Labour Relations Board
Saskatchewan

MICHELL HEIDECKER, Applicant v. SEIU-WEST (FORMERLY SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 333) and BETHANY PIONEER VILLAGE INC. o/a BIRCH MANOR, Respondents

LRB File No. 021-11; April 6, 2011
Chairperson, Kenneth G. Love, Q.C.; Members: Bruce McDonald and Clare Gitzel

For the Applicant:	Larry Seiferling, Q.C.
For the Certified Union:	Heather Jensen
For the Employer:	Kevin Wilson, Q.C.

Decertification – Effective Date – Board imposed contract following request for First Collective Bargaining Assistance – Parties wished to have Board make corrections to the Order – Union took position that no collective bargaining agreement in effect as corrections had not been made by Board prior to application for rescission – Employer made limited efforts to conform to terms of imposed contract – Board required to determine if s. 5(k)(i) or (ii) applied in determining the open period for an application for rescission.

Decertification – Interference – Union alleges Employer interference and influence in bringing application, but provides no concrete evidence of same.

***The Trade Union Act*, ss. 3, 5(k) and 9.**

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love Q.C.** Michell Heidecker (the "Applicant") applied for a rescission of the Order of the Board dated November 6, 2007, designating the Service Employees International Union, Local 333 (the "Union") as the certified bargaining agent for all employees of Bethany Pioneer Village Inc., operating as Birch Manor (the "Employer") at or near Middle Lake, Saskatchewan except the administrator, coordinator and confidential secretary.

[2] Following certification, the Union and the Employer were unable to conclude the terms of a collective bargaining agreement. The Union applied to the Board for assistance in bargaining a first collective agreement pursuant to s. 26.5 of *Trade Union Act*, R.S.S. c.T-17 (the "*Act*"). The Board granted assistance to the parties.

With the assistance of a Board Agent, the parties negotiated most of the terms of a collective agreement. The parties were not able to agree all of the terms of the agreement and the Board Agent reported to the Board that the parties were unable to reach agreement. The Board Agent recommended certain terms to the Board to be considered by the Board and, if found appropriate, to be included as the terms of the first collective agreement between the parties.

[3] Both parties initially disagreed with the report from the Board's agent. However, the parties subsequently agreed that the report from the Board Agent were satisfactory and with the consent of the parties, the Board imposed certain terms of the first collective agreement by Order dated July 21, 2010. One of the terms imposed by the Board in that Order was Article 1.01 which established that the agreement "shall be in force and effect from March 3, 2010 to March 2, 2012.

[4] Following the issuance of this Order by the Board, the parties communicated both between themselves and with the Board with respect to changes that they would jointly request to the Order of July 21, 2010. Some of the changes which were discussed were substantive, but most were to correct punctuation or typographical errors. No change was proposed to Article 1.01. As of the date of the application for rescission, no amendment had been made by the Board to its July 21, 2010 Order.

[5] Evidence from the Union's witness, Mr. Donald Logan, was that the Union did not consider the first collective agreement to be in place and they were awaiting the agreed amendments to the July 21, 2010 Board Order before they would consider the agreement to be in effect. As a result, he testified, the Union made no efforts to either enforce the agreement, to ensure the Union security provisions were being adhered to, or to collect union dues from employees.

[6] There were ongoing discussions between the parties concerning various proposed amendments to the Board's July 21, 2010 Order. However, by November of 2010, the parties had come to an agreement as to the contents of the proposed amendments and provided correspondence to the Board Registrar in that regard. The Board Registrar acknowledged receipt of that correspondence and requested advice from the parties as to the form that the proposed Order should take.

[7] Prior to receipt of a response from the parties to that correspondence, the within application was filed with the Board on January 25, 2011. Upon receipt of this application, the Board Registrar wrote to the parties to advise that pending resolution of this application, the requested amendment to the Board's Order of July 21, 2010 would be held in abeyance.

[8] In response to the application, the Employer filed a Statement of Employment listing 24 individuals in the bargaining unit. The Union objected to four (4) of those named on the Statement of Employment as being entitled to vote with respect to the application. By agreement of the parties, the ballots of those four (4) persons were double enveloped pending a determination of their eligibility by the Board. No determination was required to be made, as at the hearing of this matter the Union withdrew its objection to those persons being eligible to vote.

[9] In its reply to the application, the Union alleged that the application was not made within the open period, which they argued should be calculated in accordance with s. 5(k)(ii) of the *Act* on the basis that there was no collective bargaining agreement in effect between the parties. The Union also alleged that the application was made in whole or in part on the advice of, or as a result of, influence of or interference or intimidation by, the Employer or Employer's agent and that the application should be dismissed pursuant to s. 9 of the *Act*.

[10] The application was heard on March 16, 2010 in Saskatoon.

Evidence of the Parties:

[11] The Applicant testified concerning the reasons why she brought the application on behalf of the employees of the Employer as well as the circumstances of her employment and the making of the application. In her examination-in-chief, she acknowledged that she was the daughter-in-law of one of the members of the Board which governed the operations of the Employer. She testified that she had not talked to her mother-in-law concerning her application. Nor, she testified, had she discussed the application with anyone in management. In cross-examination, she testified that she was unaware of what her mother-in-law did on the Board. She also testified that her

husband was aware of her having made the application, but that she was unaware of any conversations between her husband and her mother-in-law concerning the application.

[12] In her cross-examination, she also advised that Mrs. McDougall, the wife of the Administrator of the care facility, also worked casually when needed if another employee was sick. She testified that she did not view Mrs. McDougall as being a part of the management of the facility, but rather saw her as a co-worker.

[13] In her testimony, the Applicant testified that the Village of Middle Lake was a small community of about 200 people. She testified that there were many people in the community who were related to each other.

[14] Mr. Don Logan testified on behalf of the Union. He provided some history with respect to the conduct of bargaining for the first collective agreement. He testified that he was not initially involved with the bargaining process, but assumed responsibility for it in July of 2009 when the parties were in conciliation.

[15] Through Mr. Logan, the Union introduced a series of documents which were an exchange of correspondence between the parties related to some amendments the parties wished to have the Board make to its Order of July 21, 2010. Following a good deal of correspondence between the parties, he testified that his counsel send a letter to the Board on November 15, 2010 outlining a final agreement between the parties respecting requested changes.

[16] Mr. Logan testified that because the final terms of the changes to the Order had not been made that the Union had taken the view that the agreement was not yet in existence and had therefore, not required payment of union dues, nor had it taken other steps to enforce the agreement.

[17] He did acknowledge that he received membership cards from time to time, particularly in late December of 2010. He testified that he found it odd that he suddenly received a batch of membership cards at that time.

[18] In cross-examination, he acknowledged that initially, both the Union and the Employer had been opposed to the report of the Board Agent. However, he noted that both parties withdrew their objections. He testified that the employer insisted that the Board impose the First Collective Agreement by Board Order. He testified that he believed the reason for this was that the employer wished to retain the ability to terminate the agreement in accordance with the provisions of s. 26.5(9) of the *Act*.

[19] He also testified in cross-examination that it was a normal process in collective bargaining to first reach a memorandum of understanding with an employer and thereafter work towards finalizing an execution version of that agreement. He agreed that the parties were *ad idem* on all of the terms of the proposed amendments to the Order as of November 15, 2010.

[20] He testified that there were no discussions between the parties which suspended the operation of the First Collective Agreement imposed by the Board's Order of July 21, 2010. However, he testified that he believed that the Employer's failure to implement or comply with the agreement showed that it too believed the agreement not to be in effect.

[21] He also testified about an event which had occurred in June of 2010 at the facility. He advised that he had been contacted by a number of employees of Birch Manor who were concerned about changes to their shift schedules which would require that employees work alone during the night shift. He testified that he did not contact the employer with respect to the proposed changes to the shift schedules, did not file a grievance under the collective agreement, or an unfair labour practice application to the Board in response to the employees concerns. Rather, he recommended that they contact the Occupational Health and Safety Branch of the Ministry of Labour Relations and Workplace Safety ("OH&S") to file a complaint.

[22] The Employer agreed to put Mr. Glenn McDougall, the facility administrator on the stand in order to allow the Union to examine him concerning this issue. He testified that he was the Administrator for all of Bethany Pioneer Village Inc, which facility included Birch Manor, the facility being dealt with in this application.

[23] He testified that both his wife and son worked at Birch Manor, but that neither of them had any managerial function. He also testified that the employees were aware of the relationship between his wife and his son.

[24] He acknowledged that he did not implement all of the provisions of the First Collective Agreement following the Board's Order of July 21, 2010. In particular, he testified that he had not:

- Changed the wage rates for employees in accordance with the agreement.
- Did not provide the Union with a seniority list in accordance with the agreement.
- Did not provide copies of job postings.
- Did not contact the Union with respect to contract implementation.

[25] He testified, however, that notwithstanding these failures, he thought the First Collective Agreement was in effect. He testified that he began to call in staff by seniority even before the Board's Order. He also noted that he began to make changes to shift schedules following the Board's Order as he was no longer bound by the statutory provisions respecting changes to terms and conditions of employment pending negotiation of a collective agreement.

[26] He testified that the changes in shift schedules lead to a mass resignation of many of his employees. Those employees, he testified, contacted OH&S. He testified that he was contacted by officials from OH&S who investigated the employee's concerns, but that no action was taken by OH&S in response to the complaints.

[27] He testified that the employees who resigned were not immediately replaced, except by temporary employees, since he was uncertain if some or any of them might return to their positions. When the investigation by OH&S was completed, he testified that he then moved to fill the vacancies. This occurred in November/December of 2010.

[28] He testified that all the time the new employees were hired, he attempted to get all new employees to sign membership cards and dues remittance cards. He testified that he also sent notice of the resignations and new hires to Mr. Logan by letter dated December 30, 2010.

[29] He testified that during the period between the Board's Order in July, 2010 and this Application in January, 2011, that he had not been contacted by the Union for any purpose.

[30] He also testified that when he was obtaining membership and dues remittance cards from employees that he did not provide any advice to them as to how they might get rid of the Union. Nor, he testified, did he advise them where they might find legal counsel to assist them.

[31] In examination by his counsel, he produced a job posting which he had done in accordance with the First Collective Agreement. He also testified that a policy which provided Earned Days Off ("EDO's") prior to the negotiation of the First Collective Agreement was terminated.

[32] He testified that prior to the mass resignations, the Union had two (2) employee representatives on the bargaining committee, both of whom resigned. He also testified that following the resignations, he was unaware of any shop steward having been appointed by the Union, nor was he aware of who, if anyone, was a member of the Union executive. He testified that he was provided no information by the Union as to which employees were on the executive, or who the Union had appointed as shop stewards.

Relevant Statutory Provisions:

[33] Relevant statutory provisions include s. 3, 5(k), 6, 9 and 26.5 of the *Act*, which provide as follows:

> 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.

. . .

5 The board may make orders:

. . .

(k) rescinding or amending an order or decision of the board made under clause (a), (b) or (c) where:

> *(i) there is a collective bargaining agreement in existence and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary of the effective date of the agreement; or*
>
> *(ii) there is no agreement and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary date of the order to be rescinded or amended;*

notwithstanding a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;

. . .

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.

6(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.

. . .

9 The board may reject or dismiss any application made to it by an employee or employees where it is satisfied that the application is made in whole or in part on the advice of, or as a result of influence of or interference or intimidation by, the employer or employer's agent.

. . .

First collective bargaining agreements

26.5(1)If the board has made an order pursuant to clause 5(b), the trade union and the employer, or their authorized representatives, must meet and commence bargaining collectively within 20 days after the order is made, unless the parties agree otherwise.

(1.1) Either party may apply to the board for assistance in the conclusion of a first collective bargaining agreement, and the board may provide assistance pursuant to subsection (6), if:

(a) the board has made an order pursuant to clause 5(a), (b) or (c);

(b) the trade union and the employer have bargained collectively and have failed to conclude a first collective bargaining agreement; and

(c) one or more of the following circumstances exists:

> *(i) the trade union has taken a strike vote and the majority of those employees who voted have voted for a strike;*
>
> *(ii) the employer has commenced a lock-out;*
>
> *(iii) the board has made a determination pursuant to clause 11(1)(c) or 11(2)(c) and, in the opinion of the board, it is appropriate to assist the parties in the conclusion of a first collective bargaining agreement pursuant to subsection (6);*
>
> *(iv) 90 days or more have passed since the board made an order pursuant to clause 5(b).*

26.5(2) If an application is made pursuant to subsection (1.1), an employee shall not strike or continue to strike, and the employer shall not lock out or continue to lock out the employees.

26.5(3) An application pursuant to subsection (1.1) must include a list of the disputed issues and a statement of the position of the applicant on those issues, including the applicant's last offer on those issues.

26.5(4) All materials filed with the board in support of an application pursuant to subsection (1.1) must be served on the other party within 24 hours after filing the application with the board.

26.5(5) Within 14 days after receiving the information mentioned in subsection (4), the other party must:

(a) file with the board a list of the issues in dispute and a statement of the position of that party on those issues, including that party's last offer on those issues; and

(b) serve on the applicant a copy of the list and statement.

26.5(6) On receipt of an application pursuant to subsection (1.1):

> *(a) the board may require the parties to submit the matter to conciliation if they have not already done so; and*
>
> *(b) if the parties have submitted the matter to conciliation or 120 days have elapsed since the appointment of a conciliator, the board may do any of the following:*
>
> > *(i) conclude, within 45 days after undertaking to do so, any term or terms of a first collective bargaining agreement between the parties;*
> >
> > *(ii) order arbitration by a single arbitrator to conclude, within 45 days after the date of the order, any term or terms of the first collective bargaining agreement.*
>
> *26.5(7) Before concluding any term or terms of a first collective bargaining agreement, the board or a single arbitrator may hear:*
>
> *(a) evidence adduced relating to the parties' positions on disputed issues; and*
>
> *(b) argument by the parties or their counsel.*
>
> *26.5(8) Notwithstanding section 33 but subject to subsections (9) and (10), the expiry date of a collective bargaining agreement concluded pursuant to this section is deemed to be two years from its effective date or any other date that the parties agree on.*
>
> *26.5(9) Notwithstanding section 33 not less than 30 days or more than 60 days before the expiry date of a collective bargaining agreement concluded pursuant to this section, either party may give notice in writing to terminate the agreement or to negotiate a revision of the agreement.*
>
> *26.5(10) Where a notice is given pursuant to subsection (9), the parties shall immediately bargain collectively with a view to the renewal or revision of the agreement or the conclusion of a new agreement.*

Analysis and Decision:

[34] The Union objected to the timeliness of this application arguing that the open period provided for in s. 5(k) of the *Act* should be determined from the date of the Board's certification Order which was November 6, 2007. The Applicant argued that the open period should be calculated based upon the effective date of the First Collective Agreement as specified in the Board's Order of July 21, 2010, which was March 3, 2010.

[35] For the Reasons which follow, the Board finds that the application is made within the open period which is to be calculated in accordance with s. 5(k)(i) of the *Act*.

[36] In making its Order of July 21, 2010, the Board was exercising its authority granted by s. 25.5(6)(b)(i), which permits the Board to conclude "any term or terms of a first collective agreement." Both of the parties consented to the Board exercising this authority to impose those terms of the First Collective Agreement which the parties had been unable to negotiate, based upon the recommendations of the Board Agent.

[37] Once that Order was made, the First Collective Agreement was "in force and effect from March 3, 2010 to March 2, 2012" as specified in Article 1.01 of the First Collective Agreement and as imposed by paragraph 1 of the Board's Order.

[38] Notwithstanding any adjustments which may have been agreed to have been made either between the parties or even if they had been implemented by an amending Order of the Board, the effective date of the First Collective Agreement would not have been modified and would have remained as outlined above.

[39] Whether the Union or the Employer took the view that the agreement was complete or effective, is not relevant to determination of the open period in accordance with the *Act.* There was no printed copy of the Collective Agreement provided by the Union to its members. Practically, the only source for determination of the effective date of the Agreement was by reference to the Board's Order of July 21, 2010.

[40] The Union also alleged that the application had been brought by the Employees "in whole or in part on the advice of, or as a result of influence of or interference by, the employer or employer's agent.

[41] The Union argued that this situation was on all fours with the fact situation in *Smith v. CUPE Local 1975 and Four Star Management and Country Classic Fashions Inc.*[1]. In that decision, at paragraph [7], the Board concluded:

> *[7] The application seeks rescission of the certification Order applying to both upper and lower Treats at the University of Saskatchewan. The uncontradicted evidence is that neither Four Star Management nor Country Classic Fashions Ltd. has*

[1] [2002] Sask. L.R.B.R. 1

> *accepted or implemented the provisions of the collective agreement imposed by the Board. In addition, Country Classic Fashions Ltd. made unilateral changes to employee's wages prior to the filing of the rescission application. In our view, the conduct of both companies constitutes influence, interference or intimidation in the making of the application within the meaning of s. 9 of the Act. In the circumstances we exercise our discretion to refuse to order a vote on the application for rescission.*

[42] Since this decision was rendered by the Board, amendments have been made to the *Act* which remove the Board's discretion with respect to the ordering of a vote on rescission applications. Section 6 now requires that the Board "must direct a vote" where the specified threshold of support is shown.

[43] Since the amendments to the *Act* to remove the Board's discretion regarding the ordering of a vote on applications for rescission, the Board has taken the view that it will "respect the right of employees to decide the representative question in rescission applications and to only withhold that right in circumstances where the Board has lost confidence in the capacity of the employees to independently decide this question for themselves because of the employer's conduct".[2]

[44] The cornerstone of the *Act* is the right, enshrined in s. 3 of the *Act* for employees to have the right to choose their bargaining representative. A secret ballot vote conducted by the Board protects and enhances the exercise of this freedom. That vote allows employees to exercise their right of association in accordance with their conscience unfettered by any scrutiny by either the employer or a trade union. The sanctity of the ballot box provides and enhances this fundamental freedom and element of the *Act*.

[45] We were encouraged by counsel for the Applicant to adopt the approach taken by the Alberta Labour Relations Board with respect to only utilize our authority under s. 9 "sparingly"[3]. However, we decline to do so. As noted by counsel for the Union, we should be cautious to import jurisprudence from other jurisdictions, without some understanding of the underlying statutory framework.

---

[2] *Alan Anderson v. International Union of Painters and Allied Trades, Local 739 and Allan's Glass Products Ltd.*, [2009] Canlii 47593, LRB File No. 045-09.

[46] We do, however, concur with the comments of Madam Justice Shelley of the Alberta Court of Queen's Bench in *United Steel Workers of America, Local 1-207 v. Alberta (Labour Relations Board)*[4] where at paragraph [59] she says:

> *[59] Even on a reasonableness standard, I conclude that the Board's decision to place the rights of employees ahead of the rights of the Union in these circumstances does hold up to a probing examination. The Board was faced with giving effect to the wishes of the Union or the wishes of an overwhelming majority of employees. Having rejected the Union's arguments and making findings of fact which I find no basis to overturn, the Board chose not to delay giving effect to the wishes of the employee group. I conclude that it was, on the facts found by the Board, open for the Board to reach the conclusion it did; namely, to allow the revocation of the Union's certification over the objection of the Union.*

[47] In this case, the Board has no discretion regarding whether or not it will allow the employees to vote in respect of the application, which vote has already been conducted by a Board Agent, with the ballot box sealed pending further order of the Board. Accordingly, absent any finding that there has been improper influence by the employer such that s. 9 of the *Act* must be invoked, the employees' right to choose their own bargaining representative must be preserved.

[48] In this case before the Board there is no direct evidence of Employer involvement, influence or intimidation with the application. Therefore, the Board must determine whether there is evidence from which it can draw an inference that the Employer has been involved with the application or has interfered with, intimidated, influenced or encouraged the application being made to an extent that the true wishes of the employees should not be determined by a vote as required by s. 6(1). In *James Walters v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Dimension 3 Hospitality Corporation o/a Days Inn*, [2005] Sask. L.R.B.R. 139, LRB File No. 238-04, the Board outlined the types of circumstances to be examined to make this determination, at 167 and 168:

---

[3] See *Foothills Forest Products Inc. (Re☺ [2007] A.L.R.B.D. No. 63, Alta L.R.B.R. LD-043, 148 C.L.R.B.R. (2nd) 228.*

[4] [2008] ABQB 91

> *[85] In order to determine whether there is such employer involvement, the Board has typically examined a number of circumstances, the significance or importance of which will vary from case to case. One of the factors which is often examined and bears relevance to this case is the applicant's reasons for bringing the application. When those reasons are not plausible or credible, the Board may also go on to examine other suspicious or unusual circumstances including, but not limited to, the circumstances surrounding the applicant's hiring, aspects of the applicant's relationship with the employer, the timing of the application and how the application was financed. Once the Board has examined the whole of the circumstances it can determine whether it will draw an inference that the employer has intimidated, interfered with or influenced the bringing of the application.*

[49] In this case, the Board can find no reason, or evidence to support the exercise of its authority under s. 9.

[50] The Board hereby directs as follows:

1. As soon as practicable, the Board Agent shall, without permitting the contents of such envelopes to be observed, open and deposit into the ballot box the four (4) ballots of employees which were double enveloped.

2. Thereafter, the Board Agent shall, in the presence of scrutineers from the Applicant, the Union and the Employer, if they wish to be present, count the ballots cast and report to an *in camera* panel of the Board the results of the vote conducted for an appropriate order allowing or dismissing the application based on the results of the ballots cast.

DATED at Regina, Saskatchewan, this **6th** day of **April, 2011.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson