The Labour Relations Board
Saskatchewan

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant, v. WAL-MART CANADA CORP., Respondent

LRB File No. 166-10, February 8, 2011
Vice-Chairperson, Steven Schiefner; Members: Mr. Ken Ahl and Mr. John McCormick

For Applicant Union: Mr. Drew Plaxton
For Respondent Employer: Mr. John R. Beckman, Q.C. and Ms. Catherine A. Sloan

Collective Agreement - First Collective Agreement – Union seeks assistance from Board in concluding terms of first collective agreement – Board hears argument on potential appoint of Board agent to meet with parties and report to Board on status of collective bargaining – Employer argues application is premature as little collective bargaining has occurred between parties – Employer also argues Board does not have authority to appoint agent in first collective agreement applications – Board discusses two-stage procedure for first collective agreement applications and concludes that lack of progress at bargaining table not impediment to appointment of agent – Board satisfied that sufficient statutory authority exists to appoint agent.

The Trade Union Act, ss. 26.5 and 42

REASONS FOR DECISION

[1] **Steven D. Schiefner, Vice-Chairperson:** In these proceedings, the United Food and Commercial Workers Union, Local 1400 (the "Union") seeks the assistance of the Saskatchewan Labour Relations Board (the "Board") in concluding a first collective agreement with Wal-Mart Canada Corporation (the "Employer") with respect to a unit of employees working at the Employer's store in Weyburn, Saskatchewan.

[2] Although the labour relations history of this workplace has been recounted in numerous decisions of this Board, the events and circumstances relevant to these proceedings are set forth below.

Background:

[3] The Union's certification application was filed with the Board on April 19, 2004.[1] On December 4, 2008, a panel of the Board (hereinafter the "original panel") rendered a decision; determined the appropriate composition of the Statement of Employment; and concluded that the Union enjoyed the support of the majority of employees in the appropriate bargaining unit.[2] In concluding that the Union enjoyed the majority support of affected employees, the original panel relied upon the card-based evidence of support filed by the Union at the time the certification application was filed with the Board.

[4] At the time the Union filed its application for certification (on April 19, 2004), and at the time argument on the Union's application before the original panel concluded (on December 13, 2005), *The Trade Union Act*, R.S.S. c.T-17 (the "*Act*") did not mandate that a representative vote be conducted and the Board's practice at the time was to determine whether or not a trade union enjoyed the support of a majority of the employees in a bargaining unit on the basis of card evidence of support (i.e. membership/support cards). At that time, the *Act* only compelled a representative vote in limited circumstances; circumstances not present before the original panel. However, in May of 2008 and before the original panel of the Board rendered its decision on the Union's certification application, s. 6 of the *Act* was amended so as to require a representative vote by secret ballot before a certification Order could be granted. However, no representative vote within the meaning of s. 6 of the *Act* (as amended) was conducted by the original panel, who, as indicated, relied on the card-based evidence of support filed by the Union with its certification application.

[5] On December 15, 2008, the Employer filed an application for reconsideration with the Board alleging the original panel erred in certifying the Union. Prior to a hearing on its application for reconsideration, the Employer sought and obtained, by Order of the Board dated December 24, 2008, a partial stay of obligations on the Employer respecting disclosure of employee information. In addition, the Union sought and obtained an Order of the Board dated January 16, 2009 compelling the parties to meet and bargain collectively. The Employer and the Union met for purpose of collective bargaining on February 4, 2009 and March 4, 2009.

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1 LRB File No. 069-04

2 See: *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp. at Weyburn, Saskatchewan, operating as Wal-Mart, Wal-Mart Canada, Sam's Club and Sam's Club Canada, et al.*, [2008] Sask. L.R.B.R. 951, 2008 CanLII 64399, LRB File Nos. 069-04, 122-04 & 124-04 to 130-04 (inclusive).

[6] On March 26, 2009, the Board rejected the Employer's application for reconsideration, concluding that the changes to s. 6 of the *Act* (that became effective on May 14, 2008) did not apply to applications filed with the Board prior to the change in legislation.[3]

[7] On March 27, 2009, the Employer applied to the Saskatchewan Court of Queen's Bench seeking judicial review of this Board's decision to designate the Union as the certified bargaining agent.[4] On March 31, 2009, the Saskatchewan Court of Queen's Bench issued a stay of the Board's certification Order. On June 23, 2009, the Saskatchewan Court of Queen's Bench concluded that the Board erred in relying on membership cards for purposes of determining whether or not the Union enjoyed majority support in certifying the Employer's store in Weyburn. Simply put, the Court concluded that the amendments to s. 6 of the *Act* ought to have been given retroactive application by the Board and, thus, the Board erred in failing to conduct a representative vote. The Board's certification Order dated December 4, 2008 was quashed and the matter was remitted back to the Board.[5]

[8] On July 22, 2009, the Union filed an application with the Saskatchewan Court of Appeal seeking to overturn the decision of the Court of Queen's Bench.[6] On October 14, 2010, the Court of Appeal granted the Union's application, concluding that the changes to s. 6 of the *Act* did not apply to applications filed and argued before the Board prior to the change in legislation.[7] In so doing, the Court of Appeal re-instated the Board's certification Order.

[9] As a result of the intervening proceedings, the status of the Union's certification Order can be summarized as follows:

Period:	Status of Certification Order:
December 4, 2008 to December 23, 2008:	Union certified to represent employees.
December 24, 2008 to March 30, 2009:	Partial stay imposed by Board. Obligation to bargain collectively but restriction on Employer's obligation to disclose employee information and membership cards.

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3 See: *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp. et. al.*, 2009 CanLII 13640, LRB File No. 069-04.

4 Q.B.G. No. 387 of 2009.

5 See: Wal-Mart Canada Corp v. *United Food and Commercial Workers, Local 1400, et. al.*, 2009 SKQB 247, (CanLII).

6 C.A. 1811 of 2009 (*United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp, et. al.).*

7 See: *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp. et. al.*, 2009 CanLII 13640, LRB File No. 069-04.

March 31, 2009 to June 22, 2009:	Stay of Certification Order imposed by Court.
June 23, 2009 to October 13, 2010:	Certification Order quashed by Court.
October 14, 2010 to present:	Union certified to represent employees.

[10] The circumstances involved in these proceedings are unique in a number of respects. Firstly, there was a not-insignificant delay in the original panel rendering its decision on the Union's certification application and during this period a number of things changed, including relevant provisions of the *Act*.

[11] Secondly, a number of intervening factors have limited the Union's practical capacity to represent its members following certification. Although the Union has been certified to represent the employees in this bargaining unit for over two (2) years, the Union's authority to do so has been either restricted or entirely vacated for all but a few months of that period.

[12] Finally, very little in the form of collective bargaining has occurred between the parties. The first collective bargaining session (on February 4, 2009) was primarily limited to the members of the respective bargaining teams introducing themselves to each other. During the second session (on March 4, 2009), the bargaining teams exchanged initial proposals involving non-monetary terms for a collective agreement and agreed to the date for a third bargaining session. The third collective bargaining session was cancelled following the stay imposed by the Saskatchewan Court of Queen's Bench on March 31, 2009. No further collective bargaining occurred between the parties following the stay and the subsequent quashing of the Board's certification Order.

[13] As indicated, the Board's certification Order was reinstated by the Saskatchewan Court of Appeal on October 14, 2010. The Union's application for first collective agreement assistance was filed with the Board on October 15, 2010; the day after the decision of the Court of Appeal. Obviously, no collective bargaining could or did take place during that limited period of time before that application was filed. On October 15, 2010, the Union wrote to the Employer advising that the Union would like to begin collective bargaining again and asked the Employer for information as to when the Employer's bargaining representatives would be available to do so. However, on October 22, 2010, the Employer wrote to the Union and advised that it was assessing its position regarding collective bargaining in light of the Union having filed an application seeking the assistance of the Board toward the conclusion of a first collective

agreement. Suffice it to say, no collective bargaining occurred between the parties following the filing of the Union's application for first collective agreement assistance.

[14] Simply put, since the Union has been certified to this workplace, the parties have met for collective bargaining on two (2) occasions, the culmination of which was the exchange of initial collective bargaining proposals involving non-monetary items.

[15] With respect to the list of issues in dispute (and statements of the positions of the parties relative to the issues in dispute), the Union filed a copy of the respective collective bargaining proposals exchanged between the parties in March of 2009. In its application, the Union took the position that no items had been agreed to by the parties and thus all issues remained in dispute, including monetary proposals (which had not been the subject of any collective bargaining between the parties). In its Reply, the Employer took the position that there was no list of issues in dispute because everything was in dispute and there was no "last offer" from either party because the only offers that had been exchanged between the parties had been their initial offers from March of 2009.

[16] The parties appeared before the Board on January 11 and 24, 2011 in Regina, Saskatchewan, at which time the Board heard argument on its authority and the appropriateness of the Board appointing an agent to meet with the parties and to report to the Board on the status of collective bargaining between the parties. In support of its application, the Union relied on the material filed in its application and in LRB File No. 184-10. The Employer's Reply was filed on January 18, 2011. The Union also filed and relied upon the affidavit of Mr. Norman Neault dated January 21, 2011.

Argument of the Parties:

[17] The Union took the position that a Board agent should be appointed in accordance with the usual practice of the Board. The Union argued that, without the Board's intervention, it would be impossible for the parties to achieve a first collective agreement given the history of the relationship between the Union and the Employer, both in Saskatchewan and elsewhere.

[18] The Union reminded the Board that it has been six and one-half (6 ½) years since the Union first applied for certification and asked the Board to be mindful of the difficulties that it

has experienced in attempting to represent the workers at this particular workplace. The Union argued that the Employer had resisted the Union's certification efforts from the very beginning and pointed to various legal proceedings advanced by the Employer during the original panel's hearing of the Union's certification application, together with the various challenges mounted by the Employer following the issuance of the Board's certification Order, as evidence of such resistance. The Union also argued that the Employer had disregarded the requirements and expectations of a certified employer as set forth in the *Act* and described the Employer as being wholly unwilling to cooperate with the Union unless expressly ordered to do so by this Board. For example, the Union argued that the two (2) bargaining sessions that took place in 2009 only occurred after the Employer was directed by this Board to do so. The Union pointed to the Employer's continued unwillingness to meet with the Union for purposes of collective bargaining following the reinstatement of the Board's certification Order by the Court of Appeal, together with the Employer's delay in filing a Reply in these proceedings until directed to do so by this Board. Finally, the Union argued that the proposals advanced by the Employer during collective bargaining in March of 2009 were not "real" proposals and that the Board should see these as further evidence of the Employer's general desire to frustrate and delay collective bargaining.

[19] For all of these reasons, the Union took the position that, without assistance from the Board, collective bargaining between the parties would be fruitless and the employees at the workplace would never know the benefits of Union representation.

[20] In the event the Board was not satisfied that the Employer had been at fault in the delay and frustration experienced by the Union in attempting to represent the bargaining unit, the Union reminded the Board that fault was not a necessary element of the exercise of the Board's discretion to appoint a Board agent in a first collective agreement applications. The Union relied on the decision of this Board in *United Food and Commercial Workers Union, Local 1400 v. Sobeys Capital Inc.*, [2005] Sask. L.R.B.R. 482, 2005 CanLII 63023, LRB File No. 128-05, as standing for the proposition that the appointment of a Board agent ought to be ordered by the Board as a routine (automatic) matter if the pleadings filed in a first collective agreement application demonstrate that the statutory preconditions of s. 26.5 of the *Act* have been satisfied. To which end, the Union argued that the pleadings, on their face, demonstrate that the statutory preconditions have been satisfied; namely that a certification Order has been issued by the Board; that the parties have bargained collectively and have failed to conclude a first collective

agreement; and ninety (90) days or more has passed since the Board issued its certification Order.

[21] In appointing a Board agent, the Union asked that a short period be imposed for the agent to report back to the Board on his/her findings, something in the range of thirty (30) to sixty (60) days.

[22] In support of its position, the Union also relied upon the decisions of this Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Prairie Micro-Tech Inc.*, [1996] Sask. L.R.B.R. 36, L.R.B. File No. 201-95; *Amalgamated Transit Union, Local 588 v. Wayne Bus Ltd.* [1997] Sask. L.R.B.R. 507, LRB File Nos. 130-97 & 163-97; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Boardwalk Equities (Sask.) Inc.*, [2002] Sask. L.R.B.R. 224, LRB File No. 150-01; *Service Employees International Union, Local 333 v. Lutheran Sunset Home of Saskatchewan and Lutheran Sunset Home Corp.*, [2005] Sask. L.R.B.R. 383, 2005 CanLII 63087, LRB File Nos. 104-04, 105-04, 106-04 & 107-04, and the decision of the Saskatchewan Court of Queen's Bench in *Lutheran Sunset Home of Saskatoon v. Service Employees International Union, Local 333*, 2007 SKQB 214, 308 Sask. R. 316.

[23] The Employer, on the other hand, argued that the parties should be left on their own to bargain collectively and that it is premature for the Board to intervene in any form; even through the appointment of a Board agent. Firstly, the Employer argued that it should not be seen as responsible for the delay or frustration experienced by the Union in representing its members. The Employer argued that, if blame for delay is going to be laid at anyone's feet, it should be the original panel's (for the delay in rendering a decision on the Union's original certification application) and the Saskatchewan Legislature's (for amending *The Trade Union Act*, without including a transition clause to indicate whether or not the amendments applied to pending applications before the Board).

[24] Secondly, the Employer argued that the Union could have contacted and communicated with the employees in the workplace (through other employees who were supportive of the Union) at any time during the past six (6) years. The Employer argued that, while its policy against solicitation restricted Union representatives from soliciting its employees at the workplace, there was nothing preventing one employee (i.e. an employee support of the Union) from talking to other employees in the workplace.

[25] Thirdly, the Employer argued that collective bargaining had hardly begun between the parties; that collective bargaining had never progressed far enough or had a chance to break down or come to any form of impasse. The Employer relied on this Board's decisions in *Prairie Micro-tech, supra; United Food and Commercial Workers, Local 1400 v. Madison Development Group Inc.*, [1997] Sask. L.R.B.R. 68, LRB File No. 053-96; *National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW – Canada) v. Saskatchewan Indian Gaming Authority Inc*, [2001] Sask. L.R.B.R. 42, LRB File No. 092-00, as standing for the proposition that the Board's discretion to intervene in collective bargaining is an extraordinary authority and that the Board should take a cautionary approach to the exercise of that discretion. To which end, the Employer argued that the history of the Board has been to only intervene in circumstances where collective bargaining had reach an impasse and/or negotiations had broken down. In the present case, the Employer noted that there was no breakdown in negotiations; rather negotiations are (because of intervening factors) where they started; at the very beginning of the process. The Employer cautioned the Board that, if it intervenes in these circumstances, then the floodgates are open and the Board is saying that it will intervene in any circumstance; even in circumstances where one of the parties comes to Board seeking assistance without making <u>any</u> effort to reach an agreement at the bargaining table.

[26] The final argument of the Employer was to challenge the Board's authority to appoint an agent in first collective agreement applications. The Employer argued that the amendments to s. 18 of the *Act* that occurred in 2005[8] altered the Board's jurisdiction to delegate its powers and functions. The Employer argued that s. 18 does not include the power to delegate to a Board agent the authority to investigate, report and make recommendations concerning first collective agreements. As a creature of statute, the Board only has the powers and jurisdiction conferred upon it by statute and the Employer argued that s.18 of the *Act* does not include the requisite authority to appoint a Board agent in these circumstances.

[27] For the foregoing reasons, the Employer argued that an agent should not be appointed by the Board; rather the Union's application for first collective agreement assistance ought to be dismissed. However, in the event the Board concluded that some form of assistance for the parties was desirable at this early stage in collective bargaining, the Employer argued that

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[8] *The Trade Union Amendment Act, 2005*, S.S., c.30. s.7

the more appropriate course of action would be for the Board to refer the matter for conciliation pursuant to s. 26.5(6) of the *Act*.

[28] Counsel for the Employer filed written submissions, which we have read and for which we are thankful.

Relevant Statutory Provisions:

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

> ***First collective bargaining agreements***
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> *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:*
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> > *(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).*
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> *(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.*
> *(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.*
> *(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.*
> *(5) Within 14 days after receiving the information mentioned in subsection (4), the other party must:*
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> > *(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.*

(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.

(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.

(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.

(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.

(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.

. . .

Powers and duties of board

42. The board shall exercise such powers and perform such duties as are conferred or imposed on it by this Act, or as may be incidental to the attainment of the objects of this Act including, without limiting the generality of the foregoing, the making of orders requiring compliance with the provisions of this Act, with any regulations made under this Act or with any decision in respect of any matter before the board.

Analysis and Conclusion:

[30] For the reasons that follow, we have concluded that it is appropriate to appoint an agent in the present case.

[31] Section 26.5 was enacted as part of the October 1994 amendments[9] to the *Act*. The purpose of s. 26.5 is to allow either party to a newly certified bargaining relationship to seek the assistance of the Board in reaching a first collective agreement. In *Prairie Micro-Tech, supra*, the Board considered the provision for the first time and adopted a two (2) stage

[9] *The Trade Union Amendment Act, 1994*, S.S. c.47 s.15.

procedure for hearing and making determinations with respect to s. 26.5 applications. The first stage involves the appointment of a Board agent with a mandate to perform two (2) separate yet valuable tasks, namely; to meet with and assist the parties, if possible, in exploring whether or not they are able to resolve the collective bargaining issues in dispute; and, if not, to report to the Board on the progress of collective bargaining and to make recommendations firstly on whether or not the Board should intervene to assist the parties to conclude a first collective agreement and, if so, the potential terms of said intervention.

[32] As indicated, the Board has adopted a two (2) stage procedure for hearing and making determinations with respect to s. 26.5 applications, with the second stage occurring following the receipt of the Board agent's report. The Board agent only has the power to make recommendations and this occurs only if the parties are unable to agree on the terms of their collective agreement. Recommendations from the Board agent with respect to potential terms that could be imposed by the Board to resolve the issue in dispute only occur if the Board agent believes that it is appropriate and necessary for the Board to intervene in the collective bargaining process. Although of valuable assistance to the Board in understanding the issues in dispute between the parties, the Board agent's report is not binding on either the Board or the parties. The final determination as to whether or not it is appropriate for the Board to assist the parties through intervention is that of the Board and this determination occurs only at this second stage in the process. At the second stage, the parties have the full opportunity to bring forth such evidence and advance such arguments as they deem appropriate in response to the recommendations contained in the Board agent's report.

[33] The Employer argued that it is premature for the Board to intervene in any form in the present case, including the appointment of a Board agent, because of a lack of collective bargaining between the parties; as the Employer described it, "*collective bargaining has barely begun*". The Employer cautioned that, if the Board elects to intervene in the present circumstances, we would be opening the floodgates to s. 26.5 applications.

[34] The Employer's argument on this point is not without merit. Certainly, very little in the form of collective bargaining has occurred between these parties. A number of forces have conspired to interfere with and delay the Union's desire to represent the members of this bargaining unit, including the original panel's delay in rendering a decision on the Union's certification application, the intervening changes that occurred to the *Act* prior to the original

panel's decision, and the lack of transitional provision in the legislation to aid in the temporal application of those changes. Multiple court proceedings were required (the last of which concluded on October 14, 2010) to resolve the issue of whether or not the original panel was correct in its December, 2008 decision to certify the Union. While the resolution of this important issue took some time and during this period the Union's practical capacity to represent its members was frustrated, the Board is not prepared to (for purposes of these proceedings) ascribe any blame to either party for the delay which has occurred in these proceedings or for the limited progress that has occurred at the bargaining table.

[35] Simply put, through no fault of their own, the parties have accomplished little more than introductions and an initial exchange of proposals at the bargaining table since the workplace was certified over two (2) years ago. Furthermore, the parties haven't even started bargaining with respect to monetary issues. However, having considered this Board's jurisprudence with respect to the appointment of Board agents in first collective agreement applications and the purpose for which such agents are appointed, we have concluded that the lack of progress at the bargaining table is not an impediment to the appointment of a Board agent.

[36] Firstly, through amendments made to the *Act* in 2005[10], the circumstances wherein the Board is authorized to intervene in the collective bargaining process was expanded (some may argue dramatically). In 2005, sub clause 26.5(1.1)(c)(iv) was added to the *Act*, which provision allows the Board to intervene in the collective bargaining process merely upon the passage of ninety (90) days since the Board granting a certification Order (provided the parties have bargained collectively).

[37] Secondly, through a number of decisions of the Board, including *Sobeys Capital Inc., supra*, and *Winners Merchants International L.P. v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, [2006] Sask. L.R.B.R. 275, 2006 CanLII 62959, LRB File No. 225-05, this Board has adopted a general preference for the routine appointment of Board agents in the first stage of hearing first collective agreement applications that (upon a cursory review) appear to satisfy the statutory preconditions for intervention set forth in s. 26.5. In the present case, those statutory preconditions include that the Union has been certified to represent the employees at this workplace; that the parties have commenced collective

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[10] *The Trade Union Amendment Act, 2005*, S.S., c.30. s.7.

bargaining and have been unable to reach a collective agreement; and in excess of ninety (90) days have occurred since the Board granted its certification Order. In our opinion, the lack of substantive collective bargaining is one of many factors to be considered by the Board agent in both working with the parties and reporting to the Board. However, we are not satisfied that it ought to be an impediment to the appointment of a Board agent. In our sixteen (16) year history with first collective agreement applications, the Board has not experienced a "flood" of applications and we doubt that this determination will alter that fact. If it does, a future panel may well wish to revisit the issue of whether or not some threshold level of collective bargaining is required before the Board should exercise its discretion to even appoint a Board agent. However, today is not that day.

[38] At this early stage in the proceedings, it is difficult to assess whether the unique circumstances of this collective bargaining relationship make it more likely or less likely that the intervention by the Board is appropriate or necessary. It is hoped that a Board agent, as a neutral third party, can assist the Board with that very question. For these reasons, we believe that the appointment of a Board agent is appropriate in these proceedings and consistent with the general preference of the Board in proceeding with s. 26.6 applications.

[39] The Employer also argued that, in its opinion, the Board does not have the requisite authority (or jurisdiction) to appoint a Board agent to investigate and make recommendations concerning a first collective agreement. The Employer argued that express statutory authority must be found to do so and that no such authority existed in the *Act*.

[40] With all due respect, we are not persuaded by this argument. The appointment of a Board agent is a procedural matter finding its authority in s. 42 of the *Act*; as is the discretion of the Board to adopt a two-stage process for hearing s. 26.5 application. Neither the appointment of a Board agent nor the tasks performed by the agent pursuant to his/her appointment are considered to be intervening in the collective bargaining process. The agent's initial function is merely to meet with the parties and, if possible, to assist the parties in advancing the collective bargaining process. The secondary function of the agent is to provide the Board with a third dimension to the evidentiary foundation provided by the two (2) parties. The Board agent only has the power to make recommendations and one of the first questions that the agent must turn his/her mind to is whether or not <u>any</u> intervention by the Board is appropriate or desirable based on his/her observations as to the collective bargaining relationship between the parties. In

appointing an agent, the Board is not delegating its power; but rather, the Board is adopting a procedure that we believed will both assist the parties to a newly formed collective bargaining relationship and augment the information available to the Board in the event a formal hearing on the application is required. In our opinion, support for these conclusions can be found in the decision of the Albright J. in *Saskatchewan Indian Gaming Authority Inc. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, 2002 SKQB 267, 221 Sask. R. 79, wherein he made the following observations regarding the Board's practice of appointing a Board agent in first collective agreement applications:

> *[45] The significant factor in the Board's use of a Board agent follows from the nature of the agent's function. The Board agent in this matter was not appointed to actually conclude the terms of the collective agreement between the parties. Here, Mr. Stevens was appointed to make recommendations to the board. Both parties were provided with the Boar agent's report, and were given the opportunity in hearings before the board to address all of the recommendations contained in the Board agent's report. They were able to do this either through the calling of evidence or cross-examination, and argument. The record discloses that the Board hearings convened on September 24, and continued September 25, September 26, and October 3 of 2001. These hearings ultimately led to the board's reasons for decisions on January 21, 2002.*
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> *[46] On examining both the philosophical basis for the Board's utilization of a Board agent, and the actual use made of the Board agent in this instance, I am led to the conclusion that the Board did not improperly delegate its powers to the Board agent, by ordering the Board agent to make his own assessment on the collective bargaining matters, and thereafter provide a report to the Board on outstanding issues. Ultimately, the decision was that of the Board and not the board agent. In essence, I consider the utilization of the Board agent to be a procedural matter within the jurisdiction of the Board. Unless the Board were to abdicate its ultimate decision-making responsibility to the Board agent, the matter does not become a jurisdictional one whereby the Board could be said to have lost its jurisdiction.*

[41] For the foregoing reasons and in order for the Board to fulfill its obligations under the *Act* in the context of this application, the Board finds its appropriate to appoint an agent to inquire into the issues of: (1) whether the Board should intervene in the collective bargaining process by imposing any term or terms of a first collective agreement; and (2) if so, what terms should be imposed. The usual order for appointment of a Board agent will issue with the requirement that the agent report back to the Board within ninety (90) days or such further period upon an extension being granted by Vice-Chairperson Schiefner.

[42] The Union noted that a potential conflict may exist with the timelines set forth by the Board in paragraph 38 of the Reasons for Decision on procedural matters in *United Food*

and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp. and Gordon Button, LRB File Nos. 096-04, 038-05, 001-09, 166-10, 177-10 & 188-10, dated December 9, 2010 (unreported). In our opinion, the requirements set forth in that paragraph were satisfied when the Board began hearing the first stage of the Union's s. 26.5 application on January 24, 2011.

[43] However, in reviewing the Reasons for Decision rendered in those proceedings, it was noted that an error occurred in paragraph 3 (of those Reasons) as to the chronology of certain events. Paragraph 4 of these Reasons for Decision contains a correct chronology of events and we apologize for any confusion this error may have caused. In our opinion, nothing of substance turns on the error contained in those Reasons for Decision.

DATED at Regina, Saskatchewan, this **8th** day of **February, 2011.**

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson