

**The Labour Relations Board
Saskatchewan**

SASKATCHEWAN UNION OF NURSES, Applicant v. THE BOARD OF EDUCATION OF THE REGINA SCHOOL DIVISION NO. 4, Respondent

LRB File No. 062-09; September 29, 2009

Chairperson, Kenneth G. Love, Q.C.; Members: Hugh Wagner and Marshall Hamilton

For the Applicant Union: Ms. Ronni Nordal
For the Respondent Employer: Ms. Meghan McCreary

Certification – Appropriate bargaining unit – Board finds Unit of Employees to be appropriate – Board discusses appropriate vs. most appropriate bargaining unit.

Community of interest – Casual employee – Does employee have sufficient connection to the workplace to be included within bargaining unit. Board discusses factors to be considered. Casual employee found to have sufficient connection to the workplace.

REASONS FOR DECISION

Background:

[1] The Saskatchewan Union of Nurses (“SUN” or the “Applicant”), brought an application pursuant to Section 5(a), (b) and (c) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (“the Act”) to certify “all Registered Nurses, Graduate Nurses, Registered Psychiatric Nurses and Graduate Psychiatric Nurses” employed by the Board of Education of the Regina School Division No. 4, (the “Respondent”). The bargaining unit applied for comprises seven (7) Registered Nurses (which number will be reduced to six (6) in the fall of 2009).

[2] In its reply the Respondent argued that the bargaining unit was not appropriate because:

1. *The Employer currently has 5 stand alone bargaining units. The creation of a 6th bargaining unit would cause “an unnecessary multiplicity of bargaining units which has an adverse effect on the employer’s operations and on long-term industrial stability”; and*
2. *The proposed bargaining unit is too small to be viable; and*
3. *The Employees in the proposed unit share a community of interest with other employees employed by the Employer.*

[3] The issues in this application were:

1. *the appropriateness of the bargaining unit which was applied for by SUN.*
2. *whether a casual employee has a sufficient community of interest to be included in the bargaining unit.*

[4] For the reasons that follow, the Board has determined these issues as follows:

1. *The casual employee enjoys a sufficiently substantial employment relationship to be considered an "employee" for the purposes of determining the issue of the level of support for an application for certification.*
2. *The unit of employees applied for by the Union is an appropriate unit of employees for the purposes of collective bargaining.*

[5] Following the hearing of this matter, but prior to the finalization of this written decision, the spouse of Board Member Hugh Wagner was offered and accepted a position as an employee of the Applicant Union. Counsel for the Applicant and the Respondent were canvassed by the Board Registrar with respect to any potential conflict of interest perceived by the parties as a result of this development. Both parties confirmed to the Board Registrar that they did not perceive Mr. Wagner's continued participation in the completion of this decision as giving rise to a conflict of interest on his part. Accordingly, Mr. Wagner has continued to participate in the finalization of this decision.

Facts Re - Casual Employee:

[6] The parties provided an Agreed Statement of Facts concerning the casual employee the Applicant sought to include within the bargaining unit. That employee was not called to testify.

[7] The one casual employee was the only employee who worked as a casual employee for the Respondent. She worked 625 hours (approximately ninety (90) days) in the 2008-09 school year. The full school work year would be 198 days.

[8] The casual employee was not required to accept work when offered, nor was the Respondent obligated to call her when they needed to fill a temporary vacancy. Like other permanent employees, she was a Registered Nurse.

[9] When the casual employee was not available, the Respondent would contract with private services for someone to fill the temporary vacancy. Alternately, the permanent employees would provide coverage for each other and would travel between locations as necessary. When that occurred, the Respondent might employ a casual Special Education Assistant to back fill when sharing or coverage occurred.

Facts Re - Appropriate Unit Issues:

[10] The Respondent employed seven (7) Registered Nurses as “Nurse Therapists” during the 2008-09 school year. In the 2009-10 school year that number was to be reduced to six (6) due to one (1) position being eliminated.

[11] The role description filed as evidence with the Board as well as a advertisement for Nurse Therapists published by the Respondent listed as a job requirement that these employees be either a Registered Nurse or Registered Psychiatric Nurse. These employees worked every day of the ten (10) month school year (198 days) from 8:00 AM to 11:55 AM and from 1:00 PM to 4:25 PM.

[12] Nurse Therapists employed by the Respondent were not within the scope of any of the other five (5) bargaining units certified to the Respondent.

[13] Nurse Therapists were a part of the Respondent’s student support services group. Their responsibilities, as set out in the procedures manual published by the Respondent included:

1. *Have primary **responsibility** for managing medication, and procedures prescribed by the student’s doctor.*
2. *Assure that a **doctor’s order** is received for all medications and medical procedures. Assure that Parent/Guardian has **signed** Essential Medical and Procedure Release forms.*
3. *Develop **protocols** for all medication, procedures and medical issues of the students.*

4. **Communicate** with the classroom teacher and parents regarding any medical concerns of the child.
5. In collaboration with the classroom teacher/principal and with parental/guardian permission **attend clinics** at Wascana Rehabilitation Center or other agencies to provide input, support the patient and receive direction for care of the child.
6. **Liaison** with O.T. and P.T. and other staff from W.R.C. to meet specific needs of the students.
7. Carry out the **therapy programs**, applying splints and braces, lifting, transferring and positioning, as directed by O.T. and P.T. of W.R.C. and/or instruct and supervise classroom paraprofessional staff on the correct methods as per W.R.C. therapists.
8. **Prepare** relevant medical and therapy related information for, and **participate** in, PPPs, Parent Teacher Conferences and Progress Reports.
9. Attend **meetings** as requested by Teacher and/or Principal.
10. **Share** with teacher and team any pertinent information with respect to progress, medical concerns and well being of students. Keep accurate **records** regarding same.
11. Work as a member of a trans-disciplinary **team** with Principal, Teacher, Assistants, Therapists and Parent/Guardian.
12. **Instruct** classroom staff on standards of cleanliness for dishes, equipment and personal hygiene, etc.
13. Respect **confidentiality** of school records and discussions.
14. Be available in **emergency** situations (at the discretion of the principal) for the general student population.
15. Continue **Professional Development** relevant to the Nurse Therapist position in a classroom setting.
16. **Provide** or **present** relevant information for professional development purposes for in-school staff.
17. Provide **supervision** of students as directed by the classroom teacher.
18. Assist in the students' **community-based activities** as directed by the principal/classroom teacher.
19. Assist with the **personal care** of students.

[14] Services are not provided to the general student population. The Nurse Therapist's role is to assist with the health requirements of special needs students who attend the schools where Nurse Therapists are employed.

[15] Medical procedures performed by the Nurse Therapist include administering prescribed medications, dealing with seizures, tube feedings and other medical procedures as prescribed by the student's Doctor. The Nurse Therapists work as a team with other members of the student's Education Team, including Teachers, and Developmental Classroom Assistants or Special Education Assistants assigned to the student.

[16] Each student has an individual personal performance plan and a unique file which is maintained with respect to his daily treatment. The Nurse Therapists are required to chart in the file maintained on each student their comments and observations concerning the student and his/her treatment on a daily basis.

[17] Developmental Classroom Assistants and Special Education Assistants work with each special needs student. They work 30 hours per week, ten (10) months per year. The major job requirements for these positions is a Grade Twelve education and a driver's license. These employees are members of bargaining unit represented by The Canadian Union of Public Employees ("CUPE"), Local 3766. That bargaining unit is comprised of approximately 400 employees, all of whom worked ten (10) months per year.

[18] CUPE, Local 4643 represents approximately 50 employees of the Respondent. These employees are support staff, all of whom work twelve (12) months per year.

[19] CUPE, Local 650 represents approximately 150 employees of the Respondent who are facilities based staff who may work either ten (10) or twelve (12) months per year.

[20] The Saskatchewan Government and General Employees' Union, Local 4292 ("SGEU") represents nine (9) Community School Coordinators.

[21] The Saskatchewan Teachers Federation ("STF") represents all Teachers employed by the Respondent.

[22] The Applicant's witness, Loretta Echtner, one of the incumbent Nurse Therapists, testified that she had never been approached by CUPE to join any of their bargaining units.

Relevant statutory provision:

[23] The following provisions of the *Act* are relevant to the Board's determination of the application:

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;*

Analysis and Decision:**The Casual Employee**

[24] The test, and basis for the test as to whether a person nominally identified as a "casual" worker has a sufficiently substantial employment relationship to be considered an "employee" for the purposes of determining the issue of the level of support for an application for certification, was outlined by the Board in *Canadian Union of Public Employees, Local 3077 v. Lakeland Regional Library Board*¹:

It has long been established that larger bargaining units are preferred over smaller ones, and that in an industrial setting all employee units are usually considered ideal. As a general rule the Board has not excluded casual, temporary or part-time employees from the bargaining unit.

However, the Board has also applied the principle that before anyone will be considered to be an "employee", that person must have a reasonably tangible employment relationship with the employer. If it were otherwise, regular full-time employees would have their legitimate aspirations with respect to collective bargaining unfairly affected by persons with little real connection to the employer and little, if any, monetary interest in the matter.

¹ [1987] Oct. Sask. Labour Rep. 74, LRB File No. 116-86 as follows, at 74

[25] Accordingly, the Board has looked particularly at two aspects: real employment connection and monetary interest in the outcome. This dictum has been applied since by the Board in numerous decisions including, to name a few, *Retail, Wholesale Canada, a Division of the United Steelworkers of America v. United Cabs Ltd.*, *Vision Security and Investigation Inc.*², and *Public Service Alliance of Canada v. Aramark Canada Ltd.*³, where the standard was referred to as a “sufficiently tangible employment relationship.”

[26] In *Vision Security, supra*, at 155, the Board observed that different criteria may pertain in different cases depending on the facts, as follows:

The criteria adopted by the Board in each case must be responsive to the facts of each situation and the Board is not bound to adopt identical criteria in every case dealing with casual employees. Because of this uncertainty regarding employee status, parties are encouraged to seek a determination of employment criteria early in the process of a certification through a request for a preliminary determination.

[27] Also in *Vision Security, supra*, the Board determined that the threshold should be 35 hours worked in the fourteen-week period prior to the filing of the application for certification, based on the nature of casual work in the security industry. The Board stated as follows at 154:

In this case, the Board has determined that any person who worked 35 hours in the 14 week period covered by the Ceredian documents filed by the Board should be included on the statement of employment. This would include employees who worked one football game every two week period. In our view, in this industry, this is a minimal standard. It takes into account the casual nature of the events work by including many casual employees, while not unfairly interfering with the legitimate aspirations of regular full-time and part-time employees to be represented by a trade union.

[28] Similarly, after considering the nature of the industry, in *Lakeland Regional Library Board, supra*, the Board included Substitute Librarians, who replaced Regular Branch Librarians during annual holidays, sick days, bereavement and other leaves who worked a minimum of 30 hours in the calendar year of the application. However, in more casual labour markets, such as the taxi industry, the Board has set different criteria for determining employment status. In *United Cabs, supra*, the Board included employees who had worked at least two shifts per week over the three month period prior to the certification date.

² [2000] Sask. L.R.B.R. 147, LRB File No. 228-99

[29] In the present case, the Board has no difficulty in concluding that the casual employee has a sufficiently substantial employment relationship to be considered an “employee” for the purposes of determining the issue of the level of support for an application for certification.

Is the Unit Applied for an Appropriate Unit

[30] While it is likely beyond dispute that the most inclusive and therefore *most appropriate unit* would be an all employee unit of non nursing staff, that is simply not the test on an application for certification. The Board is not to choose the most ideal or more appropriate unit, but rather determine whether the unit applied for is *an* appropriate one. In *Canadian Union of Public Employees v. The Board of Education of the Northern Lakes School Division No. 64*⁴, involving a union’s application for the amendment of its certification Order to include bus drivers in its support staff bargaining unit, the Board stated at 116-117:

The basic question which arises for determination in this context is, in our view, the issue of whether an appropriate bargaining unit would be created if the application of the Union were to be granted. As we have often pointed out, this issue must be distinguished from the question of what would be the most appropriate bargaining unit.

The Board has always been reluctant to deny groups of employees access to collective bargaining on the grounds that there are bargaining units which might be created, other than the one which is proposed, which would be more ideal from the point of view of collective bargaining policy. The Board has generally been more interested in assessing whether the bargaining unit which is proposed stands a good chance of forming a sound basis for a collective bargaining relationship than in speculating about what might be an ideal configuration.

[31] The test for determining if an under-inclusive bargaining unit is an “appropriate bargaining unit” was set out in *Graphic Communication International Union, Local 75M v. Sterling Newspapers Group, A Division of Hollinger Inc.*⁵, as follows:

From this review of cases, it would appear to the Board that under-inclusive bargaining units will not be considered to be appropriate in the following circumstances: (1) there is no discrete skill or other boundary surrounding the unit that easily separates it from other employees; (2) there is intermingling between the proposed unit and other employees; (3) there is a lack of bargaining strength in the proposed unit; (4) there is a realistic ability on the part of the Union to organize a more inclusive unit; or (5) there exists a more inclusive choice of bargaining units.

³ [2001] Sask. L.R.B.R. 891, LRB File No. 202-01

⁴ [1996] Sask. L.R.B.R. 115, LRB File No. 332-95

⁵ [1998] Sask. L.R.B.R. 770, LRB File No. 174-98 at 780

[32] In the present case, all other employees are included within the scope of bargaining units represented by the CUPE or SGEU. There was evidence that Developmental Classroom Assistants and Special Education Assistants represented by CUPE, intermingle and work directly with the Nurse Therapists. However, the Nurse Therapists oversee, supervise and train the Developmental Classroom Assistants and Special Education Assistants on a daily basis, and while not being in a position to discipline or hire and fire Developmental Classroom Assistants and Special Education Assistants, the Nurse Therapists do supervise and manage to some extent, the work of the Developmental Classroom Assistants and Special Education Assistants. In addition, the Nurse Therapists have different hours of work and much different levels of responsibility and training. Furthermore, the Nurse Therapists do have a discrete skill set from those included within the CUPE bargaining unit.

[33] In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. O.K. Economy Stores (a division of the Westfair Foods Ltd.)*⁶, the Board summarized the test for determining the appropriateness of a bargaining unit in the following terms:

This does not mean that large is synonymous with appropriate. Whenever the appropriateness of a unit is in issue, whether large or small, the Board must examine a number of factors assigning weight to each as circumstances require. There is no single test that can be applied. Those factors include among others: whether the proposed unit of employees will be able to carry on a viable collective bargaining relationship with the employer; the community of interest shared by the employees in the proposed unit; organizational difficulties in particular industries; the promotion of industrial stability; the wishes or agreement of the parties; the organizational structure of the employer and the effect that the proposed unit will have upon the employer's operations; and the historical patterns of organization in the industry.

The Board recognizes that there may be a number of different units of employees which are appropriate for collective bargaining in any particular industry. As a result, on initial certification applications a bargaining unit containing only one store may be found appropriate. That finding does not rule out the existence of other appropriate units and, accordingly, on a consolidation application, a larger unit may be found appropriate. There is no inconsistency between the initial determination of a single store unit with a municipal geographic boundary and a subsequent determination that a larger unit is appropriate.

[34] The difficulty with assessing the appropriateness of under-inclusive units lies in the conflict of two competing interests: employees' right to organize and join unions of their choosing vs. the desire to have stable bargaining structures. This conflict was aptly described by

⁶ [1990] Fall Sask. Labour Rep. 64, LRB File No. 264-89

the Board in the *Graphic Communications International Union, Local 75M v. Sterling Newspapers Group, A Division of Hollinger Inc.*, *supra* decision, in the context of an application for certification of employees in the press room at a newspaper company, at 776:

The Board is faced in this instance with choosing between the rights of employees to organize and the need for stable collective bargaining structures that will endure the test of time. It is clear from the decisions in other jurisdictions that the "most" appropriate bargaining units in this industry consist either of wall-to-wall units or two bargaining units, one consisting of the front end employees, including office, administration and editorial, and one consisting of the production workers, including pressmen. Such a configuration would likely result in stable and effective labour relations, in the sense that the Union would have a significant constituency within the workplace to bargain effectively with the Employer. The ultimate viability of smaller, less inclusive, bargaining units is, in our experience, and certainly in the past experience with this Employer, more tenuous over the long run. The proposed unit can be described in this sense as an under-inclusive unit.

The Board faced a similar dilemma in Hotel Employees & Restaurant Employees Union Local 767 v. Regina Exhibition Association Ltd., [1986] Oct. Sask. Labour Rep. 43, LRB File No. 015-86, where the applicant, which had previously unsuccessfully applied to represent all employees in the food services department of the employer, applied a second time to represent only the concessions department of the food services department. On the second application, the Board held as follows, at 45:

The fundamental purpose of The Trade Union Act is to recognize and protect the right of employees to bargain collectively through a trade union of their choice, and an unbending policy in favour of larger units may not always be appropriate in industries where trade union representation is struggling to establish itself. It would make little sense for the Board to require optimum long term bargaining structures if the immediate effect is to completely prevent the organization of employees. In effect, the Board is compelled to choose between two competing policy objectives; the policy of facilitating collective bargaining, and the policy of nurturing industrial stability by avoiding a multiplicity of bargaining units. Where the Board is of the view that an all employee unit is beyond the organizational reach of the employees it is willing to relax its preference for all employee units and to approve a smaller unit.

This does not mean, however, that the Board will certify proposed bargaining units based merely on the extent of organizing. Every unit must be viable for collective bargaining purposes and be one around which a rational and defensible boundary can be drawn.

[35] Applying the factors set out in *O.K. Economy*, *supra*, for the reasons that follow, lead the Board to its decision that the group of employees applied for by the Applicant is an appropriate unit for collective bargaining.

Community of interest

[36] The Respondent suggested that the Nurse Therapists lacked a distinct community of interest with other Nurses and had a greater community of interest with other employees in the Regina School Division, in part, because the employees share common terms and conditions of employment. In this proposed unit, all of the employees are Registered Nurses, and that as Nurse Therapists, they work with Developmental Classroom Assistants and Special Education Assistants and other employees and consultants to the Board to insure a proper education for those students for which they have responsibility. While they work in a team environment, they remain as professionals within that environment and participate on the team as such professionals. The Nurse Therapists have specific job skills that separate them from the other employees, similar to the exclusion of the nursing professionals from the larger “all employee” units created as a result of *The Health Labour Relations Reorganizations (Commissioner) Regulations*, R.R.S. c. H-0.03 Reg 1 (the “Dorsey Regulations).

Viability

[37] While it is near impossible for us to determine whether the proposed bargaining units are viable in the long-term, it is apparent that such smaller units have proven viable in the past, including the one unit represented by SGEU which has a similar number of employees. While the Dorsey Regulations attempted to make larger units the norm, in addition to avoiding conflict between potential choices of bargaining agents, these regulations are no longer in force and did not apply to this Respondent.

Respondent’s organizational structure

[38] The evidence of Ms. Hesselink established that the Respondent currently bargained with five (5) discrete collective bargaining units. She suggested in her evidence that the creation of another bargaining unit would represent a hardship for the Respondent. The Applicant also provided evidence of bargaining units which it successfully represented which were similar in size to this proposed unit, including a unit of Nurses at Athol Murray College of Notre Dame.

[39] As noted above, while it may be more desirable to have a more inclusive unit of employees, the wishes of the Respondent in this regard cannot prevail over the wishes of the employees and the evidence of support which has been filed in respect of this application. The

right of employees “to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing”, is set out in s. 3 of the *Act*.

[40] The unit applied for is an appropriate unit for collective bargaining. The Board previously directed that a vote be held in accordance with s. 6(1) of the *Act* to determine if there is sufficient support within the appropriate unit of employees for the Applicant’s application. That vote may now be counted, with the ballot of the casual employee included, and the results released to the parties. If sufficient support is demonstrated, an Order for certification of the unit will be issued.

DATED at Regina, Saskatchewan, this **29th** day of **September, 2009**.

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson