Labour Relations Board

1600 - 1920 Broad Street
Regina, Canada
S4P 3V2
www.sasklabourrelationsboard.com

Tel (306) 787-2406
Tel (306) 787-2405
Fax (306) 787-2664

April 1, 2011

RWDSU
1233 Winnipeg Street
REGINA, SK S4R 1K1

Attention: Mr. Larry Kowalchuk

MacPherson, Leslie Tyerman
1500 – 1874 Scarth Street
REGINA, SK S4P 4E9

Attention: Mr. Brian Kenny, Q.C.

Mr. John Moran
7 Woodlawn Place
REGINA, SK S4S 5M9

Via Fax and Regular Mail

Dear Sirs:

RE: LRB File No. 062-10; John Moran v. Retail Wholesale and Department Store Union and Casino Regina

On November 3, 2010, a panel of the Board, comprised of the Chairperson of the Board, Kenneth G. Love, Q.C., and members John McCormick and Kendra Cruson, convened to hear evidence and argument concerning the above noted matter.

The Saskatchewan, Joint Board, Retail, Wholesale and Department Store Union (the "Union") raised an objection to the Board's jurisdiction to hear and determine this application. After hearing some argument by the parties, the Board requested that Mr. Kowalchuk, on behalf of the Union, provide the Board with a written submission regarding his objection to the Board's jurisdiction.

Mr. Kowalchuk provided that submission to the Board on February 2, 2011. Mr. Moran responded to that submission by email on February 3, 2011, which email was copied to both Mr. Kowalchuk and Mr. Kenny. Mr. Kenny, although he had indicated to the Board that he would make a submission, has provided nothing to the Board.

This matter is scheduled to continue before the Board on April 7 and 8, 2011. At the hearing on November 3, 2010, Mr. Kowalchuk requested that the Board provide a decision with respect to his jurisdictional challenge, which the Board advised it would do upon his providing the written argument as requested. This letter is to provide the parties with the Board's decision in advance of the upcoming hearing.

For the reasons that follow, the Board has determined that it has jurisdiction to hear and determine the application made by Mr. Moran. In light of this decision, however, the Board will exercise its authority under s. 19 of *The Trade Union* Act to allow Mr. Moran to alter or amend his application, as necessary, in order that the real question, in controversy in these proceedings, which is whether or not the Union failed in its duty of fair representation of Mr. Moran.

The Union's objection to the Board's jurisdiction is based upon the following facts:

1. The Union is not certified by the Board to represent employees at Casino Regina. The Union has been voluntarily recognized by the Employer following the cancellation of a food service contact with Marwest Food Systems Inc. Employees formerly employed by Marwest became employees of Casino Regina.

2. RWDSU was certified to bargain collectively on behalf of employees of Marwest Food Systems Inc. on June 27, 1996. At the time of certification, the Union had requested that the Employer, Saskatchewan Gaming Corporation ("Casino Regina") be named as a common employer. The Board declined to do so.[1]

3. No application for successorship or certification has been made to the Board in respect of the former employees of Marwest. Submissions from the parties at the hearing on November 3, 2010, which were not disputed, confirmed that the Union was voluntarily recognized by the Union to bargain on behalf of the employees formerly employed by Marwest.

4. While not a part of the appropriate unit certified by the Board on June 27, 1996, the position which Mr. Moran occupies in the Shipping Department somehow came under the bargaining umbrella of the Union which negotiates, under the voluntary recognition, on behalf of Mr. Moran and his co-workers.

5. Mr. Kowalchuk, in his submission, provided the Board with a number of decisions of the Board and one arbitration award which dealt with Casino Regina. These cases included:

    - *Public Service Alliance of Canada v. Casino Regina and Canadian Union of Public Employees*[2]
    - *RWDSU v. Saskatchewan Gaming Corp.*[3]
    - *IATSE v. Saskatchewan Gaming Corp. and PSAC*[4]

[1] See *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Saskatchewan Gaming Corporation and Marwest Food Systems Ltd.*, [1996] Sask. L.R.B.R. 523, LRB File 083-96
[2] [1996] Sask. L.R.B.R. 454, LRB File No. 068-96
[3] [2002] Sask. L.R.B.R. 146, 87 C.L.R.B.R. (2d) 123, LRB File No. 163-01 & 164-01

- *RWDSU v. Casino Regina*[5]
- *RWDSU v. Saskatchewan Gamin Corp.* [6]

6. Mr. Kowalchuk also provided the Board with what appears to be the first page of a collective agreement between The Saskatchewan Gaming Corporation, Casino Regina and RWDSU. That portion of the agreement which is undated, and unsigned lists the following employees as being within the scope of the agreement.

> *2.01 This Agreement shall cover all employees who work in the Food and Beverage Service at Casino Regina except for the following: Director of Food and Beverage, Food and Beverage Shift Managers (5), Executive Chef, Administrative Assistant, Sous Chef, Manager of Food and Beverage Function Services, Manager of Beverage Services, and Manager of Restaurant Services.*

Position of the Parties

The Union's position was that the Board has no "jurisdiction to deal with a s. 25.1 allegation against a union not recognized as a certified union by the Board. It argued that the Registrar had previously communicated this to the Applicant is a previous application he had made to the Board and that had been withdrawn by him.

However, in what appeared to be a contradiction to the above noted objection, the Union also took the position that by virtue of the various decisions of the Board referred to above and by virtue of the ongoing relationship between the Union and the Employer, that it would "consent to an amended certification Order being issued to reflect the record before the Board since December, 1996 to rectify retroactively. That Order would, we presume, be identical to the scope clause of the collective agreement (attached)".

The Applicant's position with respect to the jurisdictional question was somewhat vague, which is perhaps understandable given that he is not a lawyer trained to deal with such questions. However, in his email reply, he makes the following point:

> *Where, Mr. Kowalchuk, if after having the Board recognize his amended Certification Order for his union to be the representative workforce of the Food and Beverage Workers at the Casino Regina, he still needs to explain or show how it is, that the three Shipper Receivers in the Department of Operations who work in Central Stores are included in the scope of his new agreement. Of which, he has submitted to the Labor [sic] Relations Board a copy of the new CBA agreement. The Board should*

[4] [2003] Sask. L.R.B.R. 46, 92 C.L.R.B.R. (2nd) 292, LRB File No. 101-02
[5] [2004] Sask. L.R.B.R. 187, 109 C.L.R.B.R. (2d) 106, LRB File Nos. 250-03 & 252-03
[6] [2009] S.L.A.A. No 11

note, that the Scope of the CBA change to reflect (5) from (2) Food and Beverage Shift Managers, but no change was made to recognize the three Shipper Receivers, who are in the Department of Operations who work in the area known as Central Stores, that is all we have asked all along.

Analysis and Decision

Absent hearing evidence from the parties, the Board is unable to determine the merits of Mr. Morin's claim against the Union and these Reasons should not be considered as anything other than a determination of the preliminary objection taken by the Union to the Board's jurisdiction. Furthermore, notwithstanding the merits of the case, there may still be an issue over who might be the proper bargaining agent that bears responsibility with respect to this matter. For the purposes of this letter decision, the Board has taken as proved the fact that RWDSU bargains in respect of Mr. Moran's position, notwithstanding that it appears to be included within the scope of the Board's order in favour of the Public Service Alliance of Canada ("PSAC"). Evidence may show that this presumption was in error.

An analysis of the cases provided by Mr. Kowalchuk show that the Board may have misinterpreted evidence it heard as suggesting that RWDSU was, in fact certified by the Board when it was not.

In *PSAC v. Casino Regina*[7], the Board dealt with whether or not the Canadian Union of Public Employees could be included on a representation ballot to determine if the employees wished to be represented by CUPE or PSAC. The only reference to RWDSU was the fact that CUPE claimed to have demurred in an organizing campaign out of jurisdictional concerns involving RWDSU.

In *RWDSU v. Saskatchewan Gaming Corp.*[8], the issue was representation at the Golden Nugget Casino in Moose Jaw and any potential successorship rights derived by employees of the Golden Nugget when Casino Moose Jaw was opened. In that decision, the Board determined that RWDSU had no successorship rights regarding Casino Moose Jaw and that PSAC's current certification order in Regina did not extend to the proposed Casino Moose Jaw.

IATSE v. Saskatchewan Gaming Corp.[9]dealt with an application by IATSE which was considered by the Board to be a "carve out" of various employees who were employed in the newly created Show Lounge in Regina. That application was dismissed by the Board as being untimely.

[7] *Supra* Note 2
[8] *Supra* Note 3
[9] *Supra* Note 4

In *RWDSU v. Saskatchewan Gaming Corporation*[10] the Board dealt with an application by RWDSU which claimed that Casino Regina had committed an unfair labour practice in respect of the creation of a new out-of-scope position. It is clear from the decision that no objection was raised to the Board's jurisdiction, and it appears the Board proceeded on the basis that it had jurisdiction in respect to the complaint. Mr. Kowalchuk in his submission referred to the headnote of that decision which makes reference to an amendment to the certification order which could only be made during the open period. However, it is also clear that the Board did not make any determination with respect to its jurisdiction to entertain the application for amendment. At paragraph 4 of the decision, the Board says:

> 4. *Because we are of the view that the Employer's application for a determination pursuant to s. 5(m) as to whether the disputed position is within the scope of the Union's bargaining unit (LRB No. 252-03) should be dismissed on the basis of timeliness of the application, it is not necessary for these Reasons for Decision to summarize the evidence with respect to that issue.*

At no time, did the Board find that there was a certification order made by the Board in favour of RWDSU. However, the Board proceeded to review the matter under s. 5(k) which provision provides that the Board may rescind or amend an order made under s. 5(a), (b) or c), which would have, of necessity, included a determination that there was an order made by the Board under s. 5(a), (b) or (c) in favour of RWDSU.

With respect to the members of the Board at the time, it appears that they were in error with respect to the assumption that there was a Board order in effect between RWDSU and Casino Regina. Absent any challenge to their jurisdiction, it appears that the Board proceeded on the basis that there was an order which could have been amended, notwithstanding that it declined to do so on a timeliness basis.

An exhaustive search of the Board's records does not reveal any order which names RWDSU as the collective bargaining agent for food and beverage employees at Casino Regina. The only existent order is the order made by the Board in their favour naming Marwest Food Systems Ltd. as the Employer. No amendment of this order has been made by the Board, nor has RWDSU made any application for successorship in respect of the employees covered by this order.

Nevertheless, it is equally clear that RWDSU enjoys voluntary recognition status on behalf of certain employees of Casino Regina. The extent of that recognition is yet to be determined.

---

[10] *Supra* Note 5

Mr. Kowalchuk makes the argument that absent an order from the Board which certifies RWDSU as the bargaining agent for employees of Casino Regina, the Board is without jurisdiction under s. 25.1 of the Act to determine if the union has failed to properly represent employees for whom it is certified.

Section 25.1 provides as follows:

> *25.1 Every employee has the right to be fairly represented in grievance or rights arbitration proceedings under a collective bargaining agreement* ***by the trade union certified to represent his bargaining unit*** *in a manner that is not arbitrary, discriminatory or in bad faith. [Emphasis mine]*

On the face of this section, it would appear that Mr. Kowalchuk's objection is well founded insofar as it appears that in order for the Board to have jurisdiction under s. 25.1, the Board must have certified the challenged trade union to represent the employee for collective bargaining.

However, this argument ignores the fundamental roots of s. 25.1 and the Duty of Fair representation which was determined by the Courts in Canada and the United States to be one of the responsibilities assumed by trade unions as a trade off for their being granted exclusive bargaining rights for certain employees.

The genesis for the Duty of Fair Representation is found in the Supreme Court of Canada decision in *Canadian Merchant Services Guild v. Gagnon*[11]. In this case, the Supreme Court of Canada discussed both the origination of the duty and its formal adoption by various Federal and Provincial Jurisdictions who included a similar duty into their legislation governing Trade Unions or Labour Relations.

This case recognized that the duty of fair representation arose both prior to and following its inclusion in various statutes. It recognized the principle, which arose from jurisprudence in the United States that the duty to fairly represent unionized employees was a trade off for the granting to those unions the exclusive right to bargain collectively on behalf of the employees under a collective agreement.

The duty, as it originally was cast, did not contain an requirement that the Board had certified the bargaining unit, but merely that the union had the exclusive right, as here, to bargain collectively on behalf of certain employees.

This Board has recognized that the Duty of Fair Representation, as it originally was developed,, was more extensive than the duty enshrined by the legislature in s. 25.1.

[11] [1984] 84 CLLC 12, 181, 1 S.C.R. 509.

In *Mary Banga v. Saskatchewan Government Employees' Union*[12] the Board said at p. 98:

> *The concept of the duty of fair representation was originally formulated in the context of admission to union membership. In the jurisprudence of the courts and labour relations boards which have considered this issue, however, it has been applied as well to both the negotiation and administration of collective agreements. Section 25.1 of The Trade Union Act, indeed, refers specifically to the context of arbitration proceedings. This Board has not interpreted the section in a way which limits the duty to that instance, but has taken the view that the duty at "common law" was more extensive, and that Section 25.1 does not have the effect of eliminating the duty of fair representation in the context of union membership, collective bargaining or the grievance procedure.*

We concur with these comments and agree that s. 25.1 should not be read as limiting the "common law" duty of fair representation as described in Gagnon, supra.

RWDSU has been granted, by its voluntary recognition, exclusive bargaining rights over certain employees of Casino Regina, notwithstanding there is no Board order certifying such rights. That exclusive right to bargain on behalf of these employees carries with it the concomitant duty to fairly represent those employees.

As noted above, for the above noted reasons, the Board has concluded that it enjoys the necessary jurisdiction to hear and determine the application, amended as noted to reference only a Duty of Fair Representation owed by the Union to the Employee.

The application by RWDSU is dismissed.

Yours truly,

Kenneth G. Love, Q.C.
Chairperson

[12] [1993] Sask. Labour Rep. 88, LRB File No. 173-93