You are hereby advised to abide by the Collective Bargaining Agreement and the Trade Union Act with respect to process and law where it concerns the integrity of the bargaining unit. If you fail to do so the Union will consider legal action against SGC for this flagrant violation.*

[11] The Employer replied by letter dated October 30, 2003 proposing that the issue be taken to arbitration or, alternatively, that the Employer would apply to the Board to have the matter determined. The letter provided as follows:

> *I am in receipt of your letter dated October 27, 2003 respecting the Assistant Function Service Manager (Temporary) position. It is disappointing that the union is taking such an uncooperative position despite the fact that the duties and responsibilities, as listed in the job description, are clearly those of an out of scope position.*
>
> *Given the urgency of the timing, that being the Holiday Season, we propose this matter be referred at once to a single Arbitrator so that the dispute can be settled in an expedited manner.*
>
> *As the employer has placed an employee in the new position and recognizes the current scope dispute, we will undertake that the appropriate union dues be deducted and placed in trust until the matter is resolved.*
>
> *Should you be unwilling to participate in the expedited arbitration process, we will bring an application before the labour relations board for an order pursuant to s. 5.2 of the Trade Union Act. We will also be asking that the board schedule an expedited hearing.*
>
> *We look forward to hearing from you a soon as possible and in any event not later than November 14, 2003, failing which we will proceed with an application to the Board.*

[12] The Union replied by letter dated November 4, 2003, proposing that the parties meet and negotiate with respect to the issue. The letter provided, in part, as follows:

> *…Secondly, the Collective Bargaining Agreement contemplates discussion and negotiation on all positions, both in-scope and out-of-scope, which has not happened in this case. The Union is prepared to meet and conduct those talks and sees no point in convening a costly arbitration. …I have no comment to make with respect to your intentions to go to the Labour Relations Board*

> *except that if SGC does so the Union will take the position you have committed an unfair labour practice.*

[13] The parties met on November 20, 2003. According to Ms. Miner, based on information obtained from Ms. Beddell about the duties she was performing in the job, the Union and the Employer failed to agree on the placement of the position as in- or out-of-scope. The meeting lasted approximately twenty minutes. The evidence of Mr. Sawicki was in accord with that of Ms. Miner as to what took place at the meeting: the parties disagreed as to whether the duties and responsibilities of the afs manager position differed sufficiently from those of f&b shift supervisor such as to remove the former from the definition of "employee" within the meaning of s. 2(f) of the *Act*.

[14] The Union filed the present unfair labour practice application on November 26, 2003, alleging that the Employer failed to bargain collectively in violation of s. 11(1)(c) of the *Act*. Later the same day, the Employer filed the present application for determination as to the placement of the position pursuant to s. 5(m) of the *Act*.

[15] After only a few weeks in the new position, Ms. Beddell elected to revert to her former in-scope supervisor position. The position remained vacant thereafter.

[16] The term of the collective agreement has expired, but the parties have not yet engaged in bargaining a renewal or revision.

[17] Mr. Sawicki testified that the Employer saw an urgent need for an afs manager because of the Grey Cup celebration in November, 2003, a major poker tournament and the commencement of the busy Christmas season. While he admitted that these events were known up to a couple of years in advance, the Employer's marketing staff was adding additional events.

[18] In cross-examination, upon being asked whether the Employer intended its letter of October 20, 2003 to communicate to the Union that the Employer wanted to discuss the scope of the afs manager position, Mr. Sawicki replied to the effect that, "No, we meant we have decided to add an out-of-scope position, call me if you have any problem."

Arguments:

[19] Mr. Kowalchuk, counsel on behalf of the Union, argued that the Employer committed an unfair labour practice in violation of s. 11(1)(c) of the *Act* in failing to bargain collectively with the Union regarding the newly created afs manager position and in unilaterally designating the position as out of the scope of the bargaining unit represented by the Union.

[20] Counsel submitted that the principles applicable to the creation and placement of new positions as in- or out-of-scope of the bargaining unit were clearly summarized by the Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Raider Industries Inc., et al*., [1996] Sask. L.R.B.R. 297, LRB File No. 005-96. In brief, counsel submitted, a new position is in-scope unless it is excluded by the certification order, the agreement of the parties or an order of the Board. That is, the employer must negotiate the issue of scope with the certified union. Failing an agreement as to the scope of the position, the employer must make application to the Board during the open period mandated pursuant to s. 5(k) of the *Act* for amendment of the certification order to determine the scope issue pursuant to s. 5(m), unless the existence of sufficiently urgent circumstances would justify application outside the open period under s. 5 (j).

[21] Mr. Kenny, counsel on behalf of the Employer filed a written brief that we have reviewed. Counsel argued that the Employer attempted to negotiate the placement of the new position as out-of-scope, but was unsuccessful. Facing an urgent situation with the increase in business activity during the holiday season, it was forced to fill the position and unilaterally place it out-of-scope. Counsel pointed out that the Employer had proposed expedited arbitration as a method to resolve the situation in its letter to the Union dated October 30, 2003, but the Union summarily rejected the idea. The Employer moved with haste to make its application pursuant to s. 5(m), and had not committed an unfair labour practice application.

Statutory Provisions:

[22] Relevant provisions of the *Act* include the following:

5 The board may make orders:

(j) amending an order of the board if:

(i) the employer and the trade union agree to the amendment; or

(ii) in the opinion of the board, the amendment is necessary;

(k) rescinding or amending an order or decision of the board made under clause (a), (b) or (c) where:

(i) there is a collective bargaining agreement in existence and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary of the effective date of the agreement; or

(ii) there is no agreement and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary date of the order to be rescinded or amended;

notwithstanding a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;

. . .

(m) subject to section 5.2, determining for the purposes of this Act whether any person is or may become an employee;

11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:

(c) to fail or refuse to bargain collectively with representatives elected or appointed, not necessarily being the employees of the employer,

> *by a trade union representing the majority of the employees in an appropriate unit;*

Analysis and Decision:

[23] In our opinion, the application for determination as to whether the afs manager position is outside of the scope of the bargaining unit represented by the Union as described in the certification Order and that such Order be amended accordingly should be dismissed as it was not filed within the open period mandated pursuant to s. 5(k) of the *Act*.

[24] In *Raider Industries*, *supra*, the Board provided a detailed summary of its jurisprudence regarding the principles and procedure for the determination of the scope of new positions. At 311-313, citing its previous decision in *Saskatchewan Government Employees' Union v. Wascana Rehabilitation Centre*, [1991] 3rd Quarter Sask. Labour Rep. 56, LRB Files No. 199-90 and 234-90, at 59, the Board stated as follows:

> *Accordingly, where a new position is created in an "all-employee" unit, it remains in the bargaining unit unless excluded by order of the Board or agreement of the parties. Filing an amendment application pursuant to Section 5(k) of the Act does not have the same effect as an order. Therefore, if the Employer wishes to exclude a new position from the scope of the bargaining unit, it must be done in one of the following ways:*
>
> *1. it may be excluded through the process of collective bargaining;*
>
> *2. if attempts at bargaining have failed, it can apply for an amendment to the certification order pursuant to Section 5(j), (k) or (m) of The Trade Union Act.*

[25] In *Canadian Union of Public Employees, Local 1788 v. John M. Cuelenaere Library Board*, [1996] Sask. L.R.B.R. 732, LRB File No. 052-96, the Board determined that applications as to the scope of new positions that would require amendment of the certification order to exclude the position should be made during the open period specified pursuant to s. 5(k) of the *Act*, except in unusual circumstances. At 740, the Board stated as follows:

In the Remai decision, supra, LRB File Nos. 167-93 and 168-93, the Board found that the open periods in s. 5(k) and in other sections of the Act are not mere technical embroidery, but do have jurisdictional implications. In that case, the Board commented, at 138:

> *The rationale for the open periods is, in our view, to provide some predictability and order in the context of the changes which are signalled by the events to which they apply. The open period established under s. 33(4), for example, permits trade unions and employers to prepare for the stage of bargaining which will occur following the expiry date of a collective agreement. Trade unions, employers and individual employees are made aware, by the choice of other open periods, of their opportunities to seek changes in the certification Order or other Orders issued by the Board. The Board has expressed the view in the past that it is not only beyond its jurisdiction to consider applications which are not filed during the relevant open period, but that it would produce confusion and inequity to do so.*

[26] Recognizing that the *Remai* decision predated the addition of s. 5(j) to the *Act*, at 741-742, the Board described the limited application of the provision:

In a decision in Canadian Union of Public Employees, Local 3287 v. University of Saskatchewan, [1995] 3rd Quarter Sask. Labour Rep. 195, LRB File No. 139-95, the Board resisted the argument that the amendment of s. 5(j) had the effect of eliminating completely the strait-jacket imposed by the open periods in s. 5(k). The Board observed, at 199:

> *We have concluded that the amendment to s. 5(j) does not have the overall effect of nullifying the requirements set out in s. 5(k). In our view, the purpose of the amendment is to expand the opportunities for the Board, on our own initiative, to determine that a situation is so anomalous or constitutes such a threat to viable collective bargaining that it requires some amplification or alteration in an earlier Order. It does not have the effect of relieving the parties to an application of the obligation to adhere to the requirements respecting open periods. The Union in this case proceeded correctly by filing the application during the relevant open period, and the effect of s. 5(j) in these circumstances is to allow the Board more flexibility in considering options where there is something anomalous about the consequences of the application of s. 5(k).*

Section 5(j) places in the hands of the Board a discretion to amend or rescind an Order in other circumstances than those where it is considered necessary to clarify or correct the Order. It permits the Board to contemplate such amendment or rescission for a range of reasons which could include substantive considerations of policy, as well as the technical issues which were the basis of such amendment or rescission before the amendment to s. 5(j). In our view, one of the implications of this is that the restrictions on considering applications which are filed outside the open period in s. 5(k) are no longer of a jurisdictional nature; the restrictions which remain are those imposed by the Board in the light of whatever factors we think relevant.

As we indicated in the University of Saskatchewan decision, supra, we do not think the amendment of s. 5(j) constituted a signal for the wholesale abandonment of the open periods set out in s. 5(k). As a general rule, the requirement that parties who wish to apply for amendment or rescission of Board Orders concerning the scope of bargaining units and the representation of employees by trade unions serves a useful purpose in terms of ensuring orderliness and predictability. The temporal benchmarks provided by the open periods should continue to guide the parties in the vast majority of cases. It is only where the application of the ordinary requirements creates a significant difficulty for the parties or an obstacle to sound collective bargaining that the Board should consider exercising our discretion under s. 5(j).

We have taken note of the argument made on behalf of the Employer that all that is necessary is a finding under s. 5(m) that the positions either are or are not out of scope of the bargaining unit. It is true that such a finding may clarify or resolve a number of issues which have resulted from the dispute between the Employer and the Union over the status of these positions.

On the other hand, there is equally something unresolved about a finding pursuant to s. 5(m) which is not followed by an amendment to the certification Order. As we pointed out in the case of the earlier dispute which arose between these parties, in connection with the application designated as LRB File No. 033-91, neither party can insist (in a manner which disrupts collective bargaining) on a delineation of the bargaining unit other than that contained in the certification Order. Though a finding that incumbents in particular positions are not employees within the meaning of The Trade Union Act, and must therefore be treated as being outside the scope of a bargaining unit represented by a trade union, is always of significance - and the issue of whether anyone is an "employee" is in some senses perpetually an issue - the certification Order constitutes the description of the bargaining relationship which is binding on both parties.

[27] The position taken by the Employer in its application for scope determination of the afs manager position would, if it prevailed, require amendment of the certification Order to regularize the bargaining unit description. In our opinion, the Employer has not demonstrated the requisite urgency that would cause us to entertain its application outside the open period pursuant to s. 5(j) of the *Act*. By the admission of Mr. Sawicki, the Employer had been aware of the increased business during the holiday season because of many years experience and knew of the Grey Cup celebrations at least two years in advance. Unlike the situation in *John M. Cuelenaere Library*, *supra*, where the parties had failed to resolve their difference of opinion over the scope of two key positions for over a year, leading the Board in that case to make the s. 5(m) scope determination outside the open period pursuant to s. 5(j), the Employer in the present case filled the position before attempting any negotiation with the Union and made its application within a few days of a single short meeting. Accordingly, the Employer's application in LRB File No. 252-03 is dismissed.

[28] With respect to the Union's application in 250-03, we find that the Employer committed an unfair labour practice in violation of s. 11(1)(c) of the *Act*. The cases cited above make it clear that there is an onus in the Employer to negotiate the issue of scope of newly created positions. In the present case, Mr. Sawicki admitted that the Employer did not intend that its letter of October 20, 2003 was an invitation to the Union to negotiate – it was a declaration of unilateral designation of the afs manager position as out-of-scope. Four days later the Employer filled the position. It was only when the Union suggested in its letter of November 4, 2003 that the parties meet to negotiate the matter that a meeting was arranged. During the meeting, which took place on November 20, 2003 after Ms. Beddell had been working in the position for nearly a month, the Employer essentially indicated that it was not prepared to negotiate the issue.

[29] In *Raider Industries*, *supra*, the Board clearly indicated that it is the responsibility of the Employer to ensure that matters of the scope of new positions are resolved within the parameters of the legislation. Those parameters include adherence to the open period absent urgent circumstances. The Board stated as follows, at 310-11:

> *Based on this view of the significance of the certification order in determining scope, the Board has been exceedingly clear about the*

process which must be followed if an employer wishes to create a position out of the scope of the bargaining unit. In Canadian Labour Congress, Local 481 v. Saskatchewan Government Employees' Association, LRB File No. 192-78, the Board outlined the alternatives:

> *It has been the policy of the Board, in cases of all employee units, where a new classification is created, to put the onus upon the employer to satisfy the Board that the occupant of the new classification is not an employee within the meaning of Section 2(f)(i) of The Trade Union Act and therefore should be excluded from the unit. The proper procedure for an employer in such circumstances is, if it cannot obtain Union agreement, to apply to the Board for an Order amending the Certification Order to exclude the new classification. The employer did not do so during the open period. Therefore its obligation to bargain with the Union with respect to whether or not the position should be in scope remains and the refusal of the employer to continue such negotiations constitutes an unfair labour practice. The Board makes no finding as to whether or not the new classification should be in scope or out of scope. Unfair labour practice proceedings before the Board are not a proper framework for determining such questions. There will be an Order finding the employer guilty of an unfair labour practice accordingly.*

In City Fire Fighters' Union v. City of Regina, LRB File No. 017-83, the Board commented further on this approach:

> *In this case the employer did negotiate with the Applicant with respect to which unit the Research Technician would fall into. However, having failed to reach agreement it did not then apply to the Board for an amendment to the Applicant's certification Order, either during the open period permitted by Section 5(k) of the Trade Union Act or under Section 5(j) which permits the Board to amend a certification Order where the amendment is considered by the Board to be necessary for the purpose of clarifying or correcting an Order. This is not a case in which it can be said that the parties have changed the scope of the certification Order through the collective bargaining process. The scope of the certification Order is incorporated into the collective bargaining agreement by reference, and for all practical purposes they are one and the same. Unless the certification Order is amended, the parties to the Order are bound by its terms. (See Retail, Wholesale and Department Store Union, Local 496 v. Beeland Co-operative Association Limited, LRB File 259-82, Reasons for Decision dated August 13, 1982).*

[30] We therefore find that the Employer has committed an unfair labour practice in violation of s. 11(1)(c) of the *Act*. An order will issue to that effect and ordering the Employer to refrain from further violation of the *Act*.

DATED at Regina, Saskatchewan, this **13th** day of **July, 2004**.

LABOUR RELATIONS BOARD

James Seibel,
Chairperson