Labour Relations Board
Saskatchewan

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 5506, Applicant v. PRAIRIE SOUTH SCHOOL DIVISION No. 210, Respondent

LRB File No. 149-07; August 15, 2008
Chairperson, Kenneth G. Love, Q.C.; Members: Ken Ahl and Hugh Wagner

For the Applicant: John Elder
For the Respondent: James McLellan

Bargaining unit – Appropriate bargaining unit – Fragmentation – Board has exclusive jurisdiction to determine matter of consolidation of bargaining units – In circumstances of case, single bargaining unit comprising employees in existing bargaining units constitutes appropriate unit for collective bargaining – Consolidation reduces fragmentation, allows employees to bargain together to single coherent collective agreement and goes some way to improve labour relations stability and promote industrial peace.

Successorship – Transfer of business – Section 37 of *The Trade Union Act* – Statutory statement of Board's authority in s. 37 of *The Trade Union Act* does not alter fundamental object and purpose of *The Trade Union Act* – Object and purpose of *The Trade Union Act* that employees have right to join and be represented in collective bargaining by trade union of their choice – Board declines to sweep significant number of employees into existing units or consolidated unit without evidence of their wishes.

***The Trade Union Act*, ss. 2(a) and 37.**

REASONS FOR DECISION

Background:

[1] The Saskatchewan Government made a general restructuring of boards of education and their school divisions effective January 1, 2006. The restructuring was compulsory for the public school system and voluntary for the separate school system. The amalgamation of 68 of 81 school divisions into 15 larger school divisions resulted in the current 28 public and separate school divisions in the province.

[2] The Prairie South School Division No. 210 (the "Employer" or the "Prairie South School Division") was created by the amalgamation of five (5) smaller school divisions and portions of two (2) other school divisions. The five (5) school divisions which were amalgamated were: Borderland School Division # 68, Golden Plains School Division #124, Moose Jaw School Division #1, Red Coat Trail School Division #69 and Thundercreek School Division #78. The Chaplin and Central Butte attendance areas of the Herbert School Division #79 and the Craik and Eyebrow attendance areas of the Davidson School Division #31 were also included in the Prairie South School Division. (collectively hereinafter referred to as the "legacy school divisions" or "pre-amalgamation school divisions").

[3] Canadian Union of Public Employees, Locals 3735, 4729, 4341, 4761, 55, 3291, 3507 and 4767 (the "CUPE locals or "legacy locals"), are certified as the collective bargaining agents for certain non-teacher (support staff) units (the "legacy bargaining units" of employees of the legacy school divisions as follows:

- CUPE Local 3735 – Borderland School Division #68;
- CUPE Local 4729 – Davidson School Division #31 (Craik and Eyebrow);
- CUPE Local 4341 and 4761 – Golden Plains School Division #124;
- CUPE Local 55 – Moose Jaw School Division #1
- CUPE Local 3291 – Red Coat Trail School Division #69
- CUPE Local 3507 – Thundercreek School Division #78; and,
- CUPE Local 4767 – Herbert School Division #79 (Chaplin and Central Butte).

[4] Canadian Union of Public Employees, Local 5506 (the "Union") was created as a result of the merger and transfer of obligations of the CUPE locals, pursuant to s. 39 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*").

[5] The Union brought this application pursuant to s. 37 of the *Act* which is the successorship provision in the *Act* which deals with the transfer of obligations upon the sale or transfer of a business. In this application, the Union has applied for the following relief:

(a) *A declaration that the respondent Prairie South School Division #210 is the successor employer to those employees previously covered by the certification orders issued to CUPE locals 55. 3291, 3507, 4341, 4761, 4729, and 4767 now held by CUPE local 5506.*

(b) *A declaration that CUPE local 5506 is the successor union on the merger of the affected CUPE locals and based on majority support, bargaining agent for a bargaining unit defined as follows:*

All employees employed by the Prairie South School Division No. 210 of Saskatchewan in the offices and facilities within the boundaries of the School Division, with the exception of the following:

Director of Education and the Executive Assistant to the Director of Education
Supervisor of Human Resources
Supervisor of School Support Services
Business Manager
Accounting Manager
Facilities Manager
Transportation Manager
All employees employed as teachers and functioning as such

[6] The parties agreed to defer any issues with respect to exclusions pending the Board's decision with respect to the main issues above. At the hearing the Employer provided a list of exclusions which the parties had discussed and in respect of which the Employer was given leave by the Board to append to its reply filed in respect of these proceedings. The Employer also filed a list of approximately 515 names representing employees within the bargaining unit which the Union had applied to be named as the bargaining agent for. However, some issue was taken by the Union regarding this list as there appeared to be some duplication which was never satisfactorily dealt with by the parties. As a result, the actual number of employees affected by the application, the number of employees currently certified under the current board Orders, or the number of employees not subject to the certification orders was never made clear.

[7] At the hearing, the Union and the Employer noted that there were two issues in dispute between the parties that they wished the Board to rule on prior to dealing with other aspects of the application. These two issues are:

A. What is the appropriate bargaining unit of employees in the Prairie South School Division that the Union represents; and

B. Whether or not the Board should accept the evidence of support filed by the Union in respect of this application as sufficient for determining the support for the Union in the appropriate unit determined in A above?

[8] In filing its application, the Union filed evidence of support from current members of the Union as well as from some of those employees which it did not represent in the proposed bargaining unit. However, it was unable to provide any clear evidence as to where the support originated *i.e.* was it from current members or from unrepresented members. In filing its support in this fashion the Union relied upon paragraph 111 of an earlier decision of the Board in *Canadian Union of Public Employees, Local 4799 v. Board of Education of Horizon School Division No. 205*, [2007] Sask. L.R.B.R. 425, LRB File 053-06.

[9] *Horizon School Division, supra,* was a similar case to the present case involving essentially the same parties and a similar fact situation wherein school divisions and unions had amalgamated. In its decision, at paragraph 111, the Board says, in part, as follows:

> *…A bargaining unit of all support staff would be more stable than the present configuration from an industrial relations and administration viewpoint and could be achieved in several ways: (1) the Union could file evidence of majority support among the group of presently unrepresented employees; (2) the Union could file direct evidence of support of the employees in the existing bargaining units that establishes majority support of the total number of support staff employees both within and outside of the bargaining units; (3) by representation vote of the group of previously unrepresented employees sought to be added that demonstrates their majority support; or (4) by a representation vote of all the support staff employees that demonstrates their majority support. Of course, if process (40 was followed and the vote did not demonstrate majority support among all employees, the bargaining unit would cease to exist.*

[10] This paragraph followed an extensive and exhaustive review of the previous decisions of this Board, as well as cases from other jurisdictions where appropriate.

[11] The Union argued that an “all employee” unit was the most appropriate bargaining unit as had been found by the Board in *Horizon School Division, supra*. It

argued that the current certification Orders had the cumulative effect of granting the Union such a unit of employees. It argued that there were industrial relations benefits to the creation of "all employee" units which mitigated in favour of such a unit in this case.

[12] In filing its support, the Union relied upon option #2 outlined in *Horizon School Division*, *supra* claiming majority support for the bargaining unit as an "all employee" unit.

[13] The Employer countered that if the Board were to permit certification of previously unrepresented employees, based essentially on support from the dominant group of previously represented employees, such certification denied those minority employees their right to choose, or not choose, a union of their choice as they would have no say in the decision as to who, if anyone, would act as their certified bargaining representative.

[14] The Employer also argued that it was not appropriate to ask the Board to define a new collective bargaining unit on a s. 37 application, insofar as s. 37 should be restricted to a transfer of existing obligations to a successor, not the delineation of a new bargaining unit for the parties.

[15] In its application, the Union provided copies of its current certification Orders. Both parties filed excerpts from or copies of the predecessor collective agreements as well as excerpts from and copies of the current collective agreements between the parties. The current collective agreements between the parties and the various certification orders define the collective bargaining units in conformity to the present certification Orders for each of the legacy school divisions.

[16] The Union, in its evidence, provided a table which outlined the types of employees covered by the current certification Orders. That table provides as follows:

Prairie South School Division No. 210

Union Representation at Legacy School Divisions

	Borderland	Golden Plains	Moose Jaw	Red Coat Trail	Thunder Creek	Part Herbert	Part Davidson
School Secretaries	3735	4761	55	3291	3507	4767	4729
Head Office Clerical	3735	Xc Exec Sec	55	3291		Xc Exec Sec	Xc Exec Sec
Ed. Assistants	3735	4761	55	3291	3507	4767	4729
Library Asst and Techs	3735	4761	55	3291	3507	4767	No EEs
Caretakers	3735	4341/4761	55	-	3507	4767	4729
Maintenance	3735	4341/4761	55	-	-	Sc Mtn. Sup.	Sc Mtn. Sup.
Bus Drivers	No EEs	No EEs	No EEs	-	-	-	4729
Mechanics	No EEs	No EEs	No EEs	-	-	-	4729
IT	No EEs	No EEs	55	3291	-	No EEs	No EEs

[17] In its evidence, the Employer provided copies of profile reports which were provided by the various legacy school divisions prior to amalgamation which outlined the numbers of students, employees and facilities transferred to be transferred to the new school division. Regrettably, because the documents were prepared for other purposes, there was no attempt at conformity between the terminology used by the Employer and the Union to define the various employee positions within the legacy school divisions nor was any evidence presented to try to rationalize the two forms of documentation. However, the evidence was clear that there were the following types of persons within the proposed "all employee" bargaining unit:

i. Employees represented by the Union;

ii. Employees not represented by the Union

iii. Contractors who were not employees. Contractors included some of the IT professionals and some of the bus drivers.

[18] Copies of the present certification Orders held by the CUPE locals fully describing the bargaining units are attached to these Reasons for Decision as Schedule "A".

[19] Each of the collective agreements between the CUPE locals and employers contains a standard “union security” clause.

[20] The Employer presented evidence, which was corroborated by testimony by the Union’s witness, that, as a result of the amalgamation, there was considerable change which occurred in the operation of the Prairie South School Division insofar as its head office and management functions were involved, but that little if anything changed within the various schools within the Prairie South School Division.

[21] Witnesses for the Employer and the Union agreed that there were currently employees employed at the head office of the Prairie South School Division who intermingled, some were unionized, some were not unionized and some were contractors.

Statutory Provisions:

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

> *2 In this Act:*
>
> *(a) "appropriate unit" means a unit of employees appropriate for the purpose of bargaining collectively;*
>
> *. . .*
>
> *5 The board may make orders:*
>
> *(a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit or a subdivision thereof or some other unit;*
>
> *(b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, but no order under this clause shall be made in respect of an application made within a period of six months from the date of the dismissal of an application for certification by the same trade union in respect of the same or a substantially similar unit of employees, unless the board, on the application of that trade union, considers it advisable to abridge that period;*

(c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;

. . .

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.

. . .

18. The board has, for any matter before it, the power:

. . .

(v) to order, at any time before the proceedings has been finally disposed of by the board, that:

(i) a vote or an additional vote be taken among employees affected by the proceeding if the board considers that the taking of such a vote would assist the board to decide any question that has arisen or is likely to arise in the proceeding, whether or not such a vote is provided for elsewhere; and

(ii) the ballots cast in any vote ordered by the board pursuant to subclause (i) be sealed in ballot boxes and not counted except as directed by the board;

. . .

37(1) Where a business or part thereof is sold, leased, transferred or otherwise disposed of, the person acquiring the business or part thereof shall be bound by all orders of the board and all proceedings had and taken before the board before the acquisition, and the orders and proceedings shall continue as if the business or part thereof had not been disposed of, and, without limiting the generality of the foregoing, if before the disposal a trade union was determined by an order of the board as representing, for the purpose of bargaining collectively, any of the employees affected by the disposal or any collective bargaining agreement affecting any of such employees was in force the terms of that order or agreement, as the case may be, shall, unless the board otherwise orders, be deemed to apply to the person acquiring the business or part thereof to the same extent as if the order had originally applied to him or the agreement had been signed by him.

(2) On the application of any trade union, employer or employee directly affected by a disposition described in this section, the board may make orders doing any of the following:

(a) determining whether the disposition or proposed disposition relates to a business or part of it;

(b) determining whether, on the completion of the disposition of a business, or of part of the business, the employees constitute one or more units appropriate for collective bargaining and whether the appropriate unit or units will be:

(i) an employee unit;
(ii) a craft unit;
(iii) a plant unit;
(iv) a subdivision of an employee unit, craft unit or plant unit; or
(v) some other unit;

(c) determining what trade union, if any, represents a majority of employees in the unit determined to be an appropriate unit pursuant to clause (b);

(d) directing a vote to be taken among all employees eligible to vote in a unit determined to be an appropriate unit pursuant to clause (b);

(e) amending, to the extent that the board considers necessary or advisable, an order made pursuant to clause 5(a), (b) or (c) or the description of a unit contained in a collective bargaining agreement;

(f) giving any directions that the board considers necessary or advisable as to the application of a collective bargaining agreement affecting the employees in a unit determined to be an appropriate unit pursuant to clause (b).

Analysis and Decision:

[23] Both parties requested that the board deal only with two issues with respect to this application. Those issues were:

1. What is the appropriate bargaining unit of employees within the Prairie South School Division? and

2. Whether the Board should accept the evidence of support filed as evidence of support for the bargaining unit determined to be appropriate by the Board?

Transfer of Bargaining Rights – Section 39

[24] There is no real contention between the parties regarding the application pursuant to s. 39. Notwithstanding the fact that, pursuant to s. 39(b) of the *Act*, no order of the Board is required to effect such an amalgamation – the Board's records are "deemed to be amended" to reflect the change – an Order will issue recognizing the transfer of bargaining rights from, and the amalgamation of, the CUPE locals to the Union. Pursuant to s. 39(b) of the *Act* all extant orders, agreements and proceedings in effect between the CUPE locals in the legacy school divisions shall inure to the benefit of the Union and shall apply to all persons affected thereby.

Successorship – Section 37

[25] With respect to the application pursuant to s. 37 and the matter of successorship, the Employer admits that it is the successor employer to the boards of education of the legacy school divisions and that, pursuant to s. 37(1) of the *Act*, it is bound by the existing certification Orders and collective bargaining agreements between those former school divisions and the respective CUPE locals. Accordingly, there is no issue with respect to s. 37(2)(a). This Board having recognized the merger and amalgamation of the separate CUPE locals and the transfer of bargaining rights in and to the Union, there is no issue that the Employer is bound by the fact that the extant orders, agreements and proceedings of the Board inure to the benefit of the Union.

[26] However, there is a considerable difference between the parties with respect to the Union's application to be declared as the bargaining agent for a bargaining unit comprising all of the Employer's support staff employees including those who were not organized in the legacy school divisions and included in the existing certification Orders.

Appropriate Bargaining Unit

Issue #1

What is the appropriate bargaining unit of employees within the Prairie South School Division?

[27] Firstly, we must determine, pursuant to s. 37(2)(b), whether the support staff employees constitute one or more units appropriate for collective bargaining, which initially may involve the consolidation of the existing several bargaining units into a single unit.

[28] It is long-established policy that the Board generally prefers larger more-inclusive bargaining units to smaller less-inclusive units. That preference was stated by the Board in its decision in *Horizon School Division, supra*. However, while that theoretical preference represents the optimum unit that can be established, often, in practice, such optimum bargaining unit cannot be achieved. That was the case, even in the *Horizon School Division* decision*, supra*, where an all employee unit for that school division excluded a group of employees who had been certified as an independent unit by the Deer Park Employees Association who were certified to represent *inter alia* "all employees employed by the Board of Education of the Deer Park School Division No 26…", which was one of the legacy school divisions in that case.

[29] Labour Relations Boards are often required, in choosing an appropriate bargaining unit, to choose one which is not necessarily the optimum unit for that particular employer or employment situation. Large bargaining units may be fragmented by competing unions, by craft, by location or simply as a result of the group of employees who requested that they be represented by a particular trade union. For that reason, labour relations boards are tasked with choosing not necessarily an optimum unit but an "appropriate" unit of employees. What constitutes an appropriate unit has been discussed on many occasions by the Board and need not be further discussed for the purposes of this decision.

[30] In this case, the Union argued that the aggregate effect of its certification Orders was that, in essence, it already represented an "all employee" unit of employees within the Prairie South School Division. That was certainly the case with respect to

recent certifications by the Board in respect of those employees in the former Davidson School Division No. 31, but is not as clear in other legacy school divisions as shown on Exhibit U-2.

[31] The Union, in its argument, provided numerous reasons why an "all employee" unit was preferable for collective bargaining than the various employee groups which had been certified as "appropriate" bargaining units by the Board under the existing certification Orders. While we concur, in principle, with the Union's arguments in this regard, an appropriate unit of employees need not be an optimal one for the purposes of collective bargaining.

[32] It is clear from Exhibit U-2 that there are many classifications of employees in the legacy bargaining units that fall outside the current certification Orders. Those employees are either excluded from the legacy bargaining unit by the certification Order or they are contractors who are not employees. The Union contended that the Board should sweep those employees, other than contract employees who were currently excluded from the bargaining unit, into a new, more appropriate bargaining unit, being an "all employee" unit.

[33] In the *Horizon School Division* decision*, supra*, the Board declined to sweep in employees who were previously not covered by certification orders because the union, in that case, had not filed any indication of support from such employees as to their wishes with respect to their choice of certified bargaining agent. In its decision, the Board said at 467 and 468 as follows:

> *[109] In the present case, where it is sought to add a significant number of employees to existing bargaining units or a consolidated unit, we are of the opinion that in the absence of evidence of their wishes, it is not appropriate to sweep them in. This is in accordance with the Board's long-standing historical position and what we consider to be the interpretation of s. 37 (2) in light of s. 3 of the Act and the overarching principle of employee choice. Had the legislature, in consolidating the many school divisions as at January 1, 2006, seen fit to establish a "Dorsey-style" solution to the bargaining unit configurations and labour relations complexities resulting therefrom it could easily have done so. But it did not and so we have determined to essentially follow the same path taken by the Board when health care was reorganized prior to the Dorsey Report and to allow the parties to*

> *sort out the problems themselves through the collective bargaining process with such guidance as they may seek from the Board from time to time.*
>
> *[110] Accordingly, we decline to sweep the presently unrepresented employees into the existing bargaining units or a consolidated unit on the basis of the evidence presently before us.*
>
> *[111] In our opinion, it is a certainty that, if intermingling of union and non-union employees doing the same jobs has not yet occurred, it will in the very near future and with increasing frequency. Conflict is inevitable when such employees work side by side with different terms and conditions of work including access to grievance and arbitration procedures and will increase when problems of transfer, mobility, lay-offs, job posting, seniority and the application of multiple collective agreements, etc., occur more and more frequently. We can only assume that the parties have considered this and that they have so far chosen to deal with these issues through collective bargaining. A bargaining unit of all support staff employees would be more stable than the present configuration from an industrial relations and administration viewpoint and could be achieved in several ways: (1) the Union could file evidence of majority support among the group of presently unrepresented employees; (2) the Union could file direct evidence of support of the employees in the existing bargaining units that establishes the majority support of the total number of support staff employees both within and outside of the bargaining units; (3) by representation vote of the group of previously unrepresented employees sought to be added that demonstrates their majority support; or (4) by a representation vote of all of the support staff employees that demonstrates their majority support. Of course, however, if process (4) was followed and the vote did not demonstrate majority support among all employees, the bargaining unit would cease to exist.*

[34] In the present case, the Union filed support which included support from both the existing group of employees certified by the Union as well as support from some of the accretive unit of employees. However, the Union was unable to provide direct evidence of majority support from the accretive group of employees that it wished to have included within the “all employee” unit.

[35] This Board’s decision in *Saskatchewan Rivers School Division No. 119 v. Canadian Union of Public Employees Local 4195* [1988] Sask. L.R.B.R. 478, LRB File Nos. 303-97 & 364-97, was discussed by the Board in Horizon at paragraphs 75 – 77. In that case, the Board concluded that the bargaining units should continue to exclude

the employees who were not then represented by the Union and that any problems that arose as a result should be solved through the parties through negotiations. The Board concurs with those comments in this case. The current collective agreements provide in their scope clauses, that the existing description of bargaining units as set out in the certification orders currently in effect, will apply. Those bargaining units have been determined by the parties to be appropriate units for the purposes of collective bargaining. While the units may not represent an optimal unit, they are "appropriate units" in accordance with s. 37(2)(b) of the *Act*.

Bargaining Unit Support

Issue #2

Whether the Board should accept the evidence of support filed as evidence of support for the bargaining unit determined to be appropriate by the Board?

[36] Based upon the Board's answer with respect to issue #1, the answer to Issue #2 really becomes; What evidence of support is required to be provided to include those employees who are not currently represented by the Union within the appropriate unit of employees for the purposes of bargaining collectively?

[37] This question was also discussed in the *Horizon School Division, supra,* case. At paragraphs 80 – 109, the Board dealt with the issue of the support required to be provided to add previously unrepresented employees into the appropriate unit. At paragraph 107, the Board says:

> *The overarching object and purpose of the Act is expressed in s. 3, that is, that employees have the right to join and be represented in collective bargaining by the trade union of their choice. All provisions of the Act must needs be interpreted with consideration of that fundamental object and purpose in mind. We view the overall import of the opinions of Bayda, J.A. expressed in University of Saskatchewan and Prince Albert Cooperative Association, both supra¸ as endorsed by the Supreme Court of Canada and confirmed by the Board in Sunnyland, supra and numerous cases since, that requiring evidence of the wishes of employees sought to be added to an existing bargaining unit strikes "an appropriate balance between the secure and stable status for a trade union and the entitlement of employees to express their wishes when there is to be an alteration in the existing method by which their terms and conditions of employment are determined." We do not view the statutory*

> *statement of the Board's authority in s. 37 to alter the fundamental object and purpose of the Act. It may be that there are exceptions to this position, for example, if the number of employees sought to be added were in an existing classification represented by the union and their numbers were very small in relation to an overwhelming number of employees represented by the union there may be no logical reason to require evidence of their wishes. But that is not the situation before us where nearly one-third of the support staff employees are not represented by the Union.*

[38] In *Horizon School Division, supra*, as noted above, the Board suggested that there were four possible methods whereby a union seeking to represent previously unrepresented employees could seek to include them into a more optimal "all employee" bargaining unit.

[39] Option #1 in *Horizon School Division, supra,* is the filing of support from those employees who are currently unrepresented. In that case, the Union files support from those employees who were previously unrepresented and makes application to be certified as their bargaining agent.

[40] Option #2 in *Horizon School Division, supra,* is the filing of an application for successorship, as in this case. In that case, the Board was concerned with the resultant "sweeping in" of those employees who were previously unrepresented by virtue of the redefinition of the bargaining unit as an adjunct to the successorship application.

[41] Option #3 in *Horizon School Division, supra,* is for the Board to order a representation vote among those employees who are sought to be added to the bargaining unit pursuant to an application under s. 37 for successorship rights.

[42] Option #4 in *Horizon School Division, supra,* is for a vote to be ordered among all represented and unrepresented employees in the bargaining unit which the applicant union wishes to represent. Even in *Horizon School Division, supra*, the Board cautioned against this approach which could have the effect of causing a decertification of the bargaining rights of the applicant should the vote be lost.

[43] Based on the Board's comments in *Horizon School Division, supra,* quoted above, Option #1 would, we believe, be the preferred option with respect to a

union seeking to represent previously unrepresented employees. It affords and provides those employees and their chosen bargaining agent with all of the rights and benefits normally afforded under s. 3 of the *Act*. There is no issue of "sweeping in" those employees who are free to choose to be represented in accordance with the *Act*. While it may involve greater effort on the part of the trade union which seeks to represent those employees, it provides certainty and security of choice for those employees.

[44] Option #2 is a less desirable option and would be available to be used only in the circumstances outlined in *Horizon* only "if the number of employees sought to be added were in an existing classification represented by the union and their numbers were very small in relation to an overwhelming number of employees represented by the union."

[45] This Board was urged by the Employer to order a vote among those unrepresented employees in accordance with option #3. In the case of *Saskatchewan Union of Nurses v. Twin Rivers District Health Board*, [1994] 3rd Quarter Sask. Labour Rep. 132, LRB File No. 109-94, the Board stated at 134 and 135:

> *In our decision in Eastend Wolf Willow Health Centre v. Service Employees' International Union (1992) 3rd Quarter, Sask. Labour Rep. p. 93, the Board dealt with the concept of "intermingling." This term refers to a combination of groups of employees in a new entity which replaces the previous enterprises or institutions in which the employees have been employed. The concept is not specifically addressed in The Trade Union Act, as it has been in some jurisdictions.*
>
> *Nonetheless, the Board held in that case, as well as in the case of Fairhaven Long-term Care Centre, LRB File No. 212-86, Reasons for Decision dated October 22, 1986, that the notion of intermingling has some application to the kind of situation which occurred in those two cases.*
>
> *In both of those cases, the Board held that **the employees of the new entity should be given an opportunity to make the decision with respect to representation by a trade union**. The riddles posed by the configuration in the new institution could be solved neither by allowing one of the trade unions which represented a unit of employees in one of the merged entities to lay claim to all of the employees on the basis of its certification order, nor by trying to maintain two separate groups of employees within the new structure. [emphasis added]*

[46] The Board remained seized in *Horizon School Division, supra,* with the option of ordering a representative vote should the parties so desire. The Board in this case will do the same.

[47] We have already dealt with option #4 as outlined above. While this option might be considered in some exceptional circumstances it would, we think, be unusual for, in effect, a possible decertification to result from an application for successorship. While, we cannot strictly rule out such a scenario, it is not a usual situation for the Board.

[48] Therefore, we answer the questions posed by the parties as follows:

1. While the creation of a unit of employees that represents as close to possible what would be an "all employee" unit, is preferable and desirable, those units of employees currently certified by the Board to bargain collectively are and continue to be appropriate units of employees for the purposes of collective bargaining.

2. Based on our analysis of the options presented in the *Horizon School Division* case, *supra*, as outlined above, this case does not meet the requirement for an exception to the usual practice which requires that evidence of support from those employees who are currently unrepresented and for whom representation is sought, must be provided to the Board. For that reason, evidence of support which does not establish support directly from those employees who are proposed to be added to the proposed bargaining unit cannot be accepted.

Conclusion:

[49] In all of the circumstances, we are of the opinion that Order shall issue in the following terms:

(1) THAT the bargaining and representational rights of CUPE Locals 3735, 4729, 4341, 4761, 55, 3291, 3507 and 4767 will be transferred to the Union (Local 5506);

(2) THAT that the Board of Education of Prairie South School Division No. 210 be declared as the successor employer to each of Borderland School Division No. 68; Golden Plains School Division No. 1241; Moose Jaw School Division No. 1; Red Coat Trail School Division No. 69; Thundercreek School Division No. 78; the Chaplin and Central Butte attendance areas of the Herbert School Division No. 79 and the Craik and Eyebrow attendance areas of the Davidson School Division No. 31;

(3) THAT the certification Orders attached hereto be amended to show the Union as the certified bargaining unit for those groups of employees named in the certification Orders (insofar as those orders are applicable to the Prairie School Division No. 210) and showing the Board of Education of the Prairie South School Division No. 210 in the place of the legacy school divisions.

(4) THAT this Board will remain seized of this matter in the event that the parties wish to make other representations concerning the nature and effect of the Orders outlined above.

DATED at Regina, Saskatchewan, this **15th** day of **August, 2008**.

LABOUR RELATIONS BOARD

Kenneth G. Love Q.C.,
Chairperson

DISSENT OF HUGH WAGNER

[1] I have read the Reasons for Decision of the majority in this case. In addition, I have considered the evidence, the submissions of the parties as well as the authorities cited by the parties in support of their respective positions. I find that I do not agree with the reasoning used or the conclusion reached by the majority of the Board in this case and I therefore offer the following dissenting opinion.

Background:

[2] I do not take issue with much of the background to this case as set out by the majority in paragraphs 1 through 21 of the Reasons for Decision and, except where noted herein, I have relied on that background in the analysis which follows.

[3] The Reasons for Decision note, in paragraph 6, that "[t]he parties agreed to defer any issues with respect to exclusions pending the Board's decision with respect to the main issues . . . ". The Union did take some issue with the employee list as there appeared to be some duplication owing to double listing or situations where an employee was employed on a part-time basis in more than one job classification. Nonetheless, it is clear that the proposed bargaining unit comprises between 500 and 515 employees. Prior to determination of the reserved question of exclusions from the bargaining unit, were it in my power to so order, I would direct the parties to consult and endeavour to finalize a mutually agreeable employee list with, if the parties so wish, the assistance of the Board's Senior Industrial Relations Officer/Investigating Officer or Acting Board Registrar.

[4] The Union filed, together with this application, direct evidence of support from a majority of the members of the proposed all employee unit of support staff employees employed by the Employer. In addition, during the hearing, the Union tendered Exhibit U-5 consisting of a sample declaration of support card and a November 2007 communication to support staff employees urging them to sign the support card in order to assist the efforts of the Union to become the certified collective bargaining agent of all support staff employed by the Employer.

[5] The evidence of the Union's witness, Malcolm Matheson, was uncontradicted. Mr. Matheson testified that all support staff employees, including previously unrepresented employees in the support staff ranks, were canvassed during the Union's organizing efforts. The Union then filed evidence of support from a majority of the members of the proposed bargaining unit. In filing its support in this fashion, the Union relied on the Board's decision in *Canadian Union of Public Employees, Local 4799 v. Board of Education of Horizon School Division No. 205*, [2007] Sask. L.R.B.R. 425, LRB File No. 053-06.

[6] The Employer did not lead or adduce any evidence to support its argument that the Union's evidence of support was drawn solely or largely from the previously represented employees.

Statutory Provisions:

[7] I agree that the statutory provisions set out by the majority in the Reasons for Decision are relevant to this case and I would add the following relevant statutory provisions.

> *3 Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively.*
>
> *. . .*
>
> *36(1) Upon the request of a trade union representing a majority of employees in any appropriate unit, the following clause shall be included in any collective bargaining agreement entered into between that trade union and the employer concerned, and, whether or not any collective bargaining agreement is for the time being in force, the said clause shall be effective and its terms shall be carried out by that employer with respect to such employees on and after the date of the trade union's request until such time as the employer is no longer required by or pursuant to this Act to bargain collectively with that trade union:*
>
> > *Every employee who is now or hereafter becomes a member of the union shall maintain his membership in the union as a condition of his employment, and every new employee whose employment commences hereafter shall, within 30 days after the commencement in his employment, apply for and maintain membership in the union, and maintain membership in the union as a condition of his employment, provided that any employee in the appropriate bargaining unit who is not required to maintain his membership or apply for and maintain his membership in the union shall, as a condition of his employment, tender to the union the periodic dues uniformly required to be paid by the members of the union;*

> *and the expression "the union" in the clause shall mean the trade union making such request.*

Analysis and Decision:

[8] As the majority noted in the Reasons for Decision, there was no real contention between the parties regarding the Union's application under s. 39 of the *Act*. I agree that the relief sought under s. 39 of the *Act* should be granted. In addition, there was no real issue as to whether the Employer is the successor to the legacy school divisions pursuant to s. 37(1) or as to whether, by operation of s. 37(2)(a) of the *Act* the Employer is bound by the existing certification Orders and collective agreements. The disputed issues to be determined by the Board at this time are whether the proposed bargaining unit is an appropriate bargaining unit and whether the Union has filed sufficient evidence of support.

Appropriate Bargaining Unit

[9] The Employer argued that it was not appropriate for the Union to ask the Board to define a new bargaining unit on an application under s. 37 of the *Act*. I find that the principles enunciated in s. 3 of the *Act* must be borne in mind and, on the facts of this case, these principles trump what is tantamount to a technical objection by the Employer in favour of the previous *status quo* even though the amalgamation process has delivered a new reality and incipient intermingling.

[10] The Board reviewed its case law on the issue of what constitutes an appropriate bargaining unit in *Horizon School Division*, *supra* and concluded as follows at 448:

> *[78] The Board has the exclusive jurisdiction to determine the matter of the consolidation of bargaining units: see, University of Saskatchewan, supra,and the excerpt therefrom, per Bayda, J.A., infra. In the present case, we are of the opinion that a single larger bargaining unit comprising employees in the existing bargaining units in the extant certification Orders of the Board regarding the legacy school divisions (copies of which are attached to these Reasons for Decision), . . . constitutes an appropriate unit for the purposes of collective bargaining. Consolidation of the bargaining units will reduce fragmentation to a certain degree and allow the employees in the bargaining unit to bargain together with a view to obtaining a single coherent*

> *collective agreement. This will almost certainly also go some way to improve labour relations stability and promote industrial peace – in any event, such aims will not be harmed*.

[11] On the basis of the foregoing reasoning, there is no question that, in the instant case, a bargaining unit composed of all of the Employer's support staff employees covered by existing certification Orders and collective agreements would be an appropriate bargaining unit. In *Horizon School Division*, *supra*, the Board went on to decline to include previously unrepresented employees in the bargaining unit on the evidence before it. However, the Board's decision in *Horizon School Division*, *supra*, explicitly notes (at 468) that, with appropriate evidence of support, a bargaining unit of all support staff would be a more appropriate – perhaps the most appropriate – bargaining unit. In addition, the majority describes the proposed bargaining unit as an "optimal" unit in the Reasons for Decision relating to this case. As such, it is my opinion that, so long as appropriate evidence of support is tendered, the proposed bargaining unit is an appropriate bargaining unit.

Evidence of Support

[12] As noted above, the Union filed new and direct evidence of support from a majority of the members of the proposed bargaining unit, relying upon the Board's direction in *Horizon School Division*, *supra*. By tendering this evidence of support, the Union argued that it had overcome the Board's suppositional reasoning in *Horizon School Division, supra,* that an existing certification Order cannot be evidence of support from more than fifty per cent plus one of the employees covered by the existing certification Order by virtue of the union security provisions found in s. 36(1) of the *Act*.

[13] In my opinion, it is the operation of s. 36(1) of the *Act* that has differentiated accretion or sweep-in applications under the *Act* from those in jurisdictions where payment of union dues is mandatory under the Rand formula but where membership in the certified union is voluntary. Were the *Act* the same as other legislation (e.g. the *Canada Labour Code*), in circumstances such as these, a union would be able to successfully argue that in amalgamation/merger/takeover situations its representation of a preponderant majority of employees in the newly combined unit is sufficient to determine the outcome and certification would be granted, unless the union

was seeking to change the nature and scope of the certification Order (an aspect which is not present in this case).

[14] In light of s. 36(1) of the *Act* and the Board's direction in *Horizon School Division*, *supra* and for the reasons that follow I find that the Union correctly filed sufficient evidence of majority support in the proposed bargaining unit.

[15] In *Horizon School Division*, *supra*, the Board provided the following guidance to the parties at 468:

> *A bargaining unit of all support staff employees would be more stable than the present configuration from an industrial relations and administration viewpoint and could be achieved in several ways: (1) the Union could file evidence of majority support among the group of presently unrepresented employees; (2) the Union could file direct evidence of support of the employees in the existing bargaining units that establishes the majority support of the total number of support staff employees both within and outside of the bargaining units; (3) by representation vote of the group of previously unrepresented employees sought to be added that demonstrates their majority support; or (4) by a representation vote of all of the support staff employees that demonstrates their majority support.*

[16] In the context of this application, the Board does not know how many of the previously unrepresented employees declared their support for the Union – nor, in my opinion, does the Board need to know this since, by virtue of s. 37(1) of the *Act*, the Board has jurisdiction to determine "what trade union, if any represents a majority of employees in the unit determined to be an appropriate unit . . ." including current members of the Union as well as those employees in the proposed bargaining unit not previously represented by the Union. Suffice it to say that the Union has either followed the second option identified by the Board or a combination of the first option and the second option – it has filed direct evidence of support from a majority of the employees in the proposed bargaining unit. It should be noted that, notwithstanding the enlargement of the proposed bargaining unit, the application does not alter the scope or nature of the bargaining unit from that found in the prior certification Orders.

[17] The majority notes in the Reasons for Decision that the Board has dealt inconsistently with a number of successorship and certification applications in the

education sector in Saskatchewan since its decision in *Horizon School Division*, *supra*. While I do not know whether the information provided in the Reasons for Decision is precisely accurate for each case noted, whether it is precisely accurate or not, I do not think it is particularly useful to the analysis required in this case. The certification applications can be distinguished on the basis that they are certification and not successorship applications -- they are cases where a union seeks to establish a bargaining unit, and are not cases where a union seeks to add to an established bargaining unit. The successorship applications which have been adjourned *sine die* or withdrawn were largely adjourned *sine die* pending the Board's decision in *Horizon School Division, supra,* or were withdrawn following the Board's decision in *Horizon School Division, supra,* and, in some cases, replaced with new successorship applications accompanied by evidence of support such as the case before us.

[18] It is my opinion that the Board provided a path to consistency on successorship applications like this one in its decision in *Horizon School Division*, *supra*. I agree with the majority that the four options spelled out in *Horizon School Division, supra,* are not equal to each other but I disagree on the way that the options differ from each other. On my reading of *Horizon School Division* case, *supra,* and the numerous decisions of the Board and the courts cited therein, options 3 and 4 will only ever have to be accessed if the applicant union is unable or unwilling to follow option 1 or option 2. In other words, should the applicant union file acceptable evidence of majority support (*i.e.* either evidence of majority support in the group to be added or overall evidence of majority support), no vote would be necessary.

[19] I do not agree that option 1 is to be preferred over option 2 and I do not agree with the majority's interpretation of the purported limitations placed on option 2 by the Board in *Horizon School Division*, *supra*. I believe that the Board in *Horizon School Division, supra,* saw options 1 and 2 as equally available to an applicant union and concluded that evidence of support filed under either option 1 or 2 would be equally probative and I agree with those determinations. As such, in my opinion, the Union has filed sufficient evidence of majority support in the proposed appropriate bargaining unit.

Conclusion:

[20] Were it in my power to do so, I would issue the following Orders:

(a) Declaring that the Employer is the successor to the Legacy School Divisions and that the Union is the successor to the predecessor union locals; and

(b) Certifying the Union as the bargaining agent for an all employee unit of support staff employees employed by the Employer, subject to a determination of the precise managerial and confidential exclusions from the unit.

DATED at Regina, Saskatchewan, this **15th** day of **August, 2008.**

"Hugh Wagner, Board Member"

SCHEDULE “A”

<Attached are the legacy certification Orders>