Labour Relations Board
Saskatchewan

SERVICE EMPLOYEES' INTERNATIONAL UNION, LOCAL 299, Applicant v. CANADIAN BLOOD SERVICES, Respondent

LRB File No. 024-07; July 16, 2007
Vice-Chairperson, Angela Zborosky; Members: Ken Ahl and John McCormick

For the Applicant: Keir Vallance
For the Respondent: Larry LeBlanc, Q.C.

Certification – Amendment – Practice and procedure – Union applies to amend certification order to include position previously specifically excluded – Board determines that union must show material change to position itself or to circumstances of position illustrating that now appropriate for position to be in bargaining unit – Wishes of new incumbent not sufficient to constitute material change in circumstances.

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

REASONS FOR DECISION

Background:

[1] Service Employees' International Union, Local 299 (the "Union") is designated as the bargaining agent for a unit of employees of Canadian Blood Services (the "Employer") operating in Regina, Saskatchewan. The Union filed an application with the Board on February 28, 2007 seeking to amend its certification Order pursuant to ss. 5(i), (j), (k) and (m) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), by removing the biomedical technologist positions from the list of excluded positions. The Union takes the position that such an amendment is appropriate given that: (i) the sole employee in the biomedical technologist position has indicated his desire to join the Union; (ii) the position's duties are not managerial in nature and do not require access to confidential labour relations information; (iii) the Employer has refused to negotiate the inclusion of the position in the bargaining unit; and (iv) there would be no labour relations harm or prejudice to the Employer should the position be included within the scope of the bargaining unit.

[2] The Employer filed a reply to the application taking the position that the amendment sought by the Union was inappropriate because: (i) there has been no

material change in circumstances since the conclusion of the last collective agreement between the parties or, alternatively, since the issuance of an amended certification Order in 1999; (ii) the disputed position does not share a sufficient community of interest with positions in the bargaining unit, being more closely aligned with out-of-scope positions in the laboratory technologists group; and (iii) it would otherwise be inappropriate to include one technical employee in a bargaining unit of support staff. The Employer denied that it refused to negotiate the matter with the Union, as the Union did not raise the issue during the negotiations for the most recent collective agreement. It was only subsequent to the conclusion of those negotiations that the Union asked the Employer to participate in a joint application to amend the certification Order by deleting the biomedical technologist exclusion.

[3] The anniversary of the effective date of the collective agreement is April 1, 2007 and therefore the Union brought this application within the open period mandated by s. 5(k) of the *Act*.

[4] The Order that the Union seeks to amend was most recently amended on February 15, 1999. The bargaining unit description in the Order reads as follows:

> *That **all employees employed by Canadian Blood Services, Regina Centre**, Regina, Saskatchewan, **except** the Centre Director, Centre Manager, Collections Manager, Laboratory Manager, Medical Officers/Directors, Scientists/Medical Researchers, Computer Services Supervisor, Clinic Operations Supervisor, Components Lab Supervisor, Components Lab Assistant, Recruitment Supervisor, Transport Supervisor, Clinic Coordinator, Donor Retention Coordinator, Marketing Coordinator, Communications Coordinator, Quality Assurance Manager, a Centre Confidential Secretary, **Biomedical Technologists**, all Registered Laboratory Technologists and all Registered and Graduate Nurses employed and functioning as such, are an appropriate unit of employees for the purpose of bargaining collectively;*
>
> [**emphasis added**]

[5] On the date of the hearing, the Union filed purported evidence of support from the individual occupying the disputed position.

[6] The Board heard the application on June 18, 2007. At the commencement of the hearing, the Board asked the parties to address, as a preliminary issue, whether the Union is required to establish a material change in circumstances to entitle it to an amendment of the type sought and, if so, the nature of the material change which must be established. These Reasons for Decision deal with this preliminary issue.

Positions of the Parties:

[7] For the purposes of addressing the preliminary issue before the Board, the Board accepts the representations of counsel for both parties concerning the underlying facts of the application, all of which did not appear to be in dispute between the parties. The Union was initially certified to represent a unit of employees composed of clinical assistants in 1977. In 1978, the certification Order was amended to include transport drivers, laboratory helpers and laboratory clerk-typists. The Order was further amended in 1983 to include office clerk typist (data entry) and stores accountant. In 1998, by way of a joint application by the parties, the bargaining unit in the certification Order was substantially amended to an “all-employee” unit with stated exceptions. Prior to this amendment, the bargaining unit description was defined by reference to which specific positions were included within its scope. The list of excluded positions in the 1998 Order is the very same one contained in the most recent certification Order of 1999 (referenced above) and continues to include the biomedical technologist positions. In 1999, the only amendment to the Order was to the name of the Employer again resulting from a joint application by the parties.

[8] Counsel for the Employer argued that the Board should not entertain an application for a proposed amendment of this type unless the Union, as the applicant seeking the amendment, establishes a material change in circumstances or in the duties or responsibilities of the position in question since the earlier of: (i) the date on which the parties entered into their last collective agreement; or (ii) the date the last certification order was issued. The Employer submitted that this requirement exists regardless of

whether the last certification order was issued with the consent of the parties or after the Board's consideration of the merits of the application and that the onus of proof lies upon the applicant to establish such a change. The Employer pointed out that the Board, following an extensive review of its prior decisions in *Sobey's Capital Inc. v. United Food and Commercial Workers Union, Local 1400* (2006), 127 C.L.R.B.R. (2d) 42, identified that the only exception to this rule is in the situation of an application for amendment in the nature of a consolidation of bargaining units. The Employer argued that the amendment application before us does not fall within that exception and there are otherwise no reasons to exclude the application from the principle that a material change in circumstances is required.

[9] The Employer relied on the following cases: *Government of Saskatchewan and Saskatchewan Government Employees Union*, [1983] April Sask. Labour Rep. 67; *Federated Co-operatives Limited v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 504,* [1978] July Sask. Labour Rep. 45, LRB File No. 502-77*; Saskatchewan Union of Nurses v. Saskatchewan Association of Health Organizations*, [1999] Sask. L.R.B.R. 549, LRB File No. 078-97 (hereinafter "SAHO"); *Canadian Union of Public Employees, Local 600 v. Battlefords Regional Care Centre*, [1989] Summer Sask. Labour Rep. 80, LRB File No. 186-88; *Retail, Wholesale and Department Store Union v. Canada Safeway Limited*, [1992] 1st Quarter Sask. Labour Rep. 47, LRB File Nos. 180-90, 181-90, 216-90, 217-90, 226-90 & 034-91; *Canadian Union of Public Employees, Local 4532 v. FirstBus Canada Ltd.*, [2002] Sask. L.R.B.R. 261, LRB File No. 067-02.

[10] Counsel for the Union acknowledged that the application is silent with respect to the issue of a material change in circumstances, arguing that it is not necessary to establish such a change on an amendment application of this type. The Union stated that there is no reason, other than the wording of the existing certification Order, why the incumbent should be out-of-scope given that he does not perform duties of a managerial character nor does he have access to confidential labour relations information. The Union pointed out that the Board's rationale for typically requiring a material change in circumstances is that it promotes industrial order and prevents parties from essentially asking the Board to reconsider the inclusion/exclusion of a position which, in effect, amounts to an appeal of the Board's previous decision regarding a

disputed position. The Union asked the Board to consider a flexible approach to the application of the material change principle, given that s. 3 of the *Act* protects and promotes the rights of employees to join a trade union of their choosing and the present case involves a single individual with a pre-existing union in the workplace. In the circumstances, the incumbent in question could have chosen another union to represent him in collective bargaining but, instead, has chosen the Union and the Board should honour that choice. The Union argued that to require a change in circumstances puts the biomedical technologist in a more difficult position than would exist if the Union or another union were applying for certification of a new bargaining unit including biomedical technologists. In any event, the Union argued that placing the disputed position within the scope of the existing bargaining unit would have a limited impact, if any, on industrial order in the workplace.

[11] In the alternative, the Union argued that, if a material change in circumstances is required, it has proof of such a change. The Union pointed out that the Employer recently made a change to its Saskatchewan operations such that there are no longer any biomedical technologists in Saskatoon (the lab was eliminated there) and now there is only one individual functioning in this position in Regina. In addition, a reorganization in the Employer's reporting structure in 2005 led to a change in who the biomedical technologist reports to – the incumbent previously reported to the manager in laboratory services and he now reports to the manager in facilities, where there are a number of facilities maintenance staff who are part of the Union's bargaining unit. While the Union acknowledged that there has been no change to the incumbent's duties and responsibilities, the Union argues that these changes to the workplace and the circumstances of the position have led the incumbent to wish to join the Union and illustrate reasons why the incumbent might want or benefit from the protection of the Union.

[12] In response to the Union's arguments, the Employer submitted that the "changes" relied on by the Union are not "material changes in circumstances" which would permit consideration of an amendment to now include the biomedical technologist positions within the scope of the unit.

Statutory Provisions:

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

> *5 The board may make orders:*
>
> *(i) rescinding or amending an order or decision of the board made under clause (d), (e), (f), (g) or (h), or amending an order or decision of the board made under clause (a), (b) or (c) in the circumstances set out in clause (j) or (k), notwithstanding that a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;*
>
> *. . .*
>
> *(k) rescinding or amending an order or decision of the board made under clause (a), (b) or (c) where:*
>
> *(i) there is a collective bargaining agreement in existence and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary of the effective date of the agreement; or*
>
> *(ii) there is no agreement and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary date of the order to be rescinded or amended;*
>
> *notwithstanding a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;*
>
> *18. The board has, for any matter before it, the power:*
>
> *(p) to summarily dismiss a matter if there is a lack of evidence or no arguable case;*

Analysis and Decision:

[14] There are two issues before the Board. The first is whether, on an amendment application where the Union seeks to include a previously excluded position within the scope of the existing bargaining unit, the Union must establish a material change in circumstances in order to be entitled to consideration of its amendment application. If that answer is in the affirmative, the second issue is whether the "changes" alleged to have occurred amount to the requisite material change in circumstances.

[15] In *Sobey's*, *supra*, the Board undertook an extensive review of its decisions involving the necessity to prove a material change in circumstances in a situation where the union was applying to amend its certification order by changing the geographical description from a street address to a municipal boundary. In that case the Board stated the general rule as follows, at 126:

> *[28] In our opinion, the case law, although not specifically articulated in this manner, supports the view that,* ***generally, entitlement to the amendment of a Board order can only be established by proving that there has been a material change in circumstances which justifies the amendment****. In this case, the Union urged us to amend the certification Order to reflect what the Board might have done on the initial certification application had the matter come before the Board in the first instance as a contested application, that is, to apply the general policy of describing bargaining units in terms of a municipal boundary. A review of the Board's decisions which have considered s. 5(j)(ii) illustrates that the Board does consider the law that would have applied on the initial hearing of the matter, but only after first determining that there has been a material change in circumstances, triggering the Board's ability to do so.*
>
> [**emphasis added**]

[16] The preceding quote also makes it clear that the Board considers the issue of whether there has been a material change in circumstances as preliminary to the consideration of the merits of the amendment application.

[17] In its review of the case law relevant to an amendment application similar to that before us, the Board stated in *Sobey's* at 129:

> *[32]* ***The decisions in the Casino Regina case, supra, and the Cuelenaere case, supra, which both involved the consideration of an amendment in the nature of adding excluded positions, also support the proposition that a material change in circumstances must first be shown in order for the Board to entertain the argument of an amendment to the certification order****, whether the application is brought under s. 5(j) or s. 5(k) of the Act. Although the Board came to different conclusions concerning the application of s. 5(j) in the Casino Regina case and the Cueleneare case, it is implicit in the decisions that, before the Board would consider an amendment to the certification order under s. 5(k), it looked at the question of whether there had been a material change in circumstances concerning the introduction of a new position and the determination of whether that position was properly within the scope of the bargaining unit.* ***If there had been such a change in circumstances established, the Board would have applied the general principles to determine whether the individual was an "employee" within the meaning of the Act and whether the position fell in the bargaining unit described in the certification order.*** *In Cuelenaere, before granting the amendment pursuant to s. 5(j), the Board implicitly determined that there had been a change in circumstances since the certification order had issued: the Board determined that the employer created two new positions and examined whether the duties of those positions brought them outside the scope of the certification order. Only after making those determinations did the Board consider whether it was "necessary" to amend the certification order pursuant to s. 5(j) of the Act, rather than making the parties wait for the open period mandated by s. 5(k) of the Act.*
>
> [**emphasis added**]

[18] Similarly, in *SAHO*, *supra*, the Board stated at 558:

> *[35]* ***An applicant seeking to amend an existing certification Order by excluding or including a position which is already dealt with in the Order or in a collective agreement needs to establish that there has been a material change in circumstances or in the duties and responsibilities of the position in question****: see City of Regina v. Regina Civic Middle Management Association et al., [1990] Summer Sask. Labour Rep. 80, LRB File No. 276-88; Battlefords Regional Care Centre*

> *v. Canadian Union of Public Employees, Local 600, [1989] Summer Sask. Labour Rep. 80, LRB File No. 186-88.*
>
> [**emphasis added**]

[19] In *Sobey's*, the Board identified that there had been only one exception to the "material change" rule – an application for amendment in the nature of consolidation of bargaining units. The Board discussed the rationale for the general rule and the reasons for the exception at 129 through 132 as follows:

> *[33] While we are not suggesting that there will never be exceptions to the rule that one must demonstrate a change in circumstances before the Board will consider an amendment under either of s. 5(j) or 5(k),* ***the only current exception identified in the case law concerning amendments to certification orders is in relation to amendments in the nature of consolidation of bargaining units****, which was the subject of the decision in Canadian Linen, supra.*
>
> *[34] The Canadian Linen case, supra, involved applications by two locals of the same union to amend certification orders in order to consolidate two bargaining units into one unit under a single certification order. The two certification orders involved two separate bargaining units of employees of the employer in each of its plants in Regina and Saskatoon. The bargaining unit in Saskatoon was originally certified in 1948 while the bargaining unit in Regina was certified in 1999. Each of the applications was filed in the appropriate open period for the respective bargaining unit. In determining the appropriate factors to consider on an amendment application, the Board stated at 87:*
>
> > *[58] The Act does not prescribe, proscribe or restrict the factors or criteria that the Board may consider and apply to determine whether a proposed bargaining unit is appropriate or whether an application for amendment should be considered and then granted or dismissed. While the factors and criteria considered on an application for initial certification are similar to those considered on an application for amendment, the significance accorded to, and the emphasis placed upon, any individual factor or criterion differs from the significance and emphasis placed thereon in an application for initial certification according to the type of amendment application under consideration. . . .*

[35] The Board followed with a review of the authorities that had considered an application for amendment in the nature of consolidation of bargaining units in an attempt to glean the appropriate factors for the Board to consider on amendment applications of that type. The Board stated at 94 and 95:

> *[75] It is interesting to note that in none of O.K. Economy Stores, Canada Safeway Limited, nor MacDonald's Consolidated Limited, all supra, all decisions regarding consolidation, does the Board refer to the necessity that the applicant demonstrate that there has been a material change in circumstances before the application can succeed. The issue of demonstrating a material change on amendment application gained currency with the Board's decision in Federated Co-operatives Limited v. Retail, Wholesale and Department Store Union, Local 504, [1978] July Sask. Labour Rep. 45, LRB File No. 502-77 ("Federated Co-operatives Limited (1978)"). In that case the employer made application during the open period to exclude certain classifications of employees from the existing certification order issued following a lengthy hearing for amendment not too long before in 1975. Then Chairperson Sherstobitoff (as he then was) described the practical concern of the Board that underscores the requirement that such an application for amendment be premised upon a material change in circumstances, as follows, at 46-47:*
>
> > ***A concern of the Board is to prevent applications for amendment year after year as a method of appeal from a previous decision of the Board upon the same issue merely because one of the parties is dissatisfied with the previous decision of the Board**. In this case, the panel of the Board which heard the application resulting in the Order of October 8th, 1975 and the panel which heard the present application are very substantially different, in large part because of the turnover in membership of the Board between the dates of the two applications. **It can be inferred that some persons might make applications for amendment in the hope that a new panel will view the matter in a different light. The Board wishes to make it clear that it will not sit in appeal on previous decisions of the Board and it therefore determines that in***

> ***this application, as in all applications for amendment, the applicant must show a material change in circumstances before an amendment will be granted.***
>
> *. . .*
>
> *[78] The result of the decision in Federated Co-operatives Limited (1978) is that the principle of res judicata is not applied by the Board to applications for amendment under ss. 5(i), (j), and (k).* ***The real basis for the requirement that an applicant demonstrate a material change in circumstances is, as stated above, to ensure that an application for amendment does not result in the Board sitting, in effect, in appeal of its previous order, a power that is not within the Board's jurisdiction****: See, Carpenters Provincial Council of Saskatchewan v. K.A.C.R. (A Joint Venture), [1985] Jan. Sask. Labour Rep. 41, LRB File No. 342-84.*
>
> *[79] Despite the Board's reference in Federated Co-operatives Limited (1978) to the need to show a material change in circumstances "in all applications for amendment," such reference must be considered in the context of the application then before the Board and the mischief that the policy was intended to prevent, that being, as stated above, to prevent amendment applications from being used as a method of appeal in circumstances where the principle of res judicata cannot be applied to preclude the application or as the basis to dismiss it.*

[36] The Board proceeded to note that evidence of a material change in circumstances was not required in the above referenced decisions of O.K. Economy Stores, Canada Safeway Limited, and MacDonald's Consolidated Limited, all involving consolidation of bargaining units. After reviewing similar decisions in other Canadian jurisdictions on this issue, the Board noted that, in Canadian Union of Public Employees, Local 4532 v. First Bus Canada Ltd., [2002] Sask. L.R.B.R. 261, LRB File No. 067-02, the Board referred to such a requirement and stated as follows at 109 and 110:

> *[113] In our opinion, to the extent that the decision in FirstBus Canada Ltd. purports to change the Board's policy or approach to consolidation applications outlined in O.K. Economy Stores, supra, and Canada Safeway Limited, supra, over ten years ago, it is an anomaly.* ***An application for amendment in the nature of consolidation of bargaining units is quite***

> ***different from the more common amendment application for a change to the bargaining unit description regarding the positions excluded from, or classifications included within, the scope of an existing certification order. The former type of amendment application is not liable to being used for the mischief that the so-called "material change rule" is meant to prevent: an application for consolidation cannot be construed as an unwarranted or disguised attempt to appeal the existing multiple certification orders in respect of the bargaining units sought to be consolidated.***
>
> *[114] We are of the opinion that* ***it is generally not necessary for an applicant for amendment in the nature of consolidation to establish that there has been a material change in circumstances before the application can be considered****. In our opinion, the decision in FirstBus Canada Ltd. merely demonstrates that indeed not all amendment applications for consolidation are the same, and it is necessary to determine on a case-by-case basis whether evidence of a material change may be required. This is consonant with the position of the Board in O.K. Economy Stores, supra, as concerns the appropriateness of the unit. On some applications for consolidation there may be evidence that the existing orders are no longer appropriate for the purposes of collective bargaining because of a change in circumstances and the Board is asked to consider whether some other configuration is appropriate.* ***But the fact that there has been no material change generally ought not to preclude the Board from considering whether consolidation will result in the creation of a single appropriate unit that will likely enhance the stability of the parties' labour relations.***
>
> *[**emphasis added**]*

[37] In the Canadian Linen case, supra, even though the Board found that it was not necessary for the union to show a change in circumstances before it was entitled to consideration of an order amending the certification order, the Board did comment that, if such a change was required to have been shown, it was established by reason of the fact that the union recently certified a second unit of employees in the employer's Regina location who were engaged in carrying out work identical to that performed by the employees in the bargaining unit at the Saskatoon location. Following its determination that it was not necessary for the union to establish a material change in circumstances, the Board

> *granted the amendment consolidating the bargaining units on the basis of factors it found relevant to this type of amendment application: the Board's general preference for larger bargaining units, enhanced labour relations stability without undue operational difficulty for the employer and a sufficient coherent community of interest among those in the consolidated unit.*

[20] In the *Sobey's* case, *supra*, the Board went on to find that there was nothing in the case before it to justify applying the exception in *Canadian Linen*. At 132 and 133, the Board stated:

> *[38] In our view, the exception to the general rule requiring a change in circumstances described in the Canadian Linen case, supra, does not apply to the application before us.* ***Firstly, the case before us is not an application for amendment in the nature of consolidation of bargaining units. Secondly, the rationale for the exception in Canadian Linen, that is, that the amendment application was not in the nature of an appeal from the Board's initial decision in relation to the certification orders, does not exist in the present application. In the present case, even though the certification application proceeded in camera, the question of appropriateness of the bargaining unit was necessarily before the Board for its consideration. The only evidence we have of what the Board determined in that in camera hearing is what appears on the face of the certification Order.*** *It shows that the Board determined that the appropriate bargaining unit description included the street address of the Employer's operations in Moose Jaw. Therefore, in our view, the appropriate bargaining unit, including the scope of the geographic boundary, was an issue before the Board on the original application and this application by the Union to amend that geographic boundary is in the nature of an appeal of the certification Order.*
>
> *[39] In further support of our conclusion, we note the similarities between the amendment application before us and those considered in the authorities referred to above. Both Raider Industries, supra, and Impact Products, supra, provide direct authority for the proposition that an amendment concerning a change in the geographic scope of a certification order first requires proof of a material change in circumstances. Furthermore, in our view, this application, which seeks an amendment to the geographic scope of the bargaining unit description in the certification Order, is much the same as an application to amend the scope of exclusions in the bargaining unit description in a certification order, where, as noted above in the Casino Regina and Cuelenaere cases, both supra, a material change in circumstances is required to be shown. We are not*

> *prepared to deviate from these lines of authority to establish an exception to the material change rule in the circumstances of this case.*

[21] In *University of Saskatchewan v. Administrative and Supervisory Personnel Association*, [2007] Sask. L.R.B.R. --, LRB File No. 057-05 (not yet reported), the University brought an application asking the Board to exclude from the scope of the certification order certain specified positions included within the scope of the Association's bargaining unit. One of the University's arguments was that the incumbents in the positions were not "employees" within the meaning of the *Act* and should never have been included within the scope of the unit in the first place. At --, the Board stated:

> *[26] As stated, the comment of the Board in University of Saskatchewan, LRB File Nos. 083-00 & 108-00, supra, was made in obiter and without prescribing the circumstances under which such an application might be brought by the University to exclude ASPA positions that had been in that bargaining unit for some period of time. Furthermore, the Board in that decision made no comment on the appropriate test to be utilized by the Board in making such a determination should the University bring an application before it. This is somewhat troublesome given the Board's longstanding requirement that a party must prove the existence of a change in circumstances in order to establish a right to an amendment of the certification order. Such a change in circumstances is usually established on applications for amendment concerning the status of positions by reason of the fact that the positions in dispute are new positions or they are existing positions to which the employer has added new job duties which arguably place the position out of scope**. **It is clear that, in this case, none of the disputed positions are new – they appear to be established positions that have been included in the ASPA bargaining unit for some period of time.** While there was some suggestion that the positions in question have "evolved" to a point where they should now be excluded, the evidence on that point was unsatisfactory and that matter was not argued extensively as **the University's primary position was that it was not required to show a change in circumstances on this type of amendment application**. However, given our conclusions in this case, it is not necessary that we make a determination whether a change in circumstances is required to be shown or has been shown. **The parties should be aware, however, that, in the future, in applications of this kind, the Board will expect parties to lead evidence and make argument on the issues of whether a change in circumstances is required for such an amendment and, if so, whether it has been established**. Such*

> *a requirement could be met by establishing that the positions in question are new or have changed such that managerial duties have actually been exercised by the incumbent or that the individual has regular access to and use of confidential information related to the employer's industrial relations . . .*
>
> *[footnotes omitted]*

[22] In the present case, we also see no reason to deviate from the requirement that the Union must establish a change in circumstances in order for the Board to examine its amendment application. Firstly, the case before us is not an application for an amendment in the nature of consolidation as was the situation before the Board in *Canadian Linen*, *supra*. Secondly, the application could be characterized as an appeal from the amended certification Orders issued in 1998 and 1999 because the Board necessarily had before it, even though through a joint application, the issue of the appropriateness of the bargaining unit. In our view, the present situation is no different than an application to amend to include/exclude a newly created position or an application to amend to exclude a position previously included in the bargaining unit. Although in this case the excluded positions may not all be managerial in character, the parties made a joint request and the Board made a decision that the bargaining unit sought was an appropriate one. In our view, the present type of amendment is not similar to that which involves the consolidation of bargaining units. The rationale for the exception there was to allow a determination of whether consolidation would result in the creation of a single appropriate unit that would enhance the stability of labour relations between the parties. In the present case, there was no suggestion that including biomedical technologists in the bargaining unit would enhance the stability of the parties' relationship, only that it would not negatively impact the workplace or the Employer.

[23] The Union also argued that the only matter standing in the way of including the disputed position within the scope of the bargaining unit was the wording of the 1999 certification Order (i.e. it is not a managerial exclusion). However, that is precisely the reason why the Board will not amend the certification Order without the establishment of a material change in circumstances. In 1998, the parties came to the Board with a joint application to amend the bargaining unit description, changing it from a bargaining unit defined by the inclusion of certain positions to an all-employee unit with named exclusions. One of the positions excluded, as agreed by the parties, was the

biomedical technologist. In *Sobey's*, the Board commented on the reliance placed by the Board on an agreement of the parties defining the scope of the bargaining unit, at 133:

> *[40] The Union raised the argument that its counsel's letter to the Board at the time of the original hearing was corroborating evidence that the Union was not in agreement with the Employer's proposed geographic scope of the bargaining unit. As stated, the only evidence available to this panel of the Board is that Mr. Eyre says he made a mistake in agreeing to the Employer's proposed bargaining unit description that included the street address as the appropriate geographic scope of the bargaining unit. We do not have before us the evidence the original panel of the Board had when it issued the certification Order. We are therefore left with the certification Order itself which is evidence that the Board determined that the appropriate bargaining unit included the street address as the geographic scope.* ***It is not open to this panel of the Board to second guess or overturn that panel's decision. In any event, the parties and the Board must be entitled to rely on apparent agreements of the parties without making further inquiries concerning the parties' understanding of those agreements.***
>
> [**emphasis added**]

[24] Similar comments were made by the Board in the *University of Saskatchewan* case, *supra*. The Board stated at --:

> *[26] . . . It would seem that without a "change in circumstances," the matter would be res judicata (either because of the certification order having been issued by the Board or through an order resulting from an amendment application) or it could be seen as interference by the Board with an agreement reached between the parties concerning scope. The Board is reluctant to interfere with parties' agreements on scope issues and it is highly questionable that the Board has, as the University suggests, an overriding and continuing duty to ensure that individuals who are not and never were "employees" be removed from a bargaining unit upon request. It is not the Board's duty to ensure that the scope of a bargaining unit agreed to by the parties is consistent (and it is not often aware of such agreements by the parties), particularly in a complex multi-bargaining unit setting such as the University, where the demarcation lines are not easily or rationally drawn.*

[25] In *Battlefords Regional Care Centre*, *supra*, the Board recognized the importance of honouring the agreements of the parties on scope in a case with circumstances similar to those before us. The Board stated as follows, at 80 and 81:

> *On October 16, 1984 the Board, after hearing evidence, was informed by both parties that they had agreed an order should issue excluding the Dietary Supervisor, Housekeeping Supervisor and Maintenance Supervisor from the bargaining unit and dismissing the application with respect to the Head Nurse positions. The Board accepted the parties representations and on October 29, 1984 issued an order on those terms.*
>
> *On August 29, 1988 the employer filed this application, which again requests an amendment to the certification order by excluding the same five Head Nurse positions from the bargaining unit on the basis that their primary responsibility is to actually exercise authority and actually perform functions of a managerial character.*
>
> *Counsel for the union submits, on the authority of Federated Co-operatives Limited, Sask. Labour Report July 1978, p. 49, that the Board's decision on October 29, 1984 was final and binding on the parties and that the Board should not hear this application unless the employer shows a material change in the duties and responsibilities of the Head Nurses since October of 1984.*
>
> *. . .*
>
> *Counsel for the employer submits that there is a distinction between a consent order and a decision of the Board based on the merits, and that the principle enunciated in Federated Co-operatives Limited applies only to a decision rendered on the merits.*
>
> *The Board is of the opinion that its 1984 order had the same effect as an order on the merits. The duties and responsibilities of the Head Nurses were in issue, the parties had the benefit of the evidence presented to the Board before they asked for the order to be issued, and they expected the order to be final and binding. The same matter should not be litigated again unless there has been a material change in the duties and responsibilities of the Head Nurse since 1984.*

[26] In the case before us we are also compelled to respect the agreement of the parties with respect to the bargaining unit description put before the Board for consideration at the time of the 1998 joint amendment application. As such, it is

necessary for the Union to establish a change in circumstances before we can determine its entitlement to the amendment it seeks.

[27] In the case before us, as an alternative argument, the Union has asserted that there has been a material change in circumstances entitling it to a consideration of whether an amendment should be granted. The Union pointed to changes in the reporting structure such that the incumbent reports to a different manager and changes to the Saskatchewan operations such that there is now only one biomedical technologist in the province. Essentially, the Union indicates that the change to be considered is that the incumbent now wishes to be a member of the Union.

[28] In applications for amendment concerning the inclusion or exclusion of positions within the scope of the bargaining unit, the typical change in circumstances examined by the Board is a change to the duties and responsibilities of the position (see for example: *Casino Regina, Cueleneare, Federated Co-operatives Limited, and Battlefords Regional Care Centre*, all *supra*). Occasionally, the Board has considered other types of changes. For example, in *Liquor Board of Saskatchewan v. Saskatchewan Government Employees' Union*, [1984] Nov. Sask. Labour Rep. 38, LRB File No. 083-84, the Board determined that a legislative change to the definition of "employee" in the *Act* could amount to a "material change" justifying review of a previous exclusion. Also, in *SAHO*, *supra*, the Board determined that a major health re-organization in the province whereby employment relationships were dramatically altered and levels of management were increased constituted a material change sufficient to permit the Board to reconsider the managerial status of nursing supervisors.

[29] In the present case, the changes to the reporting structure and the reduction of the number of biomedical technologist positions to one are not sufficient evidence to establish a material change in circumstances justifying an amendment. That the current incumbent in the biomedical technologist position now wishes to join the Union and have the protection of the *Act* is not a sufficient change to justify an amendment to the existing certification Order – were the Board to allow an employee's wishes to constitute the requisite change, the door would be opened to repeated applications for amendment to include previously excluded positions based only on the wishes of the current incumbent which are, of course, subject to change with subsequent

incumbents. In our view, the requisite material change would need to be a change to the position itself or the circumstances of the position which would illustrate that there is something different about the position that makes it part of the appropriate bargaining unit, as that unit was previously determined by the Board. The Union has not established such a change.

[30] The Union asked that the Board take a flexible approach with respect to the material change rule as this would be consistent with the promotion of the rights and protections of s.3 of the *Act*. We see this argument more in the nature of a request that we ignore the material change rule where an employee expresses a desire to join the Union and be included in the bargaining unit. In our view, the Board's conclusion that the Union must establish a material change in circumstances in this application strikes an appropriate balance between the rights of an employee to join a union and the stability of bargaining unit structures, as well as the final and binding nature of certification orders. Although certification orders can be amended through the application of ss. 5(i), (j) and (k) of the *Act*, requiring that a material change in circumstances be shown prevents the mischief that could occur through applications for amendment whenever an employee changes his or her mind about belonging in an existing bargaining unit.

[31] The Union commented that, if the Board requires a change in circumstances, it would be more difficult for the incumbent to join an existing bargaining unit than to apply to be certified in a different bargaining unit. While we cannot comment on the ease with which the incumbent could exercise his rights under s. 3 of the *Act* to join a trade union of his choosing, given the requirement that any unit applied for must still be an "appropriate unit," that option is available to him, as it is for the incumbents in the other excluded positions who are still "employees" within the meaning of the *Act*. In this regard, we note that there is another certification Order in this workplace involving a bargaining unit of nurses represented by the Saskatchewan Union of Nurses.

Conclusion:

[32] In conclusion, we find that the Union was required to establish a material change in circumstances in order to entitle it to consideration of the requested

amendment to the certification Order. It has not done so and its application is therefore dismissed.

DATED at Regina, Saskatchewan, this **16th** day of **July, 2007**.

LABOUR RELATIONS BOARD

Angela Zborosky,
Vice-Chairperson