The Labour Relations Board
Saskatchewan

SASKATCHEWAN GOVERNMENT and GENERAL EMPLOYEES' UNION, Applicant v. SASKATOON OPEN DOOR SOCIETY INC., Respondent

LRB File No. 049-12; November 21, 2012
Chairperson, Kenneth G. Love, Q.C.; Members: Brenda Cuthbert and Duane Siemens

For the Applicant: Greg Eyre
For the Respondent Shannon Whyley

Trade Union Act, Section 24 – Union applies to Board for resolution of a dispute concerning new positions created by Employer – Employer seeks to have new positions out-of-scope of the bargaining unit.

Jurisdiction of Board – Employer objects to Board's jurisdiction to hear and determine dispute under s. 24 of *The Trade Union Act*. – Employer argues that Union may not unilaterally refer dispute to the Board. – Union points to provision of current collective bargaining agreement which it argues provides the necessary agreement for the dispute to be referred to the Board.

Jurisdiction of Board – Board considers provision of the collective bargaining agreement – Board finds that provision does not provide a clear and unequivocal agreement to refer the dispute or class of disputes to the Board.

Trade Union Act, Section 5(j) – Notwithstanding the lack of a clear and unequivocal agreement to refer the dispute or class of disputes to the Board the Board considers its authority under s. 5(j) of the *Act* and determines to hear and adjudicate the issue under that authority.

Trade Union Act, Section 19(1) – Board considers its authority under s. 19(1) and determines to permit amendment of the Union application pursuant to s. 19(1) to permit the determination of the real questions in controversy between the parties.

REASONS FOR DECISION

Background:

[1] Saskatchewan Government and General Employees' Union, (the "Union") is certified as the bargaining agent for a unit of employees of the Saskatoon Open Door Society Inc., (the "Respondent"). On March 14, 2012, the Union applied to the Board under s. 24 of *The*

Trade Union Act, R.S.S. 1878, c.T-17 (the "*Act*"), requesting the Board adjudicate a dispute between the parties related to the creation by the Respondent of new positions which it contends should be outside the scope of the bargaining unit. The Respondent raised an objection to the jurisdiction of the Board to deal with the application. For the reasons which follow, the Board has determined that it has the jurisdiction to hear and determine the dispute.

Facts:

[2] The Board issued a certification Order related to the employees of the Respondent on March 15, 2001 (LRB File No.: 177-99). The bargaining unit certified was an "all employee" unit except for "the executive director, community reception manager, education and training manager, and caretaker."

[3] At the time of certification, the Respondent had fewer employees than it does at present. In 2004, the Respondent employed approximately 35 employees. Presently, the Respondent employs approximately 150 – 160 employees in (3) three locations in Saskatoon.

[4] The parties have negotiated changes to the scope of the bargaining unit on several occasions. In their collective bargaining agreement for the period November 17, 2001 to December 31, 2004, the collective bargaining unit was described in Article 1 as:

> *…all employees of the Employer, excluding the Executive Director, Director of Programs, one other out-of-scope Manager Position and the Caretaker* ***and any other positions that may be agreed upon during the term of this agreement.*** *[Emphasis added]*

[5] That agreement also contained a provision dealing with Changes in Classification New Classes of Positions in Article 21.02. That provision provided as follows:

> *The Employer shall give written notice to the Union of the intent to implement a new classification, including the Employer's determination as to the exclusion or inclusion in the bargaining unit, along with the rate of pay of the new classification. If the Union does not indicate in writing an objection to the rate of pay within 30 calendar days, the Employer will implement the new classification and rate of pay without further challenge from the Union. In the event of a disagreement over the exclusion of a new class of positions from the bargaining unit, the Employer may fill the positions as an out-of-scope position and the parties may refer the dispute to the Labour Relations Board.*

[6] The parties entered into a new collective bargaining agreement for the period January 1, 2005 to December 31, 2007. In that collective bargaining agreement, there were no changes to either Article 1 dealing with scope, or to Article 21.02 as referenced above.

[7] During 2006, the Respondent entered into discussions with the Union concerning the organizational restructuring proposal. By letter dated August 11, 2006 from the Union to the Respondent's Executive Director, the Union advised that it did not agree to any additional exceptions to the scope of the bargaining unit.

[8] Notwithstanding the Union's objections, on September 12, 2006, the Executive Director for the Respondent wrote to all staff to advise them that the Board of Directors had passed a motion to move forward with the implementation of the restructuring. On that same date, the Respondent advised the Union of its intention to proceed with the reorganization.

[9] The Union responded to the Respondent on November 14, 2006. In its letter, the Union advised:

> *Therefore, the Union agrees to accept the Employer's restructuring proposal for a period of one year, without prejudicing our rights to come forward at any time between now and then to apply to the Labour Relations Board with respect to the appropriateness of the exclusions. The Union understands that the Employer intends to undertake an evaluation of the organizational restructuring over the next six to twelve months, and the Union advises that it intends to participate fully in this review.*
>
> *Should the Union determine that these positions are appropriately in-scope, we will proceed to the Labour Relations Board and pursue our options there. If, on the other hand, the Union concludes that on the evidence, the positions are properly excluded, we will raise the matter no further. The Union expects the Employer to cooperate in this information gathering exercise, and in return, shall not hinder or obstruct the Employer in carrying out of its duties, subject to the provisions of the Collective Agreement.*

[10] The matter did not end there. The issue was again raised during collective bargaining for the January 1, 2008 to March 31, 2011 collective bargaining agreement. Following those negotiations, the scope clause of the collective bargaining agreement was amended as follows:

> *…all employees of the Employer, excluding the Executive Director, Language Training and Day Care Manager, Employment Services Manager, Settlement*

> *and Family Support Manager, Finance and Administration Manager, and the Supervisor of Administration and Human Resources and the Caretaker.*

No change was made to Article 21.02.

[11] In 2009, the Respondent again proposed changes to the bargaining unit scope. The proposed change was to create a Coordinator of Administration and Information and an Accountant position. The Union agreed to this proposed change and undertook to prepare a Letter of Understanding to append to the collective bargaining agreement in that regard.

[12] The Respondent again proposed changes to the Union by letter dated July 4, 2011. In that correspondence, the Respondent proposed the following positions be placed out-of-scope:

1. Human Resource Manager
2. Office Coordinator
3. Executive Assistant
4. Accountant Technician
5. HR and Finance Support Clerk

[13] In its July 19, 2011 response to the request to have these positions out-of-scope, the Union took the position that "none except the HR Manager are properly out-of-scope". On September 21, 2011, the Respondent advised that notwithstanding the Union's objections, the Respondent was "moving forward to implement the following new positions out-of-scope pending a resolution."

1. Human Resource Manager
2. Office Coordinator
3. Executive Assistant
4. Acountant Technician
5. HR and Finance Support Clerk

[14] After receipt of this letter, the Union emailed the Respondent in an attempt to clarify the situation and to reiterate that it did not consent to the positions moving out-of-scope. In an email on October 26, 2011 from Greg Eyre of the Union, he referenced ss. 5(m) and ss. 5.2

of the *Act* with respect to provisional determinations by the Board related to newly created positions and their placement within or outside the scope of the bargaining unit. He also noted:

> *It is becoming clear that Saskatoon Open Door Society does not intend to make application to the LRB to determine the scope of these new positions. therefore [sic] take this as notice that the union intends under section 21.02 of the Collective agreement and or UUthe Trade Union Act to ask the Labour Relations Board to exercise the powers grant it by sections 5 and 24 of the Trade Union Act to determine whether all positions not excluded by the certification order are in or out of scope.*

[15] The Union then filed this application.

Relevant statutory provisions:

[16] Relevant statutory provisions are as follows:

> *5 The board may make orders:*
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> *(j) amending an order of the board if:*
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> *(i) the employer and the trade union agree to the amendment; or*
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> *(ii) in the opinion of the board, the amendment is necessary;*
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> *. . .*
>
> *(m) subject to section 5.2, determining for the purposes of this Act whether any person is or may become an employee;*
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> *. . .*
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> *5.2(1) On an application pursuant to clause 5(m), the board may make a provisional determination before the person who is the subject of the application is actually performing the duties of the position in question.*
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> *(2) A provisional determination made pursuant to subsection (1) becomes a final determination after the expiry of one year from the day on which the provisional determination is made unless, before that period expires, the employer or the trade union applies to the board for a variation of the determination.*
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> *. . .*
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> *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.*
>
> . . .
>
> *24 A trade union representing the majority of employees in a unit of employees may enter into an agreement with an employer to refer a dispute or disputes or a class of disputes to the board and the board shall hear and determine any dispute referred to it by either party pursuant to such agreement and the finding of the board shall be final and conclusive and shall in regard to all matters within the legislative jurisdiction of the Legislature of Saskatchewan be binding upon the parties and enforceable as an order the board made in accordance with this Act.*

Union's arguments:

[17] The Union relied upon Article 21.02 of the collective bargaining agreement as setting forth the Respondent's agreement to refer any dispute over placement of new positions either in-scope or out-of-scope to the Board. In the Union's submission, this provision constituted the required "agreement with an employer to refer a dispute or a class of disputes to the board…".

[18] The Union also argued as an alternative, that the Board's powers under s. 5 of the *Act* empowered the Board to deal with scope issues either by agreement under s. 5(j) or 5(m) and 5.2 of the *Act*. In that respect, the Union argued that the Board had the authority to determine the real question between the parties pursuant to s. 19(1) and s. 42 of the *Act*.

Respondent's arguments:

[19] The Respondent argued that the Board did not have jurisdiction to deal with this matter under s. 24 of the *Act* as applied for by the Union. They argued that that s. 24 required the parties enter into a discrete agreement for the purposes of s. 24 of the *Act*. In support, the Respondent quoted from s. 13(1) of the Board's regulations which provides:

> *13(1) Where a trade union and an employer enter into an agreement pursuant to Section 24 of the Act, either the trade union or the employer may make application to refer to the board any dispute covered by the agreement.*

[20] The Respondent also relied upon *Re: Sunrise Health Region*[1] and the decisions quoted therein to support its argument that the Board's jurisdiction under s. 24 is confined to hearing and determining those matters specifically agreed upon by the parties.

[21] The Respondent also argued that there must not only be a joint reference of the dispute, but also that there must be a clear and unequivocal agreement as to what dispute is referred to the Board. In this case, the Respondent argued there was neither a joint reference of the dispute, or a clear and unequivocal agreement as to the nature of the dispute.

Analysis:

[22] The Respondent filed a written Brief of Law which we have reviewed and found helpful. In that Brief, the Respondent raised three (3) issues by way of preliminary objection. These were:

1. What is the scope of the Board's jurisdiction with respect to a reference under Section 24 of the *Act*?

2. Has the Union brought the application as a reference pursuant to Section 24 of the *Act*?

3. If the Board does not have jurisdiction, what effect does this have on the dispute between the parties?

[23] While, a provision in a collective bargaining agreement, such as Article 21.02 could constitute an agreement to refer a dispute to the Board under s. 24 of the *Act*, the terms of that provision must clearly and unequivocally agree to refer a dispute or class of disputes to the Board.

[24] As noted by the Board in *Re: Sunrise Health Region*[2], the Board's jurisdiction under s. 24 is framed by the parties' reference of the dispute to the Board. It described its jurisdiction at paragraph 40 as follows:

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[1] [2008] S.L.R.B.D. No. 43, para 40, [2008] CANLII 87263, LRB File No. 036-08
[2] *supra* at Footnote 1l para 41

> *The Board's jurisdiction with respect to disputes referred to it under s. 24, since its decision in The Brotherhood of Painters and Allied Trades v. Days Paints Ltd. and Daymart Coatings Ltd,. [1983] Nov. Sask. Labour Rep. 39, LRB File No. 243-83 at 41 is confined to "hearing and determining those matters specifically agreed upon by the parties". Furthermore, in Federated Co-operatives Limited and Retail Wholesale and Department Store Union, Local 540, [1984] Oct. Sask. Labour Rep. 31, LRB File No. 059-83, the Board confirmed that at 33, that it is "reluctant to assume jurisdiction under Section 24 of the Act unless the parties have clearly and unequivocally agreed to refer the disputes to the Board…".*

[25] The facts in *Federated Co-operatives Limited and Retail Wholesale and Department Store Union, Local 540, supra,* are somewhat similar to the situation here. In that case, the parties had executed a Letter of Understanding which prescribed "a procedure for determining whether persons filling newly created positions are employees within the meaning of *The Trade Union Act*".[3] In that case, the Board said:

> *As a preliminary matter, the Respondent objects to the jurisdiction of the Board to deal with this application under Section 24 of the Act, on the ground that the Letter of Understanding does not amount to "an agreement to refer a dispute or disputes or a class of disputes to the board". That objection is valid. When considered in its entirety, the Letter of Understanding prescribes a procedure for determining whether persons filling newly created positions are employees within the meaning of The Trade Union Act. The arrangement permits the Employer to apply to the Board during the open period set out in Section 5(k) of the Act if both parties do not apply to the Board outside of that period, and in the interim a provisional ruling can be obtained at the Employer's expense by referring the question to one of the persons named in the letter. The entire arrangement is inconsistent with a binding agreement between the Employer and the Union to refer this dispute to the Board under Section 24 of The Trade Union Act. The Board is reluctant to assume jurisdiction under section 24 of the Act unless the parties have clearly and unequivocally agreed to refer the dispute or class of disputes to the Board, and that is not the case here.*

[26] As in the *Federated Co-operatives* case, the agreement here (Article 21.02 of the collective bargaining agreement) does not clearly and unequivocally frame the matters in dispute between the parties. It is, at best, as described above, an outline of a procedure that the parties will follow with respect to how to deal with the creation of new positions either within or outside of the scope of the bargaining unit.

[27] In the past, the parties in this case have resolved issues related to the creation of new positions by negotiations. However, when negotiations are not successful, the parties can be left in a stalemate. As noted by the Board in the *Federated Co-operatives* case, *supra*, there

cannot be conclusive determination as to the placement of the positions without some determination by the Board, in the absence of either agreement of the parties or through reference to arbitration. In the *Federated Co-operatives* case, *supra*, the Board assumed jurisdiction over the dispute under section 5(j) of the *Act* because it has "a duty to exercise its power when properly called upon to do so".[4]

[28] In the *Federated Co-operatives* case the Board then went on to say:

> *…Therefore, the Board will clarify or correct certification orders when properly called upon to do so unless a very cogent reason why it should decline to exercise its jurisdiction can be presented by the opposing party. The fact that the parties may have agreed upon a procedure for obtaining a temporary ruling if it cannot immediately obtain a decision from the Board is not sufficient reason for the Board to decline to act. …*
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> *The Board will proceed with the hearing of this application under Section 5(j) of the Act at a time and place to be designated by the Executive Officer.*

[29] Apart from a reference of dispute under Section 24, the scope of the bargaining unit can be addressed in a number of ways, as was noted by Chairperson Ball (as he was then) in *Saskatchewan Crop Insurance Corporation v. Saskatchewan Government Employees Union*[5]. In that case, he outlined the means whereby the Board could possibly determine whether a newly created position should be placed within or outside of the bargaining unit. In that decision, he outlines those possibilities as being:

> 1. *by way of an application to amend the certification order during the open period pursuant to section 5(k) of the Act.*
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> 2. *by way of an application under section 5((j) of the Act, if the Board decides that:*
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> *(a) the newly-created position has been defined with sufficient particularity in terms of duties and responsibilities; and*
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> *(b) that the parties have attempted to resolve the issue or the dispute through the process of collective bargaining before coming to the Board.*

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[3] at p. 33
[4] *supra* at page 34
[5] [1988] S.L.R.B.D. No 13, LRB File No. 005-88

> *3. by bringing the matter to the Board by agreement pursuant to Section 24 of the Act.*
>
> *4. by way of a provisional determination pursuant to Section 5(m) and Section 5.2 of the Act, provided the determination is made prior to any person actually performing the responsibilities of the position.*

[30] As in the *Federated Co-operatives* case, *supra*, should the Board decline jurisdiction to determine this matter under s. 24, the parties are left in a stalemate with respect to the proposed positions. They have, to date, been unable to resolve their differences by negotiation. The matter is not something that an arbitrator would have jurisdiction to determine as the determination of the scope of a bargaining unit is within the sole purview of the Board. Accordingly, a deferral of the matter to arbitration pursuant to section 18(l) is not appropriate either. The Employer cannot simply mandate that the positions are out-of-scope without the Union having any practical recourse to challenge that determination. Accordingly, at some point, absent fruitful discussions in the interim, the parties will have no option, but to have the matter adjudicated by the Board.

[31] As noted above, the Board has several options where its jurisdiction to hear and determine the dispute may be founded. An application under section 5(j) is available to either of the parties since it appears that the new positions have been defined with sufficient particularity in terms of duties and responsibilities and the parties have attempted to resolve the issue through collective bargaining.

[32] Also, the hearing of this matter fell during the open period under Section 5(k) of the *Act* (however, the initial application was filed outside of that period). The Union could withdraw its current application and file a new application, or amend its current application, during the open period.

[33] Finally, if the positions have not as yet been filed, an application under section 5(m) and 5.2 could also possibly be made.

[34] Furthermore, it appears that the parties have not kept their certificate current. The amendments made through the collective bargaining process in the January 1, 2008 to

March 31, 2011 collective agreement have not been incorporated into the certification Order of the Board.

[35] Under Section 19(1), the Board has the authority to "allow a party to alter or amend his application, reply, intervention or other process …as may be necessary for the purpose of determining the real questions in controversy in proceedings." It is clear here, as it was in the *Federated Co-operatives* case, *supra*, that the intervention of the Board and the exercise of its jurisdiction to determine if a person is an "employee" for the purposes of the *Act*. Therefore, to insure the real question is determined, the Board will proceed with the hearing of this matter under Section 5(j) of the *Act*.

DATED at Regina, Saskatchewan, this **21st** day of **November, 2012**.

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson