Labour Relations Board
Saskatchewan

SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant v. PIONEER CO-OPERATIVE ASSOCIATION LIMITED, Respondent

LRB File No. 151-01; July 28, 2005
Vice-Chairperson, James Seibel; Members: Pat Gallagher and Ray Malinowski

For the Applicant: Larry Kowalchuk
For the Respondent: Larry Seiferling, Q.C.

Certification – Amendment – Add-on to existing unit – Board reviews case law relating to requirement of evidence of support of employees to be added on – Principles enunciated in cases require direct evidence of support for amendment sought from majority of employees in group to be added to bargaining unit – Immaterial that employer already provides add-on group with same wages and working conditions as in existing unit – Board dismisses application for amendment filed without evidence of support.

***The Trade Union Act*, ss. 3, 5(a), 5(b), 5(c) and 5(k).**

REASONS FOR DECISION

Background and Agreed Facts:

[1] By Order of the Board dated March 30, 1961 Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union") was designated as the bargaining agent for a unit of employees of Pioneer Co-operative Association Limited (the "Employer") "in connection with its places of business located in the City of Swift Current and the Branches located in Gull Lake, Tompkins, Kyle, Stewart Valley, Main Centre, Neville and Sanctuary," Saskatchewan. (The scope of the Order with respect to positions excluded from the bargaining unit was subsequently amended on June 4, 1962 and October 4, 1967).

[2] In the present application, the Union seeks to amend the certification Order to reflect the fact that certain branches of the Employer's business named in the Order have been permanently closed or disposed of, that at branches acquired since the granting of the Order there are employees who are not included in the bargaining unit and that at another branch the Employer has voluntarily recognized the Union.

[3] In its reply to the application, the Employer posited that the amendment could not be granted without evidence of support of a majority of employees at the branches acquired since the certification Order was last amended.

[4] The parties agreed to the following additional facts for the purposes of hearing by the Board:

1. The branches in question and the dates of amalgamation with the Employer are as follows: Aneroid (1969); Hodgeville (1974); Cabri, Abbey, Sceptre (1985); Morse (1995); and Ponteix (1998).

2. All of these branches, with the exception of Hodgville, have operated as non-union branches of the Employer since their respective amalgamations. In 1989, the employees at Hodgville indicated to the Employer in writing unanimous support for the Union and the Employer voluntarily recognized the Union as their bargaining agent.

3. With respect to all of the other branches, there is no evidence of support of the employees of the branches for the Union.

4. In 1989, the Union made a bargaining proposal to add the employees at the Cabri, Abbey, Aneroid and Hodgeville branches to the bargaining unit. Only the employees at the Hodgeville branch were added at that time. In the case of all the other branches concerned, the Employer refused to agree and the Union took no further action until the filing of the present application in 2001.

5. The employees at all of the branches receive all benefits and wage increases bargained by the Union.

6. The employees at all of the branches receive the same wages and benefits contained in the collective agreement between the parties.

7. The parties can agree on scope if the Board adds all of the branches to the certification Order.

8. There are approximately 300 employees in the existing bargaining unit.

9. There are approximately 28 employees in the proposed additional branches.

[5] Just prior to the application being filed, the Employer's general manager informed the Union's representative, Paul Guillet, that he needed permission prior to meeting with employees at the Cabri branch. Just prior to this discussion, the Union sent a signed card to the Employer for deduction of union dues for employees at the Cabri branch and was informed that dues would not be deducted as the branch was not unionized.

[6] The parties agreed that the application could be heard and considered by the agreement of the parties without consideration for the "open period" pursuant to s. 24 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*").

[7] No other evidence was filed or presented.

Arguments:

[8] The parties agreed that the issue to be determined is whether the employees in the branches in question should be included in the bargaining unit described in the certification Order without evidence that a majority of such employees supports the Union.

[9] Mr. Kowalchuk, counsel on behalf of the Union, acknowledged that the Board has ordinarily required such evidence of support of the employees in such "add-on" groups. But, he argued that on the present facts the Board should not so require recognizing that the employees in question are enjoying the benefits of bargaining – all of the terms and conditions of employment contained in the collective agreement – without having to pay dues. That is, in essence, they are already represented in bargaining by the Union. The subject employees have no individual contracts of

employment and are treated by the Employer the same as existing members of the bargaining unit. The number of employees sought to be added is less than ten per cent of the number of employees in the existing bargaining unit.

[10] Counsel argued that it was an interesting fact that the Employer's general manager sought the permission of the Union before talking to the Cabri employees, as per a requirement of the collective agreement.

[11] Counsel pointed out that it would be difficult for the Union to explain to the employees why they should join the Union when they already receive all the benefits of the collective agreement without paying dues.

[12] He also pointed out that the Union could accomplish the same thing if the local union was decertified and the Union then filed for certification covering all branches with evidence of support from a simple majority of the total complement of employees. Therefore, the requirement for evidence of support of a majority of the employees in the add-on group is a procedural formality rather than a substantive requirement.

[13] Finally, counsel pointed out that s. 3 of the *Act* refers to "the trade union *designated or selected* for the purpose of collective bargaining by the majority of employees," and argued that the employees in question have, in essence, already selected the Union to bargain on their behalf. Counsel also pointed out that s. 11(1)(e) also refers to the majority of employees "designating or selecting" the trade union, and that s. 11(1)(m) refers to "the trade union *representing* the majority of employees." This, counsel said, supports the proposition that the employees can "select" a trade union to represent them, or the Board may "designate" a union as bargaining agent without their choosing.

[14] Mr. Seiferling, counsel on behalf of the Employer, filed a written brief of his argument which we have read and considered. Counsel argued firstly that if the Board was to do what the Union in this case asks, it would go against the case law with respect to the issue developed since 1978. Counsel characterized the Union's argument as being that if non-union employees obtain the benefit of bargaining they should be

included in the unit whether or not they have indicated that they support the Union, and that if they get the benefits they should have to pay the dues.

[15] The balance of counsel's argument primarily rested on the contention that the Board has not the authority or jurisdiction to certify the add-on group without evidence of majority support. Counsel filed or referred to a number of cases in support of his argument which we have read and considered, including the following: *University of Saskatchewan v. Canadian Union of Public Employees, Local Union No. 1975* (1977), 78 C.L.L.C. 14,159 (Sask. C.A.), rev'd [1978] 2 S.C.R. 834 (S.C.C.); *Prince Albert Co-operative Association Limited v. Retail, Wholesale and Department Store Union, Local 496* (1982), 20 Sask. R. 314 (Sask. C.A.); *Municipality of Crowsnest Pass v. Canadian Union of Public Employees*, [1985] A.J. No. 628 (Alta. C.A.); *Saskatchewan Government Employees' Union v. Wascana Rehabilitation Centre,* [1993] 1st Quarter Sask. Labour Rep. 167, LRB File No. 236-92; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Sunnyland Poultry Products Ltd.* [1993] 3rd Quarter Sask. Labour Rep. 213, LRB File 001-92; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Kindersley and District Co-operative Ltd*. (1998), 167 D.L.R. (4th) 410 (Sask. C.A.).

Analysis and Decision:

[16] The Board issued an Order dated July 25, 2005 dismissing the instant application. These are the reasons for that decision.

[17] The principles applicable to the circumstances of the present case are relatively clear given the jurisprudence that has developed in the past twenty years or so. While we do not propose to undertake a detailed review, it is helpful to summarize some of the more significant cases.

[18] In *University of Saskatchewan*, *supra*, the certified union filed an application to amend a series of certification orders held by it for various employee groups at the University to provide for an "all employee" unit with certain specified exceptions – the proposed unit also included employees who had not been previously included in any of the previous bargaining units specified in the existing orders.

Evidence of support of the group of “added-on” employees (representing approximately 15 per cent of the total number of employees in the proposed unit) was adduced, but it did not support the applicant union as choice of bargaining agent. The Board rescinded the several existing orders and granted the “all employee” order as being “an appropriate unit.” The decision was taken to judicial review. The majority opinion of the Court of Appeal held that in determining the appropriate unit of employees the Board was not required to consider the wishes of the employees. In a dissenting opinion, Bayda, J.A. (as he then was), took the position that it was within the Board’s jurisdiction to issue a new certification order that would only consolidate into one bargaining unit the previously established units, but that the Board’s order exceeded its jurisdiction by dealing with the application, which expanded the scope of the existing orders, as an amendment pursuant to ss. 5(i) or 5(k) of the *Act*, rather than as a certification application pursuant to ss. 5(a), (b) and (c). While the Board need not consider the wishes of the employees in determining whether the unit is appropriate pursuant to s. 5(a), it is required to do so with respect to the designation of the bargaining agent pursuant to s. 5(b). On appeal, the Supreme Court of Canada reversed the decision of the Court of Appeal and endorsed the dissenting opinion of Bayda, J.A.

[19] In *Prince Albert Co-op*, *supra*, the union held an existing certification order including the employer’s employees (numbering approximately 120) in Prince Albert, Saskatchewan. It applied for a new certification order to include those employees and to add the employer’s 38 employees in several towns outside Prince Albert. The union filed evidence of support for the application of a majority of the employees in the add-on group, but relied upon the existing certification order as evidence of the support of a majority of employees in the existing unit. In upholding the decision of the Board in granting the application, the Court of Appeal, per Bayda, C.J.S., held that the existing certification order was evidence of support for the union of a “bare majority” of the employees in the existing unit, and that, combined with the direct evidence of the support for the union of the employees in the add-on group, constituted evidence of the support of the evidence of the majority of the employees in the enlarged unit.

[20] The Board confirmed this principle and described its rationale in *Wascana Rehabilitation*, *supra*, as follows at 173:

> *In our opinion, this approach, which allows the Union to rely on a valid and subsisting certification order as proof that it enjoys majority support in an existing unit, but requires that the wishes of a new group of employees be canvassed before the unit can be reshaped to include them, seems to provide an appropriate balance between the secure and stable status for a trade union, and the entitlement of employees to express their wishes when there is to be an alteration in the existing method by which their terms and conditions of employment are determined, whether that be through representation by some organization other than a union, or by some other means.*
>
> *. . . .*
>
> *. . .In the case of applications to amend the description of the bargaining unit to include new groups of employees, the jurisprudence indicates that, as on a certification application, the Board must take into account the wishes of employees as well as the appropriateness of the unit applied for.*

[21] We are of the opinion that the principles enunciated in these cases require that there be direct evidence of the support for the amendment sought of a majority of the employees in the group to be added to the bargaining unit. It is immaterial that the Employer already provides this group of employees with the same wages and working conditions as those in the existing unit. There many more reasons that the Union may cite to the employees in this group as advantages to union membership – not least of which is access to the protection afforded by the grievance and arbitration procedure – in seeking their support.

[22] The application is therefore dismissed.

DATED at Regina, Saskatchewan, this **28th** day of **July, 2005.**

LABOUR RELATIONS BOARD

James Seibel
Chairperson