Labour Relations Board
Saskatchewan

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4683, Applicant (Respondent) v. ALICE ROSS, Respondent (Applicant) and HERTZ NORTHERN BUS (1993) LTD., Respondent (Respondent)

LRB File No. 193-05; March 15, 2006
Chairperson, James Seibel; Members Bruce McDonald and Ken Ahl

For the Union:	Peter Barnacle
For the Respondent (Applicant):	Alice Ross
For the Employer:	Greg Hertz and Larry Sperling

Reconsideration – Criteria – Board discusses and applies criteria for reconsideration – Parties agree that statement of employment used by Board to determine level of support for application inaccurate - Board's original decision to order vote predicated upon crucial misapprehension of fact by Board because of inaccurate statement of employment – Application for reconsideration granted and application for rescission dismissed.

Decertification – Application – Existence of certification order *prima facie* proof of majority support for union from bargaining unit employees – Onus to establish otherwise, by garnering majority support as established by accurate statement of employment, on applicant for rescission – Justice not served if Board knowingly allows inaccurate statement of employment to affect employees' rights to be represented in collective bargaining – Board reconsiders evidence of support for rescission application in light of accurate statement of employment – Application for rescission dismissed.

***The Trade Union Act*, ss. 5(k) and 13.**

REASONS FOR DECISION

Background:

[1] By a certification Order of the Board dated November 14, 2004 (LRB File No. 240-04) Canadian Union of Public Employees, Local 4683 (the "Union") was designated as the certified bargaining agent for a unit of employees of Hertz Northern Bus (1993) Ltd. (the "Employer"). At all material times, Alice Ross was employed by the Employer and was a member of the bargaining unit. By application dated October 24,

2005, Ms. Ross applied for rescission of the certification Order pursuant to s. 5(k)(i) of *The Trade Union Act*, R.S.S. 1978, c. T-17, as amended (the "*Act*").

[2] In its reply to the rescission application, the Union stated that the parties had not yet agreed to a first collective agreement and raised an issue with respect to union security.

[3] The Employer filed a statement of employment purporting to list 19 persons as employees in the bargaining unit.

[4] The matter was considered by the Board on November 16, 2005, based on the statement of employment as filed and the evidence of support filed for the application for rescission, and an Order issued that date directing that a representation vote be held.

[5] However, before the vote took place, the Union applied for reconsideration of the Board's Order directing a vote, on the basis that, in preparation for the vote and by reason of discussions with the Employer regarding the voters' list, it was determined that the statement of employment filed by the Employer on the application for rescission was inaccurate in that certain persons who were in fact employees in the bargaining unit were not listed and that it was that statement of employment which was used by the Board to determine the level of support for the application on which determination the Board predicated the Order directing a vote.

[6] The Board heard the application for reconsideration on February 20, 2006 and heard the evidence and argument directed to whether the Board should grant reconsideration and, in the event that the Board should determine to do so, the evidence and argument directed to a reconsideration proper of the Board's Order of November 16, 2005.

Facts and Evidence:

[7] The facts were not in issue.

[8] The Union adduced the evidence of Brian Brotzel, a national servicing representative for the Union since 1991. Neither Ms. Ross nor the Employer sought to adduce any evidence. Briefly, Mr. Brotzel testified that the Union met with the Employer with the objective of coming to an agreement with respect to the voters' list for the vote ordered by the Board. During the course of those communications, it became apparent that the Employer had neglected to include four (4) employees on the statement of employment who ought to have been listed. The Union and Employer agreed that the statement of employment ought to have listed 23 persons rather than 19 persons.

[9] At the hearing of the reconsideration application, Mr. Hertz admitted forthrightly that the four (4) employees who were not on the statement of employment were inadvertently missed because they were not at work on the day the statement of employment was taken.

Arguments:

[10] Mr Barnacle, counsel for the Union, stated that, while the Union has no knowledge of the number of supporters for the application for rescission and, consequently, does not have knowledge of whether the addition of the four (4) persons to the statement of employment who were inadvertently left off by the Employer would have made any difference to the Board's decision of November 16, 2004, in the event that it would have, the Union seeks reconsideration of the Board's Order so that justice might properly be done.

[11] In support of the Union's position, Mr. Barnacle referred to the decisions of the Board in *Bressers v. United Food and Commercial Workers, Local 1400 and Sobey's Capital Inc.*, [2005] Sask. L.R.B.R. 68, LRB File Nos. 181-04 & 227-04; and *Saranchuk v. United Steelworkers of America and Capital Pontiac Buick Cadillac GMC Ltd*. [1998] Sask. L.R.B.R. 286, LRB File No. 250-97.

[12] Neither Ms. Ross nor the Employer proferred any argument against the application for reconsideration other than to say that the employees should be able to vote.

Analysis and Decision:

[13] The criteria and considerations that the Board has consistently applied to determination as to whether to allow an application for reconsideration were set out in *Remai Investment Corporation, operating as Imperial 400 Motel v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union et al*., [1993] 3rd Quarter Sask. Labour Rep. 103, LRB File No. 132-93, at 107 and 108, as follows:

> *Though the Board has the power under Section 5(i) to reopen decisions it has arrived at, this power must be exercised sparingly, in our view, and in a way which will not undermine the coherence and stability of the relationships which the Board seeks to foster. In a comment on an application for reconsideration of a decision of the British Columbia Labour Relations Board in Corporation of the District of Burnaby v. Canadian Union of Public Employees, [1974] 1 Can. L.B.R. 128, at 130, the Board asserted that "speed and finality of decisions are especially imperative in labour relations. Of no area of law is it truer to say that justice delayed is justice denied.*
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> *In the three jurisdictions we have alluded to above – Canada, British Columbia and Ontario – the recognition of the need to balance the claim for reconsideration against the value of finality and stability in decision-making is reflected in the procedures adopted by labour relations tribunals. In all of them, the procedure followed in connection with an application for reconsideration departs from the procedure employed for other kinds of applications. In all three cases, the applicant is required to establish grounds for reconsideration before a decision is made whether a rehearing or some other disposition of the matter is appropriate.*
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> *We have concluded that such a two-step approach is appropriate in cases of this kind. We do not agree with counsel for the Employer that we were mistaken in requiring that an applicant who seeks reconsideration of a decision of the Board must persuade us that there are solid grounds for embarking upon that course.*
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> *Counsel for the Employer argued that we should adopt the alternative of entertaining a full rehearing of the case, rather than establishing this intermediate stage. He predicted that this would not have the effect of an uncontrolled increase in the number of such applications. It is difficult to see, however, why allowing an automatic trial de novo to a disappointed applicant would not expose the Board to a growing number of applications to rehear cases in which the contest is serious or the stakes high.*
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> *In other jurisdictions, particularly in British Columbia, there has been extensive discussion of the criteria which labour relations boards might use to determine whether an applicant has been able*

> *to establish that there are grounds which justify the reopening of a decision. In their decision in the case of Overwaitea Foods v. United Food and Commercial Workers, No. C86/90, the British Columbia Industrial Relations Council set out the following criteria:*
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> > *In [Western Cash Register v. International Brotherhood of Electrical Workers, [1978] 2 CLRBR 532], the Board articulated four criteria in which it would give favourable consideration to an application for reconsideration. Subsequent decisions (Construction Labour Relations Association of British Columbia, BCLRB No. 315/84, and Commonwealth Construction Co. Ltd., BCLRB No. 61/79, [1979] 3 Can LRBR 153), added a fifth and sixth ground:*
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> *1. If there was no hearing in the first instance and a party subsequently finds that the decision turns on a finding of fact which is in controversy and on which the party wishes to adduce evidence; or,*
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> *2. if a hearing was held, but certain crucial evidence was not adduced for good and sufficient reasons; or,*
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> *3. if the order made by the Board in the first instance has operated in an unanticipated way, that is, has had an unintended effect on its particular application; or,*
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> *4. if the original decision turned on a conclusion of law or general policy under the Code which law or policy was not properly interpreted by the original panel; or,*
>
> *5. if the original decision is tainted by a breach of natural justice; or,*
>
> *6. if the original decision is precedential and amounts to a significant policy adjudication which the Council may wish to refine, expand upon, or otherwise change.*

[14] It is our opinion that the Union has established that there are sufficient grounds to warrant consideration pursuant to the first or second grounds described above, in that the decision turned on a finding of fact that is agreed by all parties to be erroneous. The Board accepted the statement of employment filed by the Employer as accurate and predicated its determination of the level of support for the application for rescission thereon. No party disputes that this was the circumstance in which the Board's decision to order a vote was made.

[15] The present situation has much in common with the decision of the Board in *City of North Battleford v. Canadian Union of Public Employees, Local 287* [2003] Sask. L.R.B.R. 288, LRB File No. 054-01, in which the Board allowed an application for reconsideration in circumstances where both parties agreed that the Board's decision was predicated upon a crucial misapprehension of fact by the Board.

[16] We, therefore, exercise our discretion to grant a reconsideration of the Board's decision of November 16, 2005.

[17] The existence of a certification order is *prima facie* proof of majority support of the employees in the bargaining unit for the certified union as their bargaining agent: see, *Prince Albert Co-operative Association Limited v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, [1982] May Sask. Labour Rep. 55, LRB File No. 535-81, affirmed (1982), 141 D.L.R. (3d) 524 (Sask. C.A.); *Saskatchewan Union of Nurses v. Sisters of Charity of Montreal (Grey Nuns)*, [1985] April Sask. Labour Rep. 46, LRB File No. 378-84; *Saranchuk*, *supra*. The onus to establish otherwise is on the applicant for rescission. This is done through the garnering of the support of employees in the bargaining unit for the application which must be greater than fifty per cent as established by an accurate statement of employment.

[18] The importance of the statement of employment as an evidentiary document is underlined by the fact that the Regulations to the *Act* require that it be in the form of a statutory declaration. Furthermore, the accuracy of the statement of employment is a crucial element to the Board's consideration of a rescission application. Justice would not be served if we were to knowingly allow an inaccurate statement of employment to affect the rights of employees to be represented in collective bargaining pursuant to s. 3 of the *Act*.

[19] In all of the circumstances, the application for reconsideration is allowed. The Order of the Board dated November 16, 2005 directing a vote is rescinded. Reconsidering the evidence of support for the application for rescission with reference the correct statement of employment, there is not the requisite support of a majority of the employees in the bargaining unit for the application for rescission. Accordingly, the application for rescission is dismissed.

DATED at Regina, Saskatchewan, this **15th** day of **March, 2006**.

LABOUR RELATIONS BOARD

James Seibel,
Chairperson