The Labour Relations Board
Saskatchewan

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant v. AFFINITY CREDIT UNION, Respondent

LRB File No. 043-10; May 18, 2010
Chairperson, Kenneth G. Love, Q.C.; Members: Duane Siemens and Brenda Cuthbert

For the Applicant: Mr. Drew S. Plaxton
For the Respondent: Mr. John Beckman, Q.C.

Certification – Practice and Procedure – Application filed more than six (6) months following dismissal of identical application for certification Order – Previous application dismissed following vote of affected employees. Employer requests Board to exercise its discretion pursuant to subsection 18(n) of the *Act* – whether application should be barred under ss. 18(n) of the *Act*.

***The Trade Union Act*, s. 3, ss. 5(b) and 18(n).**

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Chairperson:** The United Food and Commercial Workers, Local 1400, (the "Union") is designated as the bargaining agent for a unit of employees of Affinity Credit Union in Saskatoon, Saskatchewan and at other branches in the area surrounding Saskatoon, Saskatchewan[1] as well as certain other branches in Saskatchewan.

[2] On August 21, 2009, the Union filed an application with the Board to certify employees at the Affinity Credit Union Branch at Hague, Saskatchewan. At that time there were six (6) employees in the proposed unit. The Union sought a vote of those employees, which the Board saw fit to grant by its Order dated September 16, 2009. The results of the vote, as reported by the Board Agent appointed to conduct the vote, was one (1) vote in favour and five (5) votes against certification. Following the results of the vote, the Board dismissed that application by Order dated October 16, 2009.

[1] See *United Food and Commercial Workers, Local 1400 v. Affinity Credit Union* 2010 CANLII13388, LRB File No. 135-09

[3] The Union filed another application for certification on April 22, 2010 with respect to the same employees of the Hague Branch. The Statement of Employment filed by the Employer in respect of this second application listed exactly the same employees as were named in the previous application. The Board considered the Employer's application in Saskatoon on May 10, 2010.

[4] At the hearing, the Union requested that the Board order a vote of the affected employees to ensure that their wishes were captured in a timely fashion pending the Board's decision. At the close of the hearing, the Board determined to issue a direction for vote of the affected employees in the usual manner, but directed that the ballot box be sealed and the votes not counted until further order by the Board. For the reasons that follow, the Board has determined that the ballot box should be opened, the votes counted, and the results of the vote provided to this panel to determine the final outcome of this matter.

Facts:

[5] The relevant facts were not in dispute. As noted above, the Union has been certified to a unit of employees in Saskatoon, Saskatchewan and in other municipalities near Saskatoon and elsewhere in the province. The Union and the prior certified Employer to the current Employer had a mature and cooperative relationship.

[6] The history of the various amalgamations which resulted in the formation of the Affinity Credit Union (and related Employers) has been previously detailed by the Board[2] and need not be set out herein.

[7] The Employer called Ms. Lolita Humm. Ms. Humm confirmed that the Statement of Employment which she filed in respect of this application was identical (as to the employees affected) filed by her in the previous application. She confirmed as well that the previous application had been filed as noted above and that this application was filed more than six (6) months since the previous application.

Relevant Statutory Provisions:

[8] Relevant statutory provisions of the *Act* provide as follows:

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[2] See *United Food and Commercial Workers, Local 1400 v. Affinity Credit Union* 2010 CANLII13388, LRB File No. 135-09.

> **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.*
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> *. . .*
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> ***5*** *The board may make orders:*
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> *. . .*
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> *(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.*
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> ***18*** *The board has,for any matter before it, the power:*
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> *(n) to refuse to entertain a similar application for any period not exceeding one year from the date an unsuccessful application is dismissed from anyone mentioned in subclauses (m)(i) to (iv);*

Analysis and Decision:

[9] Clause 5(b) precludes the Board from making any order under that provision if there has been a previous application ”in respect of the same or a substantially similar unit of employees” within a period of six (6) months from the date the previous application was dismissed, without leave of the Board. This provision would certainly have applied since this application was “in respect of the same or a substantially similar unit of employees.” However, clause 5(b) has no application in this case as these applications were brought just outside the six (6) month period referenced in the *Act*.

[10] The Employer argued that notwithstanding clause 5(b), the Board may still, in its discretion, refuse to entertain the application under s. 18(n) of the *Act* for a period not exceeding one (1) year. The Union argued that the time frame set out by the legislature in subsection 5(b) applied specifically to certification applications, as distinct from other applications to the Board and argued that subsection18(n) should not apply with respect to certification applications.

[11] In support of its position, the Employer relied upon the Board's earlier ruling which involved these same parties.[3] The Union too relied upon this decision and also cited in support the Hansard discussions held by the Saskatchewan Legislature's Standing Committee on the Economy on May 16, 2005 and May 24, 2005 when the amendments to the *Act* (which added ss. 18(n)) were being considered.

[12] Subsection18 was inserted into the *Act* by Bill 87 – *The Trade Union Amendment Act*, (2004). The provision was purportedly taken from the Canada Labour Code. Originally, the amendment to the *Act* had been written to simply incorporate, by reference, the powers of the Canada Board under The Labour Code of Canada (s. 16 of that Code). However, following consultation, the government determined to include each power specifically within the *Act* for ease of reference. However, the Canada Labour Code never explicitly contained a provision like ss. 18(n) of the *Act*, but rather, by Regulation, it prescribed a six (6) month waiting period between applications for certification and rescission.[4]

[13] Unlike *s.* 5(b), ss. 18(n) is an empowering provision that allows the Board, in its discretion, to refuse to entertain a similar application for any period up to one (1) year from the date an unsuccessful application is dismissed by the Board.

[14] In our earlier decision concerning these parties,[5] we noted that ss. 18(m) and (n), placed the onus upon the party wishing to have the Board invoke its powers under these sections, to satisfy the Board that it should invoke those provisions and bar or refuse to entertain the application. The Employer accepted that onus and called Ms. Lolita Humm as its witness with respect to the matters under consideration here. In that decision, the Board also noted that the authority in ss. 18(m) and (n) should be exercised sparingly by the Board and only in the clearest and most compelling cases when they would be used to counter the rights granted to employees under *s.* 3.

[15] As we noted in that earlier decision, s. 3 is a substantive right and one with which the Board will not interfere without clear and compelling reasons or industrial relations prejudice

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[3] *United Food and Commercial Workers, Local 1400 v. Affinity Credit Union* [2009] S.L.R.B.D. No. 25, 170 C.L.R.B.R. (2d) 275, CANLII 45865, LRB File Nos. 078-09 & 079-09.
[4] S. 15(f) *Canada Labour Code* RSC 1985 c. L-2
[5] See note 3 above

to one of the parties (or potentially others). When the competing interests of the rights of employees to have their application for certification is considered opposite the reasons and rationale advanced by the Employer, the rights of the employees must prevail.

[16] In the circumstances of this case, the Board declined to exercise its authority under ss. 18(n) to refuse to hear the current applications. The Employer failed to satisfy the Board that there was sufficient rationale for the Board to interfere in the right of employees to choose a bargaining representative in accordance with s. 3. While the Board's resources are scarce, and in appropriate circumstances, it may well determine to exercise its discretion under ss. 18(n) to avoid unnecessary or prolix procedures or applications, this is not one of those cases.

[17] The Employer argued that another vote at this time would cause disruption in the workplace. That disruption, in and of itself, is not sufficient rationale to refuse to conduct a vote to determine the wishes of the employees. The Employer also urged "judicial economy", that is that the Board should not promote multiple applications or allow unions "multiple kicks at the can"[6]. With respect, we cannot agree. While, as noted above, the Board has finite resources, and in appropriate circumstances, it will economize those resources, this application is not such a case.

[18] The legislature has provided guidance to the Board with respect to certification applications in s. 5(b), that is, the unless leave is granted by the Board, no application for certification may be made within six (6) months of the dismissal of a similar application. That same interdiction is carried into the Canada Labour Code Regulations[7]. There may be circumstances where the Board may see fit to extend that period to the one (1) year provided for in ss. 18 (m) or (n), but those circumstances are not present here.

[6] My words, not those of the Employer's counsel
[7] See note 4 above.

[19] As a result of this decision, the Board will proceed to process the application for certification in accordance with the Board's usual practices. The Board hereby directs that the vote of the affected employees be counted and the results of that vote be made known to the panel for an appropriate Order.

DATED at Regina, Saskatchewan, this **18th** day of **May, 2010.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.,
Chairperson