

The Labour Relations Board
Saskatchewan

SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant v. 617400 SASKATCHEWAN LTD. carrying on business as ALBERT STREET GARDEN MARKET IGA, Respondent

LRB File No. 179-05; November 8, 2005

Vice-Chairperson, Wally Matkowski; Members: Marshall Hamilton and Maurice Werezak

For the Applicant: Larry Kowalchuk
For the Respondent: Brian Kenny, Q.C.

Vote – Final offer vote – Voters’ list – Board holds that employees who crossed picket line and worked for employer as at date of application pursuant to s. 45 of *The Trade Union Act* should not be allowed to vote on employer’s final offer - Employees who engage in strike activity in concert with one another are entitled to vote on employer’s final offer.

The Trade Union Act, s. 45.

REASONS FOR DECISION

Background:

[1] Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the “Union”) is certified as the bargaining agent for a unit of employees of 617400 Saskatchewan Ltd. carrying on business as Albert Street Garden Market IGA (the “Employer”) by an Order of the Board dated September 22, 1999. On October 3, 2005, the Union requested that the Minister of Labour appoint a special mediator, pursuant to s. 45 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the “Act”).

[2] By letter dated October 5, 2005, the Minister of Labour appointed Doug Forseth, executive director of the Labour Relations and Mediation Division of Saskatchewan Labour as special mediator pursuant to s. 45 of the *Act*.

[3] By letter dated October 12, 2005, filed with the Board on October 13, 2005, Mr. Forseth, pursuant to s. 45(1.1) of the *Act*, recommended that the Board conduct a vote on the final offer from the Employer to its employees who are members of the Union. Mr. Forseth’s letter included two voters’ lists, one compiled by the Union and one compiled by the Employer.

[4] The Board held a hearing on October 21, 2005 to hear submissions from the parties relating to the composition of the voters' list, how the voters would be made aware of the content of the employer's final offer and how the vote would be conducted. Section 45(2) of the Act requires the Board to conduct the vote if recommended by the special mediator.

[5] Counsel for the Employer advised the Board that the Employer is not interested in having a presence when the Union presents the Employer's final offer to the Union's membership and that the Employer has no interest in having a scrutineer present while the vote is conducted.

[6] The Board held two further conference calls with the parties on October 26 and November 1, 2005 to finalize the composition of the voters' list and the format of the Employer's final offer.

Relevant statutory provisions:

[7] Relevant provisions of the Act are as follows:

2(k.1) *"strike" means any of the following actions taken by employees:*

(i) *a cessation of work or a refusal to work or to continue to work by employees acting in combination or in concert or in accordance with a common understanding; or*

(ii) *other concerted activity on the part of employees in relation to their work that is designed to restrict or limit output or the effective delivery of services;*

...

45(1) *Where a strike has continued for 30 days:*

(a) *the trade union;*

(b) *the employer; or*

(c) *any employees of the employer involved in the strike where those employees represent at least 25% of the bargaining unit or 100 employees, whichever is less;*

may apply to the minister for the appointment of a special mediator pursuant to section 23.1.

(1.1) A special mediator appointed for the purposes of subsection (1), in addition to the powers conferred by section 23.1, may:

(a) investigate and meet with any or all of the parties to a labour-management dispute; and

(b) if the special mediator considers it advisable, recommend that the board conduct a vote among the striking employees to determine whether a majority of the employees voting, whose ballots are not spoiled, are in favour of accepting the employer's final offer and returning to work.

(2) On the recommendation of a special mediator pursuant to clause (1.1)(b), the board shall conduct the vote recommended, and subsection 11(8) applies, with any necessary modification, to the vote.

(3) Every employee who is involved in the strike and who has not secured permanent employment elsewhere is entitled to vote for the purpose of this section.

(4) No more than one vote in respect of the same strike shall be held or conducted under this section.

(5) Where, pursuant to this section, employees have voted to accept an employer's final offer and to return to work, the employer shall not withdraw that offer.

Union's arguments:

[8] Counsel for the Union argued that only union members who were supporting the strike in the sense that they were no longer working for the Employer were entitled to vote on the Employer's final offer. Counsel acknowledged the Board's decision in *Jessup and Hanna v. Saskatchewan Government Employees' Union and Government of Saskatchewan*, [1986] Feb. Sask. Labour Rep. 48, LRB File Nos. 373-85 & 375-85, which held that anyone who has contributed to a strike in some tangible, demonstrable way is involved in the strike. However, counsel stated that the *Act* has been changed since the *Jessup* decision, most notably by the definition of the term "strike." Counsel argued that it would be unjust for individuals who crossed the picket line and were, in effect, undermining the union's strike actions, to have a say in the final offer vote.

Employer's arguments:

[9] Counsel for the Employer argued that everyone who had some role in the strike was entitled to vote on the final offer.

Analysis:

[10] The fundamental question raised at this hearing was whether or not employees who were not supporting the strike and who crossed the picket line and worked for the Employer should be allowed on the voters' list to vote on the Employer's final offer. For a variety of reasons, the Board rules that employees who were not supporting the strike and who crossed the picket line and worked for the Employer as at the date of this application should not be allowed to vote on the Employer's final offer.

[11] When the Board reads s. 45(3) of the *Act* in conjunction with s. 2(k.1) of the *Act*, every employee who is involved in the strike as at the date of the application is entitled to vote on the employer's final offer. To rule otherwise would mean that a group of individuals, who had not endorsed the union's concerted activity, could vote to possibly curtail the union's concerted activity. In the Board's view, this would not be a reasonable, correct or fair result.

[12] Counsel both referenced the *Jessup* decision, *supra*, which states at 53: "In the Board's opinion, anyone who has contributed to a strike in some tangible, demonstrable way is "involved" in it within the meaning of Section 45 of The Trade Union Act."

[13] The Board also states in *Jessup, supra*, at 54:

In the Board's opinion, Section 45 was designed only for the common situation in which substantially all of the employees in an appropriate unit engage in strike activity in concert with one another, so that employees affected by the decision to accept the employer's final offer are, by and large, one and the same as those entitled to make that decision. That is not the situation in this case, and the Board has therefore decided that this would not be an appropriate case in which to conduct a vote.

[14] The factual differences between the case at hand and the *Jessup* case, *supra*, are numerous. In *Jessup*, the union proceeded with rotating strike action, which could have resulted in the Board authorizing a vote where either 900 or 3000 employees out of the union's 12000 members voted on the employer's final offer. The Board allowed for a wide definition of

the term striking employees to ensure that this unjust situation did not occur. *Jessup, supra*, does not stand for the proposition that union members, who are not supporting the strike and crossing the picket line and working for the employer, are entitled to vote on the employer's final offer.

[15] Kelly Miner is appointed as Board agent to conduct the final offer vote in accordance with s. 45 of the *Act* and any other relevant provision of the *Act* and the Regulations. The Board will also send a letter to those employees who are not eligible to vote, stating that they are not eligible to vote as they worked for the Employer as at the date of this application.

DATED at Regina, Saskatchewan, this **8th** day of **November, 2005**.

LABOUR RELATIONS BOARD

Wally Matkowski,
Vice-Chairperson