Labour Relations Board
Saskatchewan

TIM HILL, Applicant v. INTERNATIONAL UNION OF OPERATING ENGINEERS, HOISTING, PORTABLE & STATIONARY, LOCAL 870 and RURAL MUNICIPALITY OF BLUCHER, No. 343, Respondents

LRB File No. 012-06; April 23, 2007

INTERNATIONAL UNION OF OPERATING ENGINEERS, HOISTING, PORTABLE & STATIONARY, LOCAL 870, Applicant v. RURAL MUNICIPALITY OF BLUCHER, No. 343, Respondent

LRB File Nos. 039-06, 040-06, 041-06, 042-06, 043-06 & 044-06; April 23, 2007

Chairperson, James Seibel; Members: Bruce McDonald and Clare Gitzel

The Applicant:	Tim Hill
For the Union:	Trent Garneau
For the Employer:	Kevin Wilson

Decertification – Practice and procedure – Where union did not file reply to application, did not appear at hearing, did not object to vote being ordered or to voters' list prior to vote, did not use proper form for objection to vote and did not file objection to vote within time mandated, Board dismisses union's objection to conduct of vote and directs Board agent to count vote.

Practice and procedure – Respondent argues that applications disclose no reasonable cause of action – Facts alleged in applications fairly general without much detail, however, assuming facts true, not plain and obvious that applications do not disclose reasonable basis for unfair labour practice.

Practice and procedure – Delay – While applicant has not adequately explained 6-month delay, 6-month delay by itself not enough to warrant Board assuming prejudice to respondent – Respondent did not lead evidence of prejudice – Board declines to dismiss applications for delay.

Practice and procedure – Abuse of process – Respondent argues that applications made to collaterally attack Board's decision on rescission application and constitute abuse of process – Board unable to conclude collateral attack primary reason for filing – Board dismisses respondent's preliminary objection but does not allow filing of applications to delay conclusion of rescission application.

***The Trade Union Act*, ss. 5(k), 11(1)(a), 11(1)(e), 11(1)(f) and 11(1)(m).**

REASONS FOR DECISION

Background and Facts:

[1] In LRB File No. 012-06, the Applicant, Tim Hill, applied for rescission of the Order of the Board dated March 9, 2005, designating International Union of Operating Engineers, Hoisting, Portable & Stationary, Local 870 (the "Union") as the certified bargaining agent for a unit of employees of the Rural Municipality of Blucher, No. 343 (the "Employer"). The application was filed during the open period mandated by s. 5(k)(ii) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), along with ostensible evidence of support of a majority of employees in the bargaining unit according to the statement of employment filed by the Employer which listed the names of five (5) employees as being in the certified bargaining unit. The Union did not file a reply to the application.

[2] The Board heard the application on February 21, 2006. No one appeared on behalf of the Union. The Board ordered that a secret ballot vote be conducted among all employees within the bargaining unit to determine whether or not they wished to continue to be represented by the Union for the purposes of bargaining collectively with the Employer. An agent of the Board conducted the vote on March 23, 2006 according to a list of eligible voters prepared from the statement of employment. However, at the time the vote was conducted, the Union sought to have two names added to the list – Robin Wilson and Bryan Buck -- and to have one name removed – Brian Rempel. The ballot box was sealed (tag no. 12363) and Mr. Rempel's ballot "double-enveloped" by the Board agent. The vote was not counted pending the filing of an objection to the vote by the Employer.

[3] The Employer filed an objection to the vote with the Board on March 27, 2006 on the ground that the Union was seeking improperly to have names added to and a name removed from the list of eligible voters.

[4] On March 28, 2006, the Union filed a letter with the Board purporting to object to the vote on the ground that the names set out above should have been added to or deleted from the voters' list. Also on March 28, 2006, the Union filed unfair labour practice applications against the Employer and applications for reinstatement and

monetary loss – LRB File Nos. 039-06 through 044-06 inclusive, in relation to the alleged wrongful termination by the Employer of Mr. Wilson on November 24, 2005 and of Mr. Buck on November 27, 2005. The Union alleged that the terminations were in violation of ss. 11(1)(a), (e), (f) and (m) of the *Act*. By letter to the Board that same date the Union stated that the reason for asking that Mr. Wilson and Mr. Buck be added to the voters' list was that they had each been wrongfully dismissed by the Employer and ought to have been listed on the statement of employment. The Union also submitted that Mr. Rempel should be removed from the voters' list on the ground that, while he purportedly had been hired by the Employer on January 12, 2006, he had not yet worked by the time the vote was conducted.

[5] In its reply to the unfair labour practice applications, the Employer sought, *inter alia*, to have the applications dismissed on the grounds of delay, abuse of process and failing to disclose a reasonable basis for the alleged unfair labour practices.

[6] All matters were set for hearing by the Board on August 29, 2006.

Representations of the Parties:

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[7] Mr. Garneau, representative on behalf of the Union, stated that the Union had sent a letter to the Board Registrar dated February 14, 2006 advising that it intended to object to the composition of the statement of employment filed by the Employer. No such letter exists in the Board's file and Mr. Garneau did not produce a copy of it at the present hearing. In any event, he did not explain why the Union did not appear at the hearing of the application for rescission on February 22, 2006 to make the objection, nor why it did not attempt to do something about the Board's order for a vote issued after the hearing. Indeed, Mr. Garneau stated that he contacted Mr. Wilson on March 21, 2006, a couple of days prior to the vote, to check the accuracy of the list of eligible voters and was satisfied that it was accurate. However, when the vote was conducted two days later Mr. Garneau advised the Board agent that Mr. Rempel's name ought to be removed from the list. The Board agent "double-enveloped" Mr. Rempel's ballot. Mr. Garneau then filed a letter with the Board purporting to object to the vote. He did not

explain what happened between March 21, 2006 and the vote on March 23, 2006 or why no objection to the vote was filed with the Board until March 28, 2006.

[8] Mr. Wilson, counsel on behalf of the Employer, stated that the Employer did not dispute the vote *per se* and submitted that the time for the Union to dispute the composition of the voters' list was at the original hearing on February 22, 2006; however, he said, because the Union did not file a reply to the application, in any event, it had no standing to do so at the hearing.

[9] Counsel on behalf of the Employer pointed out that further and, in any event, pursuant to s. 29 of the Regulations under the *Act*, S.R. 163/72, a party that wishes to object to a vote must file an objection in Form 15 verified by statutory declaration within three days of the date the vote was taken. The Union did not file its objection to the vote within the time mandated, and, in any event, did not do so in accordance with the form verified by statutory declaration – it merely filed a letter on March 28, 2006. Accordingly, counsel submitted, the objection was not properly before the Board and ought not to be considered.

[10] Counsel on behalf of the Employer submitted that the Union had not adequately explained why it did not contest the application at the hearing on February 22, 2006 nor did it represent that the information that caused it to file its purported objection to the vote was not known to it, nor reasonably obtainable, before the hearing. Therefore, the Board ought not to consider the objection application.

[11] Mr. Hill made no submission.

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[12] Counsel on behalf of the Employer objected to the filing of the unfair labour practices and ancillary applications on the grounds of delay and abuse of process. Counsel filed a written brief of his argument which we have reviewed.

[13] Counsel on behalf of the Employer submitted that, while both Mr. Buck and Mr. Wilson – both seasonal employees laid off at the end of the 2004 work season who were not recalled in the spring for the 2005 work season -- were advised by the

Employer in October, 2005 that they would not be recalled the next season and were terminated because they had not worked for over 12 months, the Union did not file the unfair labour practice applications in relation to their terminations for more than 6 months, on March 28, 2006.

[14] Firstly, counsel on behalf of the Employer argued that the delay in making the applications was excessive and, therefore, prejudice to the Employer is presumed. The onus then shifts to the Union to provide a credible explanation for the delay and to prove that there is no material prejudice to the Employer. Counsel submitted that the Union had not done so.

[15] With respect to this argument, counsel referred to the following decisions: *Kinaschuk v. Saskatchewan Insurance Office and Professional Employees' Union, Local 397*, [1998] Sask. L.R.B.R. 528, LRB File No. 366-97; *Saskatchewan Union of Nurses v. South Central Health District*, [1995] 2nd Quarter Sask. Labour Rep. 281, LRB File No. 016-95; *Nistor v. United Steel workers of America*, [2003] Sask. L.R.B.R. 15, LRB File No. 112-02.

[16] Secondly, counsel for the Employer submitted that the applications ought to be dismissed for abuse of process. Referring to the decisions of the Supreme Court of Canada in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 and the Saskatchewan Court of Queen's Bench in *Craik v. Little Pine First Nation*, [2000] S.J. No. 245, counsel argued that a superior court has an inherent jurisdiction to ensure that its process is not used to simply harass parties through the initiation of actions that are obviously without merit. Counsel submitted that the Board has a similar inherent jurisdiction to dismiss an application when it is clearly without merit, discloses no reasonable cause of action, or is frivolous, vexatious or an abuse of the Board's process. Given that the Union took no action regarding the terminations – by filing grievances or by application to the Board or otherwise – for over half a year, it disclosed that its true motive in filing the unfair labour practice applications was to mount a collateral attack on the Board's order for a vote in the rescission application.

[17] Mr. Garneau on behalf of the Union submitted that the reason why the Union did not file the applications earlier was because it was waiting through the 2005

work season to see whether Mr. Buck and Mr. Wilson would be recalled by the Employer and, when they were not recalled, the Union intended to address the issue during the parties' collective bargaining. He admitted that bargaining was significantly progressed but said that the Union had intended to wait until bargaining was nearly completed.

Relevant Statutory Provisions:

[18] The Union alleges that the Employer has violated the following provisions of the *Act*:

> *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:*
>
> > *(a) in any manner, including by communication, to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any right conferred by this Act;*
> >
> > . . .
> >
> > *(e) to discriminate in regard to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including discharge or suspension or threat of discharge or suspension of an employee, with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in a proceeding under this Act, and if an employer or an employer's agent discharges or suspends an employee from his employment and it is shown to the satisfaction of the board that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right under this Act, there shall be a presumption in favour of the employee that he was discharged or suspended contrary to this Act, and the burden of proof that the employee was discharged or suspended for good and sufficient reason shall be upon the employer; but nothing in this Act precludes an employer from making an agreement with a trade union to require as a condition of employment membership in or maintenance of membership in the trade union or the selection of employees by or with the advice of a trade union or any other condition in regard to employment, if the trade union has been designated or selected by a majority of employees in any such unit as their representative for the purpose of bargaining collectively;*
> >
> > . . .

> *(f) to require as a condition of employment that any person shall abstain from joining or assisting or being active in any trade union or from exercising any right provided by this Act, except as permitted by this Act;*
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> . . .
>
> *(m) where no collective bargaining agreement is in force, to unilaterally change rates of pay, hours of work or other conditions of employment of employees in an appropriate unit without bargaining collectively respecting the change with the trade union representing the majority of employees in the appropriate unit;*

Analysis and Decision:

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[19] With respect to the Union's purported objection to the vote conducted with respect to the rescission application filed on March 28, 2006, even if the Union made it known to the Employer (or even the Board for that matter) that it intended to dispute the statement of employment filed in respect of same, it filed no reply to the application in accordance with the Regulations or otherwise, did not appear at the hearing of the application and did not attempt to seek reconsideration of the Board's order for a vote. The Union provided no explanation as to why it took no steps whatsoever to object to the statement of employment or voters' list until the vote was being conducted approximately one month after the hearing. Indeed, Mr. Garneau stated that he was satisfied with the composition of the voters' list (which was identical to the names on the statement of employment) as late as March 21, 2006, two days before the vote on March 23, 2006. He did not provide any explanation as to his change of mind.

[20] Furthermore, the objection to the vote was not made in accordance with s. 29 (1) of the Regulations, which provides as follows:

> *29(1) Any trade union or any person directly affected having any objection to the conduct of the vote or to the counting of the votes or to the report shall, within three days after the last date on which such voting took place, file with the secretary a written statement of objections in Form 15 and verified by statutory declaration together with two copies thereof, and no other objections may be argued before the board except by leave of the board.*

Neither was the objection filed in the required form verified by statutory declaration, nor was it filed within the time expressly mandated. While the Board has the discretion to allow amendment to an application, accept an application not in the form specified by the Regulations and to extend time limits, and is cautious and circumspect with respect to strict application of the Regulations and in considering applications for amendment and extension of time limits, the Union has provided no credible or indeed any explanation as to why the Board should exercise its discretion to do so in this case.

[21] For the foregoing reasons the Union's objection to the vote is dismissed. An Order will issue appointing the Board's Investigating Officer, Kelly Miner, to count the vote at the time and place designated by her on at least seven (7) days' notice to the parties and to determine the eligibility of voters on the basis of the voters' list compiled from the statement of employment filed herein. Each party may have a scrutineer present at the counting of the vote upon providing notice to Ms. Miner of its intention to do so. The results of the vote shall be provided to the Board in the ordinary course and the appropriate Order will then issue accordingly barring any further objections.

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[22] With respect to the unfair labour practice and ancillary applications, LRB File Nos. 039-06 through 044-06, one of the arguments mounted by counsel for the Employer was that the unfair labour practice applications disclose no reasonable cause of action. In *Hunt, supra*, Wilson, J., on behalf of the Supreme Court of Canada, stated, at 980, that in assessing whether or not a claim discloses a reasonable cause of action one must assume that the facts pleaded are true:

> *. . . assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action?*

[23] In LRB File No. 039-06 -- the unfair labour practice application respecting Bryan Buck – the Union alleges that the Employer committed breaches of ss. 11(1)(a), (e), (f) and (m) of the *Act*. In paragraph 5 of the application, the Union states that the facts which disclose that the Employer has violated those provisions are as follows:

(a) On June 15, 2005 Mr. Bryan Buck was not recalled for his regular operator duties by the Employer. As per past practices Mr. Buck has started work for the Employer on June 15.

(b) On October 3, 2005 the Employer sent a letter to Mr. Buck stating that effective November 27, 2005 his employment and all benefits with the Employer had been terminated due to the fact that Mr. Buck had been laid off for more than 12 months.

(c) The Employer was certified with the International Union of Operating Engineers, Local 870 on March 9, 2005 LRB File No. 034-05.

(d) Mr. Buck has worked for the Employer for numerous years.

(e) At the time of his lay-off Mr. Buck was exercising his rights under the Trade Union Act.

[24] In LRB File No. 042-06 -- the unfair labour practice application respecting Robin Wilson -- the Union alleges also that the Employer committed breaches of ss. 11(1)(a), (e), (f) and (m) of the *Act*. In paragraph 5 of the application, the Union states that the facts which disclose that the Employer has violated those provisions are as follows:

(a) On April 1, 2005 Mr. Robin Wilson was not recalled for his regular operator duties by the Employer. As per past practices Mr. Wilson has started work for the Employer on April 1.

(b) On October 3, 2005 the Employer sent a letter to Mr. Wilson stating that effective November 24, 2005 his employment and all benefits with the Employer had been terminated due to the fact that Mr. Wilson had been laid off for more than 12 months.

(c) The Employer was certified with the International Union of Operating Engineers, Local 870 on March 9, 2005 LRB File No. 034-05.

(d) Mr. Wilson has worked for the Employer for numerous years.

(e) At the time of his lay-off Mr. Wilson was exercising his rights under the Trade Union Act.

[25] In our opinion, these facts as alleged are fairly general without much detail. Nonetheless, assuming that the facts as stated are true, we cannot say that if

proven it is "plain and obvious" that the unfair labour practice applications do not disclose a reasonable basis for an unfair labour practice.

[26] However, counsel for the Employer also argued that the applications should be dismissed for excessive delay or abuse of process. We agree that the Union could have filed the applications much sooner after the April 1 and June 15 dates when it says that Mr. Wilson and Mr. Buck should ordinarily have been recalled – which would translate into a delay in filing of approximately 10 months to a year -- or at the very least soon after the October 3, 2005 letters of lay-off, a delay of approximately 6 months.

[27] However, there is no statutory time limit for the filing of such applications. Each case must be considered on its own merits and in the context of all the circumstances (see, *Kinaschuk* and *Nistor*, both *supra*). Mr. Garneau, on behalf of the Union, submitted that the applications were not filed earlier because the Union intended to raise the issue of the lay-offs with the Employer near the completion of bargaining for a first collective agreement. In our opinion, this explanation does not make much sense, and the Union adduced no evidence to substantiate its submission in this regard. Mr. Wilson and Mr. Buck had already been off work for about 18 months (i.e., since the end of the 2004 season).

[28] In our opinion, while the Union has not adequately explained the delay in filing the applications, a delay of 6 months by itself in these circumstances is not so extreme as to warrant our assuming prejudice to the Employer and the Employer did not adduce evidence of any actual prejudice resulting from the delay. Accordingly, while it is unfortunate that the Union can provide no explanation for the delay, the delay is not so excessive that prejudice to the Employer can be presumed so as to shift the onus to the Union to provide a credible explanation.

[29] Finally, counsel for the Employer submitted that the primary reason for the filing of the unfair labour practice applications on March 28, 2006 was to mount a collateral attack upon the Board's Order for a vote in the rescission application. Counsel for the Employer submits that this constitutes an abuse of the Board's process and the applications ought to be dismissed.

[30] While it may very well be that the filing of the applications on that date is not a coincidence, we are unable to conclude that the primary reason that the applications were filed was as a collateral attack and not to protect the alleged rights of Mr. Wilson and Mr. Buck. This is not to say that in other circumstances the Board will not recognise the doctrine of collateral attack and abuse of process. However, that being said, we have no intention of allowing the filing of the applications to delay the counting of the representation vote and the conclusion of the rescission application as described earlier in these Reasons for Decision. The Union had every opportunity to deal with alleged issues regarding the composition of the statement of employment and the voters' list. It is not uncommon for a party to dispute the voters' list prior to the vote. Generally, the issue is raised with the Board's agent when the list is being composed and if no resolution is reached the issue is referred to the Board for decision. If the Union is primarily concerned with the fate of these two gentlemen, it can continue with the unfair labour practice applications notwithstanding that the certification Order may be rescinded as a result of the vote.

[31] Accordingly, the Employer's application for summary dismissal of LRB File Nos. 039-06 through 044-06 is dismissed.

DATED at Regina, Saskatchewan, this **23rd** day of **April, 2007.**

LABOUR RELATIONS BOARD

James Seibel,
Chairperson