Labour Relations Board
Saskatchewan

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL No. 1400, Applicant v. BARRICH FARMS (1994) LTD. and TRUE NORTH SEED POTATO CO. LTD., Respondents

LRB File No. 043-07; December 4, 2008
Vice-Chairperson, Steven Schiefner; Members: Clare Gitzel and Gerry Caudle

For the Union: Drew Plaxton
For the Employer: Meghan McCreary

Remedy – Interim Order – Criteria – Application for stay pending hearing of application for reconsideration of certification Order – While Board satisfied that arguable case exists, Board concludes that balance of labour relations convenience favours maintaining the *status quo* – Board dismisses interim application for stay of impugned Certification Order

***The Trade Union Act*, ss. 5.3, 6 and 42**

REASONS FOR DECISION

Background:

[1] On April 23, 2007, the United Food and Commercial Workers, Local No. 1400, (the "Union") filed an application with the Board pursuant to Sections 5(a), (b) and (c) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") to be designated as the certified bargaining agent for a unit of employees of Barrich Farms (1994) Ltd., and True North Seed Potato Co. Ltd. (the "Employer").

[2] On or about April 30, 2007, the Employer filed its Statement of Employment. An issue arose between the parties as to which employees should be included in the Statement of Employment for purposes of determining whether or not the Union had majority support of the members of the proposed bargaining unit. If the Union did indeed enjoy sufficient support, it was seeking automatic certification, as was permitted by the *Act* at that time. A hearing before the Board was commenced on June 18, 2007 and concluded on August 8, 2007, at which time the matter was reserved.

[3] On October 24, 2008, the Board rendered its decision, determined the composition of the Statement of Employment, and concluded that the Union enjoyed the

support of the majority of employees in the proposed bargaining unit. The Board went on to conclude that the proposed unit was appropriate for collective bargaining with the Employer and issued a certification Order pursuant to s. 5 of the *Act* (the "certification Order").

[4] On November 7, 2008, the Employer filed an application for Reconsideration with the Board. On November 13, 2008, the Employer applied under s. 5.3 of the *Act* for an interim Order of the Board staying the effect of the certification Order made by the Board on October 24, 2008 (the "application for Interim Relief" or "Interim application"). A hearing with respect to the Employer's application for Interim Relief was heard by the Board on November 19, 2008 in Saskatoon. At the conclusion of the hearing, the Board orally dismissed the Employer's Interim application. These Reasons for Decision relate only to that application.

Preliminary Objections:

[5] The Union raised a number of preliminary objections to the Employer's Application for Interim Relief. These were as follows:

> *(a) THAT both the Employer's application for Reconsideration and application for Interim Relief should be heard by the same panel of the Board that originally heard and determined the Certification application.*
>
> *(b) THAT the application for Reconsideration was not brought in accordance with the Board's procedures insofar as the application was not a sworn document.*
>
> *(c) THAT the Board has no jurisdiction to order the relief sought by the Employer (i.e. a stay of the Board's certification Order).*

[6] With respect to the first preliminary objection, the Board notes that the panel of the Board that heard and determined the Certification application was comprised of Chairperson James Seibel (as he then was) and Board members Clare Gitzel and Gerry Caudle. The Board further notes that, while it may be desirable as a

matter of policy to have the original panel hear applications for reconsideration, doing so is not a requirement of the *Act*. The within panel of the Board is comprised of both Clare Gitzel and Gerry Caudle, who where members of the original panel. Following a brief adjournment to consider the submissions of the parties on this matter, the Board ruled orally that it was properly constituted and had jurisdiction to hear the matter. *See: North West Company v. United Food and Commercial Workers, Local 1400,* [2008] CanLII 47050, LRB File No. 026-04.

[7] With respect to the second preliminary objection, the Board notes that there is no prescribed form in the Regulations to the *Act* for an application for interim relief. The Board further notes that neither the Regulations nor the Board's *Practice Directive No. 1 – Interim Orders and Interlocutory Injunctions* requires that an application for interim relief be in the form of a sworn document. What *Practice Direction No. 1* does require is that applications for interim relief musts, *inter alia,* be described with reasonable particularity stating the grounds for the application, the relief being sought by the applicant, and the sections of the *Act* being relied upon. The Board is satisfied that the Employer's application for Interim Relief complies with *Practice Directive No. 1*. Furthermore, the Board notes that s. 19 of the *Act* provides that "*[No] proceedings before or by the board shall be invalidated by reason or any irregularity or technical objection ...*". The section goes on to authorize the Board to amend any defect or error in any proceeding before it if necessary for the purpose of determining the real question(s) at issue in the proceedings.

[8] With respect to the third preliminary objection, the Union argued that, while the Employer's Application for Interim Relief indicates that the Employer is seeking a "stay" of the Board's certification Order pending its Application for Reconsideration, the Employer was *de facto* seeking to "set aside" the Board's certification Order pending an "appeal". The Union argued that the Board had no authority to set aside a certification Order on an interim application on the basis that doing so would be to grant a "remedial" remedy, something beyond the Board's authority on an interim application. In this respect, the Union relied upon the decision of this Board in *Service Employees International Union, Locals 299, 333 & 336, et al v. Saskatchewan Association of Health Organizations, et al.*, [2006] Sask. L.R.B.R. 375 LRB File Nos. 119-06, 122-06 & 123-06. The Board notes that there is nothing in s. 5.3 of the *Act* which restricts the nature of the

order that may be issued by the Board on an application for interim relief. In appropriate circumstances, an order staying a certification Order may well be in keeping with the Board's jurisprudence with respect to the preservative nature of an order pursuant to s. 5.3 of the *Act*.

[9] The Union's preliminary objections to the Employer's application for Interim Relief are dismissed.

Evidence:

[10] In support of its application for Interim Relief, the Employer filed the affidavit of Harry Meyers of Outlook, Saskatchewan. Mr. Meyers deposed that he is an owner/operator of the Employer. Mr. Meyer's affidavit indicated that the work place is a seasonal operation, with the number of employees working for the Employer varying depending on the season. Mr. Meyers deposed that, on November 13, 2008, approximately fourteen (14) employees of the bargaining unit were working for the Employer. Starting in mid-April of 2009, the Employer anticipates hiring an additional twenty (20) employees for spring planting.

[11] Mr. Meyers also deposed that he received notice that of the Board's certification Order on or about November 3, 2008. On or about November 7, 2008, the Employer received a "notice to bargain" from the Union and an indication that the Union was prepared to commence contract negotiations forthwith. Mr. Meyer's affidavit indicates that, on November 10, 2008, Ms. Brandi Tracksell-Sampson, a representative of the Union visited the work place and advised that the Union was coordinating a first meeting of the proposed bargaining unit. On November 12, 2008, the Employer received notice of the Union Security clause required pursuant to s. 36 of the *Act*.

[12] In support of its Reply, the Union filed the Affidavit of Brandi Tracksell-Sampson of Saskatoon, Saskatchewan. Ms. Tracksell-Sampson deposed that she is a member and employee of the Union, performing the duties of Union Representative, and that she is responsible for the organizing drive, Board applications and related matters in relation to the Employer's workplace. Ms. Tracksell-Sampon's affidavit confirms that the Union, by correspondence dated November 7, 2008, gave notice to the Employer that it was prepared to commence collective bargaining. Ms. Tracksell-Sampson's affidavit

also confirms that the Employer acknowledge receipt of the Union's correspondence and advised the Union of the names of the Employer's bargaining representatives. Ms. Tracksell-Sampson deposed that she attended to the work place on November 7, 2008 (not on November 10th as indicated by Mr. Harry Meyers) for the purpose of posting a notice to the employees covered by the certification Order, advising as to the time and place of the Union's first meeting of the members of the bargaining unit.

Arguments:

[13] Ms. Meghan McCreary, counsel on behalf of the Employer, filed a written outline of the Employer's argument, for which the Board is thankful. The Employer takes the position that the Board, in granting the certification Order, failed to properly apply s. 6 of the *Act*; specifically, that the Board failed to direct a secret vote of employees as now required by the *Act*. In its application for Reconsideration, the Employer also alleged that the Board erred in excluding certain individuals from the Statement of Employment. However, this later allegation was not advanced by counsel for the Employer during the hearing on the application for Interim Relief.

[14] The Employer argued that both s. 35 of *The Interpretation Act, 1995* and the common law provides that procedural amendments to statutes have immediate application to pending matters and, since the Board's certification Order was issued after the coming into force of the amendment to s. 6, the new procedural requirements implemented by this amendment should have been applied by the Board, notwithstanding the fact that the Union's application for Certification was filed and heard before the amendments to s. 6 of the *Act* came into force.

[15] The Employer took the position that the Board's certification Order resulted from an improper interpretation of the law. Furthermore, the Employer argued that the Board's original decision in issuing the certification Order is precedential and amounts to a significant policy adjudication, which the Board may wish to change.

[16] The Employer argued that greater labour relations harm would occur if the requested stay was not granted than if the *status quo* was maintained. The Employer argued that s. 26.5 of the *Act* required the parties to commence collective bargaining within twenty (20) days of the certification Order and that commencing

collective bargaining pending a decision on the Employer's application for Reconsideration would create confusion and uncertainty in the workplace. Furthermore, the Employer argued that the commencement of collective bargaining could influence the outcome of a certification vote, if one was so directed by the Board. Finally, the Employer argued that collective bargaining could ultimately be unnecessary, depending on the outcome of the Employer's application for Reconsideration and the outcome of a certification vote (if one was ordered following reconsideration).

[17] Mr. Drew Plaxton, counsel on behalf of the Union, argued, in addition to the preliminary objections mentioned earlier, that the Board was correct in issuing a certification Order without a certification vote (as is now required by the *Act*). The Union argued that the Board was correct in not applying the amendment to s. 6 to applications for Certification that were filed with the Board prior that change to the legislation coming into force. The Union argued that, prior to the change to the s. 6, workers had the right to be certified to a trade union by means of mere card support. In other words, prior to the change to the legislation, a certification vote was not required if sufficient support was evident from the card support filed with the Union's application for Certification. As a consequence, the Union took the position that the change to the legislation was not merely "procedural" but rather represented a substantive change in the law and should not be applied to proceedings commenced prior to the coming into force of the change. The Union took the position that, for legislation to have a retroactive effect, express language is required to do so. In support of this position, the Union relied upon the decision of the Board in *International Union of Operating Engineers, Hoisting, Portable and Stationary, Local 870 v. K.A.C.R. (A Joint Venture),* [1983] Nov. Sask. Labour Rep. 56, LRB File No. 275-83.

[18] The Union took the position that the delay in concluding their application for Certification has already operated to the detriment of the Union and will inevitably have resulted in the erosion of the Union's support. In this regard, the Union argued that delays in applications generally operate to the detriment of unions, as do delays in obtaining collective agreements, which make it difficult for unions to demonstrate the benefits of union membership. Similarly, the Union argued, turnover of employees also has a detrimental effect on union support in that the original supporters may leave the unit and be replaced by new workers (workers who may have been hired by the

employer believing that they would be less likely to support the union). Simply put, the Union took the position that, if a stay of the certification Order was granted, the Union and its members would suffer further and potentially irreparable harm because the members would be deprived of the benefits of union representation and the support for the Union would be further eroded pending a final determination on the application for Reconsideration.

Statutory Provisions:

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

> *5.3 With respect to an application or complaint made pursuant to any provision of this Act or the regulations, the board may, after giving each party to the matter an opportunity to be heard, make an interim order pending the making of a final order or decision.*
>
> *. . .*
>
> *42 The board shall exercise such powers and perform such duties as are conferred or imposed on it by this Act, or as may be incidental to the attainment of the objects of this Act including, without limiting the generality of the foregoing, the making of orders requiring compliance with the provisions of this Act, with any regulations made under this Act or with any decision in respect of any matter before the board.*

Analysis and Decision:

[1] As indicated, at the conclusion of the hearing the Board ruled orally that the Employer's application for Interim Relief should be dismissed. These reasons for decision embody and expand upon the reasons orally provided by the Board at that time.

[2] The test to be met on applications for interim relief has been well established by the Board. A recent statement of the test is found in *Grain Services Union (ILWU – Canada) v. StarTek Canada Services Ltd.*, [2004] Sask. L.R.B.R. 128, LRB File Nos. 115-04, 116-04 & 117-04, where the Board stated as follows at 135 through 139:

> *[31] The test for the granting of interim relief was enunciated by the Board in Regina Inn, supra, [Hotel Employees and Restaurant Employees Union, Local 206 v. Canadian Hotels Income Properties Real Estate Investment Trust #19 Operations Ltd. (o/a Regina Inn), [1999] Sask. L.R.B.R. 190, LRB File No. 131-99] as follows, at 194:*

> *The Board is empowered under ss. 5.3 and 42 of the Act to issue interim orders. The general rules relating to the granting of interim relief have been set down in the cases cited above. Generally, we are concerned with determining (1) whether the main application reflects an arguable case under the Act, and (2) what labour relations harm will result if the interim order is not granted compared to the harm that will result if it is granted. (see Tropical Inn, supra, at 229). This test restates the test set out by the Courts in decisions such as Potash Corporation of Saskatchewan v. Todd et al., [1987] 2 W.W.R. 481 (Sask. C.A.) and by the Board in its subsequent decisions. In our view, the modified test, which we are adopting from the Ontario Labour Relations Board's decision in Loeb Highland, supra, focuses the Board's attention on the labour relations impact of granting or not granting an interim order. The Board's power to grant interim relief is discretionary and interim relief can be refused for other practical considerations.*

[32] As explained above, the test is adapted from that set out by the Ontario Labour Relations Board in Loeb Highland, [1993] OLRB Rep. March 197. With respect to the [first of the] *two parts of the test – that is, whether the main application raises an arguable case – the Ontario Board stated as follows, at 202:*

> *Turning first to the idea of a threshold test with respect to the merits of the main application, we have some concern about applying a high level of scrutiny to that application at the time of a request for an interim order. To the extent that such scrutiny may imply a form of prejudgment of the final disposition of the main matter, it is not particularly compatible with the scheme for interim relief set out in the Act and the Board's Rules of Procedure. More specifically, the procedure for interim relief contemplated by the Board's Rules reflects the inherent necessity for expedition in these matters. To that end, evidence is filed by way of certified declarations which are not subject to cross-examination. Indeed, s. 104(14) of the Act and Rules 92 and 93 indicate the Board may not hold an oral hearing at all, but may receive the parties' arguments in writing as well.*
>
> *This means that the Board is not in a position to make determinations based on disputed facts. In these circumstances, it would normally be unfair for an interim order to be predicated to any significant extent on a decision with respect to the strength or weakness of the main case. That should await the hearing of the main application when the Board hears oral evidence and can make decisions with respect to credibility based on the usual indicia, in a context where the parties have a full right of cross-examination. This is*

> *particularly important in cases such as the section 91 complaint to which this application relates, where decisions are often based on inferences and the various nuances of credibility play a key role. In other words, the granting of interim relief in this context should usually be based on criteria which minimize prejudging the merits of the main application.*

[33] With respect to the second part of the test – consideration of the respective labour relations harm – as the Board explained in Hotel Employees and Restaurant Employees Union, Local 206 v. Chelton Suites Hotel (1998) Ltd., [2000] Sask. L.R.B.R. 434, LRB File Nos. 091-00, 110-00,125-00,139-00,144-00 &3 145-00, at 444, it is an adaptation of the civil irreparable harm criterion to the industrial relations arena.

. . .

[37] On an application for interim relief we are not charged with determining whether the allegations have been proven, but rather with whether the status quo should be maintained pending the final determination of the main application: an interim order is intended to be preservative rather than remedial. As the Board observed in Chelton Suites Hotel, supra, an interim order must be consonant with the preservation and fulfillment of the objectives of the Act as a whole and of the specific provisions alleged to have been violated. The Board stated at 443:

> *Any interim order must first and foremost be directed to ensuring the fulfillment of the objectives of the Act pending the final hearing and determination of the issues in dispute. This includes not only the broad objectives of the Act but also the objectives of those specific provisions alleged to have been violated.*

[38] Accordingly, and as iterated in Chelton Suites Hotel, supra, at 446, each application for interim relief is determined according to its specific facts. Certain types of applications have particular factors that the Board takes into account in assessing the application according to the test. The factors considered are driven by the specific objectives of the particular statutory provisions alleged to have been violated.

[20] In applying the first part of the test for interim relief, that is, whether the Employer's application for Reconsideration reflects an arguable case, the Board finds that it does. In doing so, the Board is mindful of the caution of the Ontario Board in *Loeb Highland, supra*, a caution echoed by this Board, about applying too high a level of scrutiny to the first part of the test in an application for interim relief. As noted by this Board in previous decisions, at this stage in the proceedings, we are not charged with determining whether or not the Board erred in law. Rather, our task is to determine if

there is an arguable case that the Board may have erred in failing to order a certification vote as now required by s. 6 of *the Act*.

[21] At the time the Union filed its application for Certification (on April 23, 2007), and at the time of the hearing before the Board (on June 18, 2007 and August 8, 2007), s. 6 of the *Act* read as follows:

> *6(1) In determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, in addition to the exercise of any powers conferred upon it by section 18, the board may, in its discretion, subject to subsection (2), direct a vote to be taken by secret ballot of all employees eligible to vote to determine the question.*
>
> *(2) Where a trade union:*
>
> > *(a) applies for an order of the board determining it to represent the majority of employees in an appropriate unit for which there is an existing order of the board determining another trade union to represent the majority of employees in the unit; and*
> >
> > *(b) shows that 25% or more of the employees in the appropriate unit have within six months preceding the date of the application indicated that the applicant trade union is their choice as representative for the purpose of collective bargaining*
>
> *the board shall, subject to clause 5(k), direct a vote to be taken by secret ballot of all employees eligible to vote, but the board may, in its discretion, refuse to direct the vote where the board:*
>
> > *(c) is satisfied that another trade union represents a clear majority of the employees in the appropriate unit; or*
> >
> > *(d) has, within six months preceding the date of the application, upon application of the same trade union, directed a vote of employees in the same appropriate unit.*
>
> *(3)* ***Repealed.***

[22] On May 14, 2008, *The Trade Union Amendment Act, 2008* was given Royal Assent and, in so doing, s. 6 of the *Act* was amended to read as follows:

> *6(1) Subject to subsections (1.1) and (2), in determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, in addition to the exercise of any powers conferred upon it by section 18, the board must direct a vote to be taken by secret ballot of all employees eligible to vote to determine the question.*

> *(1.1) No vote shall be directed pursuant to subsection (1) unless the board is satisfied, on the basis of the evidence submitted in support of the application and the board's investigation in respect of that evidence, that at the time of the application at least 45% of the employees in the appropriate unit support the application.*
>
> *(1.2) The board must require as evidence of each employee's support mentioned in subsection (1.1) written support of the application, as prescribed in the regulations made by the Lieutenant Governor in Council, made within 90 days of the filing of the application.*
>
> *(2) Where a trade union:*
>
> > *(a) applies for an order of the board determining it to represent the majority of employees in an appropriate unit for which there is an existing order of the board determining another trade union to represent the majority of employees in the unit; and*
> >
> > *(b) shows that 45% or more of the employees in the appropriate unit have within 90 days preceding the date of the application indicated that the applicant trade union is their choice as representative for the purpose of collective bargaining*
>
> *the board shall, subject to clause 5(k), direct a vote to be taken by secret ballot of all employees eligible to vote, but the board may, in its discretion, refuse to direct the vote where the board:*
>
> > *(c)* ***Repealed.***
> >
> > *(d) has, within six months preceding the date of the application, upon application of the same trade union, directed a vote of employees in the same appropriate unit.*
>
> *(3)* ***Repealed.***

[23] The Board notes that in *K.A.C.R. (a Joint Venture), supra*, in a similar fact situation to the case at bar and in applying similar provisions in *The Interpretation Act* (as it then was), the Board concluded that when a substantive law is altered while an action is pending, the rights of the parties will generally be decided according to the law as it existed when the action was commenced unless the new statute indicates a clear intention to operate retroactively. This case would tend to indicate that the Board was correct in applying the legislation in place at the time the Union filed its application for Certification. On the other hand, the language used in paragraphs 35(1)(d) and (e) of *The Interpretation Act, 1995* is not the same as in the provisions interpreted by the Board in *K.A.C.R*. *(a Joint Venture)*, *supra*. What significance, if any, turns on the different language used in the two (2) statutes has not been canvassed by this Board nor

has the Board reviewed the jurisprudence regarding the interpretation of statutory amendments that have occurred in the intervening twenty-five (25) years since the Board's decision in *K.A.C.R. (a Joint Venture)*, *supra*, if any.

[24] Based on the test adopted by this Board in considering applications for interim relief, the Board is satisfied that the Employer has demonstrated that there is an arguable case.

[25] In applying the second part of the test for interim relief, that is, the balance of labour relations harm, the Board is not persuaded that the requested relief would be appropriate in the current situation. In so finding, the Board notes that little has transpired between the parties since the issuance of the certification Order by the Board other than transmittal of statutory notices by the Union (*i.e.* notice to bargain and union security clause), the identification of each parties' bargaining teams, and the coordination of a first meeting of the bargaining unit. The Board saw no evidence of mischief on the part of either the Employer or the Union, something for which the parties should be commended. Certainly, there was an unfortunately delay in the rendering of a decision on the Union's application for certification; something for which neither party bears any responsibility.

[26] Simply put, the Board was not satisfied that the commencement of collective bargaining, prior to a decision on the Employer's application for reconsideration, would create confusion and uncertainty in the workplace. Even if it could be said that it would do so, the Board concluded that greater confusion and uncertainty would be caused by staying the certification Order so recently issued by the Board. Furthermore, the Board was not satisfied that the commencement of collective bargaining would negatively influence the outcome of a certification vote (if a vote is subsequently ordered). Again, absent mischief in the workplace, the Employer's conclusion that collective bargaining could influence the outcome of a certification vote is speculative; as is the assumption that such influence would tend to favour the union. Finally, while the Board recognizes that collective bargaining involves the allocation of time and resources by the parties, the Board was not satisfied that the potential that the energies expended in collective bargaining may ultimately prove to be unnecessary was sufficient on its own to warrant the requested stay. If such were the case, all applicants

seeking reconsideration of the Board's decisions in a certification application would be automatically entitled to a stay.

[27] The fact that this application was heard during the Employer's off-season, when a reduced work force was present, was a factor in the Board's deliberations. The Board notes that the parties have several months until spring seeding, during which time it is hoped that the Employer's application for Reconsideration can be resolved or adjudicated.

[28] For the reasons set out herein, the Employer's application for Interim Relief is dismissed.

DATED at Saskatoon, Saskatchewan, this **4th** day of **December, 2008**.

LABOUR RELATIONS BOARD

Steven Schiefner
Vice-Chairperson