Labour Relations Board
Saskatchewan

NEAL DONOVEL, Applicant v. SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION and SYSCO FOOD SERVICES, Respondents

PIERRE DUVAL, Applicant v. SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION and SYSCO FOOD SERVICES, Respondents

LRB File Nos. 086-06 & 087-06; November 14, 2006
Chairperson, James Seibel; Members: Leo Lancaster and John McCormick

The Applicants: Neal Donovel and Pierre Duval
For the Union: Larry Kowalchuk
For the Employer: Jennifer Olenyk

Duty of fair representation – Scope of duty – Employees moved from out-of-scope to in-scope not credited with full service seniority – Board finds that union addressed issues involved carefully and rationally with deference to interests of all affected by negotiations and demonstrated sensitivity and sensibility to balancing of interests of competing groups of employees – Board finds no violation of duty of fair representation.

Employee – Status – New position – In workplace with "all employee" bargaining unit, new position automatically in bargaining unit unless bargaining with union or application to Board by employer results in agreement or decision that position out-of-scope – Board sets out steps employer must adhere to in determining proper assignment of position and potential consequences to employer of non-adherence.

***The Trade Union Act*, ss. 5(m), 5.2, 11(1)(c) and 25.1.**

REASONS FOR DECISION

Background:

[1] Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union"), is designated as the bargaining agent of a group of employees of Sysco Food Services (the "Employer"). The Applicants, Neal Donovel and Pierre Duval, are members of the bargaining unit. The Applicants each filed an application with the

Board alleging that the Union had violated s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the *"Act"*) by failing to fairly represent the Applicants in the context of collective bargaining resulting in the Applicants being brought from out-of-scope to within the scope of the bargaining unit.

[2] A third application of the same type filed by Jason Yeo (LRB File No. 088-06) was withdrawn.

[3] The Board heard the applications on October 10, 2006.

Evidence:

[4] The general material facts of the complaints made by Mr. Donovel and Mr. Duval are substantially identical and the parties are in substantial agreement as to those facts.

[5] Mr. Donovel commenced employment with the Employer approximately eight to nine years ago in a position within the scope of the bargaining unit. After approximately three years, he moved to an out-of-scope position.

[6] The Union maintained that over time the Employer had created new positions that it treated as out-of-scope but which the Union believed to properly be within the scope of the bargaining unit. During 2004 and 2005, the Union filed a series of grievances relating to the awarding of the disputed positions to out-of-scope applicants or new employees instead of according to the seniority positions under the collective agreement and disputing the qualifications that the Employer attached to some of the positions as inflated and unnecessary. The Union also filed an application with the Board on April 20, 2005 seeking amendment of the 1968 certification Order to reflect both negotiated changes to the scope clause of the collective agreement and what it maintained was the true situation regarding the disputed positions.

[7] In mid-2005, the Union opened negotiations with the Employer to resolve the grievances and application to the Board. The negotiations resulted in a settlement agreement dated October 25, 2005 (the "settlement agreement") that provided, *inter alia*, that several of the disputed positions were within the scope of the bargaining unit

including, maintenance assistant, receptionist, assistant merchandiser, credit assistant, eSYSCO coordinator, multi-unit sales clerk, ICC supervisor, logistics supervisor, and office clerk. Both Mr. Donovel and Mr. Duval were among the 13 employees brought in-scope as incumbents in their positions.

[8] The problem for the Applicants arose as a result of a provision in the settlement agreement that provided for the formula for determining how much union seniority would be granted to those incumbent individuals whose positions were now to be within the scope of the bargaining unit. In the case of Mr. Donovel, he was credited with two years and eleven months seniority, being all of his service time in a position in-scope of the bargaining unit, but he was not credited for any of the time he worked in an out-of-scope position before being forcibly returned to within the scope of the bargaining unit. Mr. Duval's situation was similar. Mr. Donovel admitted that, if he had returned to an in-scope position voluntarily, he knew he would have lost all of his previously earned union seniority by reason of his having gone out-of-scope. However, he maintained that he now had less union seniority than other employees who had been with the Employer fewer years than he had and that he was prejudiced in terms of bidding on vacancies or with respect to any other seniority-based rights, such as protection from layoff.

[9] Brian Haughey has been a staff representative for the Union for 16 years. He testified that the problem with the disputed positions grew over a period of a few years, when the Employer embarked on a strategy to de-centralize its operations. As a result, according to Mr. Haughey, the Employer created a number of new positions over time, which it filled without reference to provisions of the collective agreement that would have allowed members of the bargaining unit to apply based on the seniority and ability clause. In the opinion of the Union, however, the positions ought properly to have been in-scope of the bargaining unit, either because they were clearly so, or because the Employer had included knowledge or educational requirements that were not necessary to do the job.

[10] Mr. Haughey testified that the Union filed the grievances because the membership wanted the disputed positions posted and opened for bidding by members of the Union in accordance with the provisions of the collective agreement. Mr. Haughey opined that, if that had happened instead of resolving the situation by way of negotiation

and the settlement agreement, which provided for withdrawal of the grievances, then it would have been likely that many, if not all, of the incumbents in the disputed positions would have lost their jobs because they lacked sufficient bargaining unit seniority to be successful in a competition. Instead, as a result of the negotiated settlement, the grievances were withdrawn, the incumbents were allowed to remain in their positions, and they were granted at least some union seniority. Mr. Haughey testified that during the discussion of the situation in union meetings some members were against crediting the incumbents with any union seniority, but that it was finally determined to do so according to the settlement agreement formula as a fair compromise in the circumstances.

[11] In addition, the incumbents retained all of their service time for the purposes of vacation and labour standards entitlements. Further, the incumbents who, during the period when they were treated by the Employer as out-of-scope employees, had the option to receive extended health benefits beyond those to which in-scope employees were entitled at the time, were allowed to keep those benefits fully paid by the Employer and they were "red-circled" as far as their wage rates – that is, no incumbent suffered any financial loss as a result of being moved into the bargaining unit. In addition, the incumbents were given the option to join or not to join the Union, as would existing employees at the time of certification, rather than not having such an option if the Employer had properly assigned the position to the bargaining unit in the first place.

Arguments:

[12] Mr. Donovel, on behalf of himself and Mr. Duval, argued that the situation simply is not fair and that the people brought in-scope have in essence been penalized.

[13] Mr. Kowalchuk, counsel on behalf of the Union, argued that, at the time of the negotiations between the Union and the Employer, the Applicants were not members of the bargaining unit and had no rights that the Union was required to represent and, accordingly, the Union could not be in breach of its duty of fair representation. In fact, counsel submitted, the Employer was representing the interests of the incumbents in the disputed positions when negotiating with the Union.

[14] Counsel pointed out that the conflict with the Applicants (and the other incumbents in the disputed positions) arose when the Union was representing its existing members by filing grievances on the basis that the positions occupied by the incumbents had been unlawfully filled in the first place and that the incumbents would have been displaced if the grievances had been advanced to a successful conclusion. Instead, the Union negotiated a settlement with the Employer that resulted in the withdrawal of the grievances, the maintenance of employment with no loss of income for the incumbents in the disputed positions and the concession by the existing membership of the Union to grant some seniority to the incumbents even though they were not entitled to it under the terms of the collective agreement.

Relevant Statutory Provisions:

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

> *5 The board may make orders:*
>
> *(m) subject to section 5.2, determining for the purposes of this Act whether any person is or may become an employee;*
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> . . .
>
> *5.2(1) On an application pursuant to clause 5(m), the board may make a provisional determination before the person who is the subject of the application is actually performing the duties of the position in question.*
>
> *(2) A provisional determination made pursuant to subsection (1) becomes a final determination after the expiry of one year from the day on which the provisional determination is made unless, before that period expires, the employer or the trade union applies to the board for a variation of the determination.*
>
> *5.3 With respect to an application or complaint made pursuant to any provision of this Act or the regulations, the board may, after giving each party to the matter an opportunity to be heard, make an interim order pending the making of a final order or decision.*

. . .

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;*

. . .

25.1 Every employee has the right to be fairly represented in grievance or rights arbitration proceedings under a collective bargaining agreement by the trade union certified to represent his bargaining unit in a manner that is not arbitrary, discriminatory or in bad faith.

Analysis and Decision:

[16] The issues raised in the present case are important because it is recognized that a bargaining agent owes a duty to fairly represent the members of the bargaining unit in collective bargaining. However, the Union has raised an interesting question: whether, because the Applicants were not members of the bargaining unit when the Union and Employer were negotiating the conditions of their entry into the bargaining unit, the Union did not have a duty to represent them fairly in those negotiations and, in fact, it was the Employer that represented their interests. In the alternative, if there was such a duty, the Union says that it fulfilled its obligation.

[17] We have decided to deal with the latter issue first and for that purpose have considered the position of the Applicants in the best light possible by assuming, without actually so deciding, that the Union owed them the duty to represent them fairly in its negotiations with the Employer. That being said, for the reasons that follow, we have determined that if such duty did exist in these circumstances (without deciding that it does), the Union did not breach the duty of fair representation. Following the reasons on that point, we will address the initial issue raised by the Union.

[18] The Board's general approach to applications alleging a violation of the duty of fair representation was summarized in *Laurence Berry v. Saskatchewan*

Government Employees' Union, [1993] 4th Quarter Sask. Labour Rep. 65, LRB File No. 134-93. It has been followed in numerous decisions of the Board since. In *Berry*, the Board also addressed the meanings of the terms used in s. 25.1 of the *Act,* stating as follows at 71 and 72:

> *The terms "arbitrary," "discriminatory," and "in bad faith," which are used in the legislative description of the kind of conduct on the part of a trade union which is to be prevented, have been held to address slightly different aspects of the duty. The Supreme Court in Gagnon used the following comments from the decision of the British Columbia Labour Relations Board in Rayonier Canada (B.C.) Ltd. (1975), 2 CLRBR 196, at 201, to convey the distinct attributes of the duty of fair representation:*
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> > *... The union must not be actuated by bad faith, in the sense of personal hostility, political revenge, or dishonesty. There can be no discrimination, treatment of particular employees unequally whether on account of such factors as race and sex (which are illegal under the Human Rights Code) or simple, personal favouritism. Finally, a union cannot act arbitrarily, disregarding the interests of one of the employees in a perfunctory manner. Instead, it must take a reasonable view of the problem before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations.*
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> *This Board has also commented on the distinctive meanings of these three concepts. In Glynna Ward v. Saskatchewan Union of Nurses, LRB File No. 031-88, they were described in these terms:*
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> > *Section 25.1 of The Trade Union Act obligated the union to act "in a manner that is not arbitrary, discriminatory, or in bad faith". The union's obligation to refrain from acting in bad faith means that it must act honestly and free from personal animosity towards the employee it represents. The requirement that it refrain from acting in a manner that is discriminatory means that it must not discriminate for or against particular employees based on factors such as race, sex or personal favouritism. The requirement that it avoid acting arbitrarily means that it must not act in a capricious or cursory manner or without reasonable care. In other words, the union must take a reasonable view of the problem and make a thoughtful decision about what to do.*

[19] It is not our mandate to determine whether the Union was correct in taking the course of action that it did, but rather to determine whether it approached the negotiations and made its decisions in a fair and reasonable manner, without gross negligence, taking into account all reasonably available information and relevant considerations.

[20] On the facts of the present case viewed in the light of the principles set out above, we are of the opinion that the Union did not act in a manner that was arbitrary, discriminatory or in bad faith in making the settlement agreement with the Employer on the terms which it did. In our opinion, the Union addressed the issues involved carefully and rationally and with deference to the interests of all affected by the negotiations whether they were members of the bargaining unit or not.

[21] It must be remembered that, if the duty to represent the interests of the Applicants fairly existed in these circumstances, the Union owed the same duty to the existing members of the bargaining unit. This necessarily required some balancing of the interests of the competing groups and, in our opinion, the Union demonstrated sensitivity and sensibility to the balancing of those interests.

[22] The settlement agreement was successful in achieving a resolution of a tough situation by which all were required to compromise: the employees on behalf of whom the grievances were filed lost the potential opportunity to bid on the positions in dispute; the entire membership had to accept that the incumbents in the disputed positions would be granted some seniority even though they were not so entitled under the terms of the collective agreement; the Employer was forced to accept the transfer of 13 employees from out-of-scope to in-scope; the Union was forced to mediate with existing members concerning the entry of the incumbents into the bargaining unit and expend resources on a situation that, as is explained later in these reasons, would likely not have arisen if the Employer had followed the appropriate procedure for the creation of new positions.

[23] We understand that Mr. Donovel and Mr. Duval feel they are prejudiced in availing themselves of certain seniority-based benefits such as the increasing protection

from layoff according to placement on the seniority list, but they must recognize that they also acquired some measure of job security from dismissal by virtue of the grievance and arbitration procedure under the collective agreement.

[24] Because of the view that we have taken of the situation, we do not find it necessary to decide *per se* whether the Union owed a duty of fair representation to the Applicants in the present case, but we wish to comment on the appropriate procedure in such circumstances that is designed to ensure that such an anomalous situation is not likely to occur.

[25] If the Union had acted more promptly to decide the issue of the appropriate assignment of each new position as it was created by applying to the Board pursuant to ss. 5(m) and 5.2 of the *Act*, the issue of the duty of fair representation would not have arisen at all, because the conditions of the entry of the incumbents into the bargaining unit would not have had to be negotiated – the Board would have simply determined whether the position was in- or out-of-scope. A union may even apply for an interim order pursuant to s. 5.3 of the *Act* assigning the position until the main application is heard. And, of course, if an employer has failed to bargain with respect to the assignment of a position, the union may make an unfair labour practice application pursuant to s. 11(1)(c) of the *Act*.

[26] However, to be clear, this in no way is meant to absolve an employer of its duty in law to follow the appropriate procedure identified by the Board in its decisions when creating new positions or changing the requirements/duties of old ones in a way that it contends places the positions out-of-scope of the bargaining unit. That is, in workplaces with an “all employee” bargaining unit, such as that in the present case, new positions are automatically within the scope of the bargaining unit unless bargaining with the union results in an agreement that the position is out-of-scope, or application to the Board *by the employer* results in a decision to the same effect.

[27] As the Board stated in *Saskatchewan Government Employees' Union v. Wascana Rehabilitation Centre*, [1991] 3rd Quarter Sask. Labour Rep. 56, LRB File Nos. 199-90 & 234-90, at 59, "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." Therefore, an employer is required to bargain collectively with the union in order to obtain agreement on an exclusion, or apply to the Board for an amended certification order pursuant to s. 5(j), (k) or (m) of the *Act*.

[28] An employer must adhere to the following steps in determining the proper assignment of the work and the position:

1. notify the certified union of the proposed new position;

2. if there is agreement on the assignment of the position, then no further action is required unless the parties wish to update the certification order to include or exclude the position in question;

3. if agreement is not reached on the proper placement of the position, the employer must apply to the Board to have the matter determined under ss. 5(j), (k) or (m);

4. if the position must be filled on an urgent basis, the employer may seek an interim or provisional ruling from the Board or agreement from the union on the interim assignment of the position.

[29] An employer is not entitled to act unilaterally by assigning the position as out-of-scope of the bargaining unit without obtaining the agreement of the union or, failing such agreement, without obtaining an order from the Board, or the employer will be in violation of its obligation to bargain collectively under s. 11(1)(c) of the *Act*: See, *University of Saskatchewan*, *infra*.

[30] In practical terms, however, if the employer fails to bargain with the certified union, the union may file an unfair labour practice application and/or an application under s. 5(m), accompanied by an application for interim assignment of the position if appropriate in the circumstances.

[31] Some examples of decisions of the Board describing the application of this procedure to multi-bargaining unit workplaces include the following: *Canadian Union of Public Employees, Local 21 v. City of Regina and Regina Civic Middle Management Association v. City of Regina*, [1998] Sask. L.R.B.R. 464, LRB File Nos. 023-95 & 037-96; *Canadian Union of Public Employees v. University of Saskatchewan and Administrative and Supervisory Personnel Association*, [2000] Sask. L. R.B.R. 83, LRB

File No. 218-98. In the present situation, we wish to make it clear that the Employer ought to follow the proper procedure in the future.

[32] The applications are dismissed and an Order has been issued accordingly.

LABOUR RELATIONS BOARD

James Seibel
Chairperson