

**The Labour Relations Board
Saskatchewan**

**DARRYL MARKOWSKI, Applicant v. UNITED FOOD AND COMMERCIAL WORKERS,
LOCAL 1400 and 612362 SASKATCHEWAN LTD. o/a NATIONAL HOTEL, Respondents**

LRB File Nos. 153-10 & 160-10; May 3, 2011

Vice-Chairperson, Steven Schiefner; Members: Duane Siemens and Greg Trew

The Applicant: Mr. Darryl Markowski.
For the Respondent Union: Mr. Drew Plaxton.
For the Respondent Employer: Mr. Larry Seiferling.

**Decertification – Practice and procedure – Timeliness – Application
filed with the Board outside of 30 - 60 day period prescribed by *The
Trade Union Act* – Employee asks Board to allow application to
continue notwithstanding late filing – Board not prepared to permit
late filing of rescission application – Board dismisses application.**

The Trade Union Act, ss. 5(k) and 19.

REASONS FOR DECISION

Background:

[1] Steven D. Schiefner, Vice-Chairperson: Mr. Darryl Markowski (the “Applicant”) applied to the Saskatchewan Labour Relations Board (the “Board”) for a rescission of an Order of the Board dated June 17, 2004 designating the United Food and Commercial Workers, Local 1400 (the “Union”) as the certified bargaining agent for a unit of employees employed by the National Hotel (612362 Saskatchewan Ltd.), (the “Employer”).

[2] In fact, the Applicant forwarded two (2) applications for rescission to the Board. The Applicant’s first application was received by mail by the Board Registrar on September 21, 2010 and was assigned LRB File No. 153-10. The Applicant’s original application, together with his evidence of support, was returned to the Applicant by the Registrar on that same date by Registered Mail for refinement and clarification. Another application for rescission was received from the Applicant by the Board Registrar on October 8, 2010. This second application was assigned LRB File No. 160-10.

[3] The Applicant’s application was heard on April 4, 2011 in Saskatoon, Saskatchewan. The Applicant testified in support of his application and elected to call no further

evidence. At the close of the Applicant's case, with leave of the Board, the Union brought an application for non-suit, without making an election (i.e.: reserving the right to call evidence). In its application for non-suit, the Union asked the Board to dismiss the Applicant's application on the basis that it was filed outside of the time limits prescribed by s. 5(k) of *The Trade Union Act*, R.S.S. 1978, c.T-17 (the "Act") and, thus, the Board had no jurisdiction to hear the Applicant's rescission application

[4] Upon hearing argument from the parties, the Board granted the Union's application for non-suit and dismissed the Applicant's rescission application. In doing so, the Board gave brief oral reasons. These Reasons for Decision supplement the oral reasons provided by the Board on April 4, 2011.

Facts:

[5] The evidence relevant to these proceedings was not in dispute. The Union was certified by the Board to represent a unit of employees of the Employer on June 17, 2004. At the time of the Applicant's application, a collective agreement was in existence between the Union and the Employer bearing an effective date of November 1, 2007 to October 31, 2010. Notice to revise this collective agreement had been given and the parties were involved in collective bargaining. The anniversary of the effective date of the collective agreement in existence between the Union and the Employer was November 1st. As a consequence, the relevant "open" period prescribed by s. 5(k) of the *Act* was from September 1, 2010 until October 1, 2010.

[6] As indicated, the Applicant filed, or attempted to file, his first application with the Board on September 21, 2010. While this document was received by the Board during the open period, it was returned to the Applicant by the Registrar on the same day it was received, with the following letter:

September 21, 2010

*Darryl Markowski
4 - 39 10 Street West
PRINCE ALBERT SK S6V 3A7*

Dear Sir:

RE: LRB File No. 153-10; Application, Rescission, v. National Hotel

I am returning your application for refinement and clarification. Applications must, on the face of the document, provide a factual basis for processing. Your documents are deficient or incorrect as follows; reference at point 4 regarding an Order dated September 1, 2010, which the Board cannot locate or reference. Reference at point 5, you reference an effective date of a collective agreement which is approximately six weeks in advance of the application.

Finally, at para 6, you state the reasons for the application as "see attached Form", to which none was attached to the documents received by the Board this day.

In closing, the application should be filed in triplicate as required by the Regulations, which can be viewed on our website at www.sasklabourrelationsboard.com. It would also be helpful to enclose a copy of the current collective agreement to allow the Board to determine if the application is in the open period. Thank you and should you have any further questions, please do not hesitate to contact this office.

Yours truly,

*F. W. (Fred) Bayer,
Board Registrar*

*ENCLOSURE: Documents Advanced
FB/fb*

[7] In addition, the Applicant testified that he received a phone call from the Registrar on or about September 21, 2010 and was told by the Registrar that he had done part of his application wrong and that his application was being returned. In his evidence, the Applicant acknowledged that he completed part of his application incorrectly and that he forgot to send in a document that was supposed to be attached to his application. Finally, the Applicant testified that he spoke to the Registrar about the open period and how to calculate it. From this conversation, the Applicant was aware there was a deadline for returning his application to the Board for filing.

[8] The Applicant testified that he "had never done anything like this before" (i.e.: completed forms and made an application to the Board) and that he was unsure of the proper procedures to follow. The Applicant testified that he got the form for his original application from the Board's website but that he didn't know what he was supposed to put down in a number of the blanks when he completed his application. The Applicant testified that for one of the blanks (para. #4) he just guessed and put in the date he completed his application.

[9] The Applicant testified that he knew another employee at the workplace who had previously made an application to the Board and he approached this employee for assistance. The name of the employee that the Applicant approached was Mr. Ronnie Rogoza. The

Applicant knew that Mr. Rogoza had unsuccessfully made an application to the Board to decertify the Union before but testified that he did not know the reason that application had been unsuccessful. From his conversation with Mr. Rogoza, the Applicant knew he could not ask the Employer for assistance; that he could not work on his application at work; that he could not gather support for his application at work; and that he could not use the photocopier at work.

[10] The Applicant testified that he completed a new application form based on the advice that the Registrar had given him and he attached the document that was supposed to be attached. In addition, the Applicant also testified that, when his first application was returned by the Registrar, he approached Mr. Rogoza for help and he spoke to a “lady” at the “Canada building”. Mr. Rogoza cautioned the Applicant that he should get his application back to the Board “*as soon as possible*”.

[11] The Applicant testified that, after he completed his second application, he went back to the same notary public who commissioned his first application and completed his second application. The notary’s declaration indicates that the Applicant’s second application was sworn on October 5, 2010. The Applicant testified that he then sent his new application, together with his evidence of support (that had also been returned with his first application), by courier back to the Board’s office in Regina.

[12] As indicated, the Applicant’s second application was received by the Board on October 8, 2011.

Argument of the Parties:

[13] In its application for non-suit, counsel on behalf of the Union argued that the Applicant’s application was filed outside the open period prescribed by the *Act* and thus was out of time. Counsel argued that the Applicant’s original application was defective and that the Registrar attempted to help the Applicant cure the defects in his application. While the Registrar helped the Applicant with his original application (i.e.: to properly complete it), the Union argued the Applicant failed to follow the Registrar’s advice regarding his filing deadline. The Union acknowledged that calculating the open period can be a difficult task for a layperson. However, the Union argued that late filing of a rescission application was not something that could be cured by the Board and asked that the Applicant’s application be dismissed.

[14] Counsel on behalf of the Employer argued that the Registrar erred in not accepting the Applicant's original application and noted that it was filed within the open period. Counsel argued that the defects in that application could have been cured by the Board pursuant to s.19 of the *Act*. Counsel reminded the Board of the informational disadvantage that employees face when they seek to decertify a Union. Counsel noted that, if employees seek to bring a trade union into the workplace, they received skilled and professional assistance from service representatives, organizers and legal advice, all paid for by the trade union. However, no such advice is available for employees seeking to decertify a trade union; unless they retain their own legal counsel, they have to represent themselves; and, if they err and turn to their employer for assistance, their application could be tainted. The Employer argued that the Board should accept the Applicant's first application, cure the defects therein pursuant to s. 19 of the *Act*, and proceed with a representative vote of members of the bargaining unit.

[15] The Applicant argued that the Board's forms were confusing and that he did "*his best*" to comply with the requirements for completing his application. For many of the same reasons advanced by counsel for the Employer, the Applicant asked that his application not be dismissed and that a representative vote of members of the bargaining unit be held.

Relevant Statutory Provisions:

[16] The relevant provisions of *The Trade Union Act* are as follows:

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

...

19(1) *No proceedings before or by the board shall be invalidated by reason of any irregularity or technical objection, but the board may, at any stage of proceedings before it, allow a party to alter or amend his application, reply, intervention or other process in such manner and upon such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy in proceedings.*

(2) *The board may at any time and on such terms as the board may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings.*

(3) *For greater certainty but without limiting the generality of subsections (1) and (2), in any proceedings before it, the board may, upon such terms as it deems just, order that the proceedings be amended:*

(a) *by adding as a party to the proceedings any person or trade union that is not, but in the opinion of the board ought to be, a party to the proceedings;*

(b) *by striking out the name of a person or trade union improperly made a party to the proceedings;*

(c) *by substituting the name of a person or trade union that in the opinion of the board ought to be a party to the proceedings for the name of a person or trade union improperly made a party to the proceedings;*

(d) *correcting the name of a person or trade union that is incorrectly set forth in the proceedings.*

(4) *The board may at any time correct any clerical error in any order or decision made by the board or any officer or agent of the board.*

Analysis:

[17] The Applicant impressed the Board as a credible and thoughtful individual who genuinely desired, for his own personal reasons, to no longer work in a unionized workplace. The Applicant expressed his desire to his coworkers and sought out like-minded individuals in the workplace. As is often the case, at some point in time, the Applicant's desire resonated into more than just talk and he began discussing the topic with his coworkers, not for the purpose of conversation, but to gather information and support for whatever steps were necessary to do something; to take action. It was clear from the evidence that the Applicant had a poor understanding of what he needed to do. On the other hand, there can be no doubt as to the Applicant's personal motivation to do something. Through questioning his coworker, the Applicant learned that he needed to get and complete certain forms; and that he needed to make an application by filing those forms with the Board.

[18] The Applicant testified that he did not know about the open period when he forwarded his first application to the Board. However, he did learn about the open period from the Registrar, who explained to him both that there was a thirty (30) day period when rescission applications had to be filed with the Board and how to calculate that open period. The Applicant was given this information on or about September 21, 2010; giving him approximately ten (10) days within which to amend and return his application to the Board.

[19] The Board has considerable sympathy for the Applicant. It was obvious to the Board that he was unfamiliar with the forms he was trying to complete, as well as the requirements of the *Act* and the procedures of the Board. In this regard, the concerns of counsel for the Employer are well taken; employees wishing to decertify a trade union are at an information disadvantage. A long standing goal of the Board (and arguably its reason for existence) is to provide a simplified and efficient process whereby employers, trade unions and individuals alike may exercise their rights under the *Act* without fear of overly technical objection. To which end, the Board's procedures and processes attempt to accommodate both laypersons and seasoned professionals. Furthermore, the Legislature has seen fit to grant the Board with generous authority to cure technical defects or irregularities in applications for the purpose of determining the real questions in controversy in proceedings. Unfortunately for the Applicant, in our opinion, the late filing of a rescission application is not the kind of technical defect or irregularity that the Board can cure pursuant to s. 19 of the *Act*.

[20] Applicants seeking to rescind a certification Order of the Board must file their applications with the period of time prescribed by s. 5(k) of the *Act*. The Province of Saskatchewan, through *The Trade Union Act*, has prescribed the procedure for employees to become organized and represented by a trade union. In doing so, the Legislature has also recognized and established a procedure for members of a bargaining unit to revisit the representative question. Part of the prescribed procedure is a statutory limitation on the period of time when employees may bring rescission applications. The legislative goal of doing so is to promote stability in an organized workplace; whereby a trade union's exclusive right to represent the members of a certified bargaining unit is unassailable other than during specific, annually-occurring periods. In the Board's opinion, s.19 of the *Act* does not provide sufficient authority to allow the Board to accept the late filing of a rescission application.

[21] Even if the Board could find sufficient authority in s. 19 to cure a defect of late filing, we would not have been persuaded to do so. In our opinion, allowing for the late filing of a rescission application, even under the somewhat unusual and sympathetic circumstances of this case, would create an undesirable precedent and would undermine the certainty and predictability of a trade union's representative rights. In coming to this conclusion, the Board is very mindful of the informational disadvantage faced by employees seeking to decertify an incumbent trade union relative to the depth of assistance available to employees seeking to become organized. Nonetheless, in our opinion, the temporal limits prescribed in the *Act* serve an important role in promoting industrial peace and stability in the workplace. In our opinion, it would represent both an error in law and policy to allow rescission applications to be filed outside of the period prescribed by the *Act*.

[22] In coming to this conclusion, we were not persuaded by the argument that the Board could rely on the fact that the Applicant delivered his first application to the Board within the open period as a vehicle or basis upon which to cure the defect in the late filing of his second application. While it is arguable that the Board could have cured the defects in the Applicant's first application under the authority of s. 19 of the *Act* (had that application be accepted by the Registrar and the matter proceeded to hearing before the Board), it is speculative to assume the Board would have cured the defects in that application. Furthermore, the facts are that the Applicant's original application, together with his evidence of support, was returned to the Applicant so that he could correct his own application. When these documents were returned to him, he had sufficient time to complete that task and to return the documents to the Board. The Registrar routinely assists applicants with their applications and there was time for the Applicant to refine and clarify his application. The Registrar explained both that there was a deadline by which rescission applications must be filed and the means by which to calculate that deadline. Furthermore, the Applicant's own adviser, Mr. Rogoza, told him to get it done "*as soon as possible*". Unfortunately, for the Applicant, he did not heed the advice his was provided. In this regard, the Board notes that the Applicant did not swear his second (his corrected application), until after the open period had already closed.

[23] In dismissing the Applicant's application, the Board is also mindful that the open period occurs every year and the Applicant, if he chooses to do so, may file a new rescission application in the not too distant future and, if he does so, he will have the benefit of the experience he has learned from this current application.

Conclusion:

[24] For the foregoing reasons, the Applicant's application for rescission must be dismissed.

[25] However, because the Applicant's application was dismissed for a technical irregularity (i.e.: being filed outside of the open period), in our opinion, the dismissal of his application ought not to be an impediment to the filing of a similar application pursuant to s. 18(m) or (n) of the *Act*.

DATED at Regina, Saskatchewan, this **3rd** day of **May, 2011**.

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson