Labour Relations Board
Saskatchewan

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 333, Applicant v. LUTHERAN SUNSET HOME OF SASKATOON and LUTHERAN SUNSET HOME CORP. o/a LUTHERCARE COMMUNITIES - VILLA ROYALE PERSONAL CARE HOME, LUTHER RIVERSIDE TERRACE PERSONAL CARE HOME AND SUPPORT GROUP and TRINITY HOMES, Respondent

LRB File Nos. 104-04, 105-04, 106-04 & 107-04; October 5, 2005
Chairperson, James Seibel; Members: Duane Siemens and Clare Gitzel

For the Applicant: Rod Gillies
For the Respondent: Larry Seiferling, Q.C.

> **Collective agreement – First collective agreement – Practice and procedure – Assertion that appointment of Board agent to perform standard functions presupposes Board intervention has no merit – Board agent's report not binding on Board and parties given opportunity to make representations to Board urging exclusion of items recommended by Board agent or inclusion of others or that Board decline to intervene at all – Board appoints Board agent.**
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> **Collective agreement – First collective agreement – Practice and procedure – Suggestion that Board agent does not understand Board's role under s. 26.5 of *The Trade Union Act* without merit – Board's practice is to appoint persons well experienced in labour relations, mediation, the structure, purpose and object of *The Trade Union Act*, collective bargaining and the Board's process – Board appoints Board agent.**
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> ***The Trade Union Act*, s. 26.5.**

REASONS FOR DECISION

Background and Facts:

[1] By certification Orders dated March 9, 2001 (LRB File No. 011-01), July 10, 2002 (LRB File No. 110-02), December 16, 2002 (LRB File No. 225-02) and December 23, 2002 (LRB File No. 184-02), Service Employees International Union, Local 333 (the "Union") was designated as the certified bargaining agent for four units of employees of Lutheran Sunset Home of Saskatoon and Lutheran Sunset Home Corp. operating as Luthercare Communities – Villa Royale Personal Care Home, Luther

Riverside Terrace Personal Care Home and Support Group and Trinity Homes (the "Employer").

[2] The Union filed the within applications on May 7, 2004 requesting that the Board exercise its discretion pursuant to s. 26.5 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), (as it then was) to assist the parties in achieving first collective agreements. The Union requests that the Board appoint a Board agent to meet with the parties and report to the Board with recommendations as to whether the Board should intervene and, if so, with respect to which issues and on which terms.

[3] The parties have bargained collectively but have failed to conclude a first collective agreement for any of the bargaining units. The parties last bargained collectively on January 12, 2004 before the hearing of this application on November 5, 2004.

[4] The Union received a strike mandate from the employees in each bargaining unit on November 18, 2003.

[5] The parties have each filed a list of the disputed issues and a statement of their respective positions on those issues.

[6] The position of the Employer is that the application is premature.

Statutory Provisions:

[7] Relevant provisions of the *Act* include s. 26.5 which, at the time the applications were filed, read as follows:

> *26.5(1) Either party may apply to the board for assistance in the conclusion of a first collective bargaining agreement, and the board may provide assistance pursuant to subsection (6), if:*
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> *(a) the board has made an order pursuant to clause 5(a), (b) or (c);*
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> *(b) the trade union and the employer have bargained collectively and have failed to conclude a first collective bargaining agreement; and*
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> *(c) one or more of the following circumstances exist:*

(i) the trade union has taken a strike vote and the majority of those employees who voted have voted for a strike;
(ii) the employer has commenced a lock-out;or
(iii) the board has made a determination pursuant to clause 11(1)(c) or 11(2)(c) and, in the opinion of the board, it is appropriate to assist the parties in the conclusion of a first collective bargaining agreement pursuant to subsection (6).

(2) If an application is made pursuant to subsection (1), an employee shall not strike or continue to strike, and the employer shall not lock out or continue to lock out the employees.

(3) An application pursuant to subsection (1) must include a list of the disputed issues and a statement of the position of the applicant on those issues, including the applicant's last offer on those issues.

(4) All materials filed with the board in support of an application pursuant to subsection (1) must be served on the other party within 24 hours after filing the application with the board.

(5) Within 14 days after receiving the information mentioned in subsection (4), the other party must:
(a) file with the board a list of the issues in dispute and a statement of the position of that party on those issues, including that party's last offer on those issues; and
(b) serve on the applicant a copy of the list and statement.

(6) On receipt of an application pursuant to subsection (1):
(a) the board may require the parties to submit the matter to conciliation if they have not already done so; and
(b) if the parties have submitted the matter to conciliation or 120 days have elapsed since the appointment of a conciliator, the board may do any of the following:
(i) conclude, within 45 days after undertaking to do so, any term or terms of a first collective bargaining agreement between the parties;
(ii) order arbitration by a single arbitrator to conclude, within 45 days after the date of the order, any term or terms of the first collective bargaining agreement.

(7) Before concluding any term or terms of a first collective bargaining agreement, the board or a single arbitrator may hear:
(a) evidence adduced relating to the parties' positions on disputed issues; and
(b) argument by the parties or their counsel.

(8) Notwithstanding section 33 but subject to subsections (9) and (10), the expiry date of a collective bargaining agreement

> *concluded pursuant to this section is deemed to be two years from its effective date or any other date that the parties agree on.*
>
> *(9) Notwithstanding section 33 not less than 30 days or more than 60 days before the expiry date of a collective bargaining agreement concluded pursuant to this section, either party may give notice in writing to terminate the agreement or to negotiate a revision of the agreement.*
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> *(10) Where a notice is given pursuant to subsection (9), the parties shall immediately bargain collectively with a view to the renewal or revision of the agreement or the conclusion of a new agreement.*

Arguments:

[8] Mr. Gillies, counsel on behalf of the Union, argued that the bargaining units were certified some considerable time past and the parties have been and are unable to reach any first collective agreements. There is grave potential of public harm if job action ensues, that is, to the community of residents cared for in the facilities operated by the Employer. Accordingly, the Board ought to issue what counsel termed its "standard order" appointing a Board agent to explore with the parties whether there is the possibility of agreement on any or all of the outstanding issues and, in the event that all the issues are not resolved, to provide a report to the Board making recommendations as to on which issues the Board should consider intervening and determining and on what terms. In support of his arguments, counsel referred to the Board's decision in *Amalgamated Transit Union, Local 588 v. Wayne Bus Ltd.*, [1997] Sask. L.R.B.R. 507 (LRB File Nos. 130-97 & 163-97).

[9] Mr. Seiferling, counsel on behalf of the Employer, submitted that the Employer did not disagree with the appointment of a Board agent to assist the parties. The crux of counsel's argument, however, was that the "standard order" function that the Board agent report to the Board with recommendations "almost presupposes" that the Board will intervene and there is no guarantee that the Board agent even understands what the Board's role is in first contract assistance, *i.e.*, that it should take "a cautious and minimalist approach" to intervention. Rather than making recommendations as to whether the Board should intervene, let alone on what terms, counsel submitted that the Board ought to direct the Board agent to report on the "balance of power" between the parties. In support of his arguments counsel referred to the following cases, which we have reviewed in detail: *United Food and Commercial Workers, Local 1400 v. Remai*

Investment Corporation, o/a Corona Regency Inn, Yorkton, [1996] Sask. L.R.B.R. 132, LRB File No. 004-96; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Prairie Micro-Tech Inc.*, [1996] Sask. L.R.B.R. 36, LRB File No. 201-95; *Board of Education of the Tisdale School Division No. 53 v. Canadian Union of Public Employees, Local 3759*, [1996] Sask. L.R.B.R. 503, LRB File No. 078-96; *United Food and Commercial Workers, Local 1400 v. Madison Development Group Inc. o/a Madison Inn*, [1997] Sask. L.R.B.R. 68 and 425, LRB File No. 053-96; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Raider Industries Inc, et al.*, [1997] Sask. L.R.B.R. 97, LRB File Nos. 169-96 & 170-96; *International Union of Operating Engineers, Local 870 v. Rural Municipality of Coalfields No. 4*, [1998] Sask. L.R.B.R. 280, LRB File No. 326-97.

Analysis and Decision:

[10] Section 26.5 was enacted as part of the October 1994 amendments to the *Act*. In *Prairie Micro-Tech*, *supra*, the Board, led by then Chairperson Bilson, considered the provisions for the first time and subtitled the Reasons for Decision, "Preliminary Guidelines" designed, as stated at 38, to "outline the direction which [the] Board propos[ed] to adopt as a starting point for the consideration of applications. . . ." In that decision, the Board reviewed the procedures in the other Canadian jurisdictions with legislation aimed at first contract assistance. It is not surprising that the Board's approach to such applications has evolved since that decision or that the Board's response with respect to requests for appointment of a Board agent has become more standardized. However, from the outset, the Board has articulated that the purpose of the Board agent function, as described at 52 of that decision, is:

> *…to assist the parties in exploring whether … any or all of the issues outstanding between them may be resolved.*
>
> *The other would be to report to the Board on the progress of this process, and to make recommendations to the Board concerning issues which might appropriately be the subject of arbitration by the Board. Though these recommendations would not be binding on the Board they would clearly be of considerable value in helping the Board to decide at what point arbitration would be appropriate, and what its scope would be.*

[11] In *Wayne Bus Ltd.*, *supra*, decided a year and a half later with some additional experience with the still relatively new and untested provisions, the Board described the process as follows, at 514 and 515:

> *In devising the process which will implement the remedy provided by this section most effectively, the Board has included an adjudicative stage. Indeed, our procedure to date has contemplated two such stages, one in which the parties make representations on the general nature and scope of the arbitration, and the other in which the parties are heard on the specific terms which may or may not be imposed.*
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> *In deciding how best to support the objectives of the* Act*, it is our view that the Board must not be dazzled by the possibilities of the adjudicative paradigm. We are conscious of our responsibility to be fair to the parties, and we believe that the procedures we follow provide adequate opportunities for the parties to express their views and respond to the issues which may determine the outcome of first contract arbitration.*
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> *It must always be remembered, however, that the overarching objective of the Board is to support, strengthen and encourage collective bargaining between the parties. Though we are aware of our obligation to provide opportunity for a fair hearing, we must never lose sight of the fact that the backdrop against which this adjudication occurs – the collective bargaining relationship – is a volatile scene in which change occurs rapidly, and the bargaining strength and aspirations of the parties shift constantly. This is particularly true in the early days of the relationship, before an initial agreement has been put in place. We cannot permit the legitimate objectives of the parties to collective bargaining to be frustrated by a process which becomes so technical, legalistic or punctilious that it is impossible to provide answers to the essential issues which come before us in a timely fashion.*
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> *We are satisfied that the process we have adopted for the handling of applications for first contract arbitration provides adequately for a fair hearing of the respective positions of the parties. It provides them as well with further opportunity to fashion their own collective agreement with the assistance of a Board agent. When a hearing is eventually held, the Employer is free to raise the question of whether the prerequisites for Board intervention has been met. In the meantime, the parties are engaged by the Board agent in an effort to resolve their differences by bargaining, albeit with third party assistance; it is, after all, the process of collective bargaining which is the focus of the legislative scheme under which these applications have arisen.*

[12] The assertion that the appointment of a Board agent to perform the functions stated in these cases "presupposes" that the Board will intervene has no merit. The report of the Board agent is not binding upon the Board and the parties are given the opportunity to make representations to the Board urging the exclusion of items the Board agent recommended for consideration, or the inclusion of others, or that the Board decline to intervene in the first collective agreement at all. In the many cases that have come before the Board under this provision in the intervening years, the Board has come to various conclusions as to how to proceed based on the facts of each case including, *inter alia*, declining to intervene at all, declining to appoint a Board agent and proceeding directly to hearing and declining to follow some or all of the recommendations of the Board agent.

[13] Similarly, any suggestion that a Board agent does not necessarily understand the Board's role under s. 26.5 is without merit. The Board's practice is to appoint persons well experienced in labour relations, mediation, the structure, purpose and object of the *Act*, collective bargaining and the Board's process.

[14] In the present case, the Union has met the criteria set forth in s. 26.5 (1) of the *Act* to apply to the Board to request assistance – the certification Order contains an order pursuant to clause 5(b) of the *Act*, the parties have bargained collectively and have failed to conclude a first collective agreement and the Union has taken a successful strike vote. However, the Board lacks information upon which it can assess the appropriateness of rendering assistance. As a result, the Board will appoint a Board agent to report to the Board within 60 days of the issuance of the Order on the terms described therein.

DATED in Regina, Saskatchewan this **5th** day of October, 2005.

LABOUR RELATIONS BOARD

James Seibel
Chairperson