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, Respondents

LRB File Nos. 104-04, 105-04, 106-04 & 107-04; November 2, 2006
Chairperson, James Seibel; Members: Clare Gitzel and Maurice Werezak

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

Collective agreement – First collective agreement – First collective agreement provisions in *The Trade Union Act* essentially neutral and in circumstances of case bad faith bargaining not relevant to issues of whether Board should intervene and, if so, with respect to which terms of draft collective agreement – This does not prevent either party from asserting that certain provisions were or were not agreed to prior to hearing of first collective agreement application – Board also addresses order of proceeding at hearing before Board subsequent to delivery of Board Agent's report.

***The Trade Union Act*, s. 26.5.**

PRELIMINARY ISSUES: REASONS FOR DECISION

Background and Positions of the Parties:

[1] In October 2004, Service Employees International Union, Local 333 (the "Union") applied to the Board pursuant to s. 26.5 of *The Trade Union Act*, R.S.S. 1978, c. T-17, (as it then was), (the "*Act*"), for assistance in achieving a first collective bargaining agreement. By Order dated October 5, 2005, the Board appointed a Board Agent to assist in the resolution of the first agreement by meeting with the parties and examining the matters in dispute and to report to the Board with recommendations as to whether the Board ought to intervene to assist the parties to conclude the agreement and, if so, what terms, if any, the Board should impose.

[2] The Order further directed that, within seven days of receiving the Board Agent's report, the parties should each file a statement with the Board indicating their agreement or lack of agreement with the provisions in the first collective agreement that were recommended by the Board Agent and indicated that, if either party did not agree with any or all of the recommendations, the Board would conduct a hearing in accordance with s. 26.5 of the *Act*.

[3] The Board Agent submitted an extensive report to the Board dated May 24, 2006 (the "Board Agent's Report"). The Union responded, by letter dated June 1, 2006, that it had no objections to the Board Agent's recommendations for terms to be imposed by the Board in the first collective agreement. 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 (collectively the "Employers") responded by letter dated June 2, 2006 objecting to the recommendations of the Board Agent in 16 subject areas.

[4] The Board scheduled the hearing of the matter for October 25 and November 6, 2006.

[5] At the commencement of the hearing, counsel for both parties raised a preliminary issue as to whether the Union or Employers ought to present evidence first. Counsel for the Employers submitted that the Union ought to be required to present its evidence first, followed by the Employers.

[6] Counsel for the Employers also asked that the Board explain in detail the issues to be addressed, the nature of the evidence that should be presented and the philosophical approach of the Board to applications for first collective agreement assistance.

[7] Counsel for the Employers also raised a preliminary issue related to the allegation in the reply filed on behalf of the Employers that the Union had alleged in the present application for first collective agreement assistance that certain terms and provisions had not yet been agreed to in bargaining, when in fact they had. The reply states, in part, as follows:

> *16. The Respondent says that this application is an abuse of process because the Union has been guilty of bad faith bargaining in presenting in their package of disputed Articles items that have been agreed to between the parties.*

[8] The reply also asks that "a finding of bad faith bargaining be made against the Union …."

[9] Counsel for the Employers submitted that the Board should first hear evidence related to the Employers' allegation of bad faith bargaining on the part of the Union and if such a finding is made, rather than intervene to render assistance in concluding a first contract, direct the parties to return to collective bargaining to negotiate the balance of outstanding matters.

Decision:

[10] We have not set forth in detail the respective submissions of counsel. Counsel for both parties are experienced in the proceedings in this type of application -- the Board's decisions that have been rendered since the provision was included in the *Act* in 1994 speak for themselves with respect to the Board's general approach to applications for first collective agreement assistance and the order of evidence. Counsel for the Employers filed a book of authorities that contains many of these decisions. It is open to counsel for both parties, in argument, to make submissions as to whether the Board ought to follow precedent or take some other approach.

[11] In this matter the parties and the Board have the Board Agent's Report, which is not the case in every application. The Board's jurisprudence demonstrates that the submissions in such cases are directed to the statements and recommendations in, and the basis of, the Board Agent's report with which that party takes issue and to meet and address the submissions and arguments that the opposing party presents.

[12] On this point, we can do no better than to iterate the following statement by then Chairperson Bilson in a letter to the parties prior to the hearing in *United Food and Commercial Workers, Local 1400, v. Madison Development Group o/a Madison Inn*, [1996] Sask. L.R.B.R. 777, LRB File No.053-96:

[The Board Agent] was appointed as an agent of the Board for the purposes of exploring with the parties the possibility of reaching a collective agreement and, if no such agreement could be reached, of making recommendations to the Board concerning the terms of an agreement which might be imposed by the Board pursuant to Section 26.5 of The Trade Union Act.

In the appointment of the Board Agent, we set our expectations of the process which would be followed when the recommendations were received, which we described in the following terms:

> *If either or both parties reject the recommendations, the Board will hold a hearing, at which the parties will be asked to state the grounds on which they have rejected the recommendations. The Board may then proceed to make a decision whether to accept the recommendations in the report of the Board agent, or to hold further hearings at which the parties would be allowed to make, further representations on the issues defined by the Board.*

The Board has had an opportunity to give further consideration to the nature of the hearing which will be held, and we have decided that we should set out some guidelines for the parties in this respect, in order to allow them to prepare for the hearing:

1. We would like to make it clear that the process we have chosen to follow differs in some respects from an "interest arbitration of the kind with which the parties may be familiar. We have elsewhere commented on our understanding of the purpose and scope of the first contract arbitration remedy which was added to The Trade Union Act in 1994. It is, in our view, consistent with the purpose of this remedy within the framework of the Act to have appointed an agent with a mandate which included both the exploration with the parties of the possibility of reaching an agreement without further assistance from the Board, and the presentation to the Board of recommendations based on his experience with the parties.

The mandate was not adjudicative in nature, and it remains for the Board to assess whether the recommendations should form the basis for an imposed collective agreement. It is not our expectation that it, would be necessary at this hearing to entertain any representations concerning communications between the respective parties and [the Board agent] or the process in which the parties engaged with his assistance.

2. In this context, we think it appropriate to ask the parties, in preparing their representations for the hearing, to focus on the

> *issue we set out in the initial document appointing [the Board agent]: the grounds on which either or both if the parties have rejected the recommendations. Representations on this issue could include arguments about the legitimacy of comparators which were used or not used, indications of what the alternative suggested by the respective parties might be, and statements outlining the essence of the difference between the parties on various items. . . .*
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> *3. In the draft collective agreement submitted by [the Board Agent], he has laid out . . . those provisions which are based on his own recommendations. We would ask the parties to provide some specific guidance to the Board with respect to whether or not they are in agreement with these items, and the basis for any resistance they might have to their inclusion in a final collective agreement.*
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> *4. With respect to the wage rates proposed by the draft collective agreement, we would ask the parties to focus on the issue as we stated in the . . . appointment of {the Board Agent]. It is not necessary, in our view, to contemplate the introduction of evidence concerning wage rates or wage patterns, or the presentation if information which would augment our understanding of the course of dealings between the parties.*
>
> *We would ask the parties to comment instead on the general principles which [the Board Agent] has stated in his report as being the basis of these proposed rates.*
>
> *5. It may or may not be necessary to hold hearings to allow further representations on specific proposals. . . .*

[13] Because counsel for the Employers has taken issue with the role of the Board Agent, we wish to point out that the appointment document in the present case is substantially similar to that referred to in the letter, *supra*, and to iterate that the role of the Board Agent is not adjudicative in nature.

[14] With respect to the issue as to whether the Board ought to hear evidence or make a determination whether, as alleged by the Employer, the Union in the present case is guilty of bad faith bargaining, we do not propose to allow the presentation of such evidence or to make a determination on that point. The first collective agreement assistance provisions of s. 26.5 of the *Act* are essentially neutral. As stated by then Chairperson Bilson in the letter, *supra*, the parties should focus on the issues set out in the document appointing the board agent. Nothing prevented the Employers from

making an unfair labour practice application. This does not prevent either party from asserting that certain provisions were or were not agreed to prior to the hearing of the application.

[15] With respect to the order of proceeding, the application was filed by the Union and it will proceed first, followed by the Employers. In its response to the Board Agent's Report, the Union stated that it accepts the Board Agent's Report in its entirety. Practically speaking, it is then for the Employers to make their presentation as to their objections to the statements and recommendations in, and the basis of the Board Agent's Report. The Union may then present its response.

DATED at Regina, Saskatchewan, this **2nd** day of **November, 2006.**

LABOUR RELATIONS BOARD

James Seibel,
Chairperson