The Labour Relations Board
Saskatchewan

HEALTH SCIENCES ASSOCIATION OF SASKATCHEWAN, Applicant v. MEDSTAR VENTURES INC. (c.o.b. North-East Emergency Medical Services), Respondent

LRB File No. 034-13, May 3, 2013
Vice-Chairperson, Steven Schiefner; Members: Mr. Duane Siemens and Ms. Joan White

For Applicant Union: Mr. Marcus R. Davies
For Respondent Employer: Mr. Gordon D. Hamilton

Collective Agreement - First Collective Agreement – Union seeks assistance from Board in concluding terms of first collective agreement – Board noting that, in the two years since union was certified, only seven days of collective bargaining occurred and that little progress had been achieved by parties at bargaining table - Nonetheless Board satisfied that parties had achieved a minimum threshold of collective bargaining - Board appoints agent to inquire into the status of collective bargaining and to make recommendations on whether Board should intervene by imposing terms of first collective agreement.

The Trade Union Act, ss. 26.5 and 42

REASONS FOR DECISION

[1] **Steven D. Schiefner, Vice-Chairperson:** In these proceedings, the Health Sciences Association of Saskatchewan (the "Union") seeks the assistance of the Saskatchewan Labour Relations Board (the "Board") in concluding a first collective agreement with Medstar Ventures Inc. (the "Employer") with respect to a unit of employees working at the Employer's workplace in Nipawin, Saskatchewan, known as North-East Emergency Medical Services.

[2] The Union's application was filed with the Board on March 1, 2013 and the Employer's Reply was filed on April 8, 2013. The Union's application and the Employer's Reply were considered by an *in camera* panel of the Board on April 16, 2013 in Saskatoon. Having reviewed these materials, we find it appropriate to appoint an agent in these proceedings. The agent of the Board shall have two (2) tasks. Firstly, the Board agent shall meet with and assist the parties, if possible, in resolving the collective bargaining issues that remain in dispute. Secondly, if the parties are unable to conclude a first collective agreement with this assistance, the Board agent shall then report to the Board. In this regard, the Board agent shall report on the progress of collective bargaining and shall make a recommendation as to whether or not the

Board should intervene through imposition of specific terms of a first collective agreement and, if so, the terms that the agent believes ought to be imposed by the Board.

Background:

[3] The Union was certified by this Board to represent the employees of this workplace on December 17, 2010[1]. Thereafter, the parties commenced collective bargaining. Proposals and some counter-proposals have been exchanged. The parties have met on seven (7) occasions, namely: March 2, 2011, April 6, 2011, September 27, 2011, September 28, 2011, February 13, 2012, February 14, 2012, and March 27, 2012. In addition, the parties briefly utilized the services of a mediator in November of 2012.

[4] While agreement appears to have been reached by the parties on some of the articles necessary for a new collective agreement, they have not been able to achieve agreement in many other areas. The Union estimates that the parties are in agreement on ten (10) articles but that eighteen (18) articles remain in dispute. The Employer suggests that some of the disputed articles have been "*partially agreed-upon*". The range of articles in dispute is not-insignificant. In addition, many of the typically thorny issues, including most of the monetary items, remain in dispute.

[5] Simply put, since the Union has been certified to this workplace over two (2) years ago, the parties have met for collective bargaining on seven (7) occasions but haven't made a great deal of progress at the table. In their material, each party tended to lay the blame for the lack of progress on the doorstep of the other.

[6] In its application, the Union seeks the assistance of this Board in concluding a first collective agreement with the Employer citing the time that has elapsed since it was certified to this workplace and the lack of progress at the bargaining table. The Employer, on the other hand, takes the position that the parties have not yet reached an impasse and that they should be left on their own. The essence of the Employer's argument is that it is premature for the Board to intervene in these proceedings at this point in time. The Union countered by disputing many of the factual assertions in the Employer's Reply; by noting the Employer had refused to provide further dates for the continuance of collective bargaining; and by noting that the

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[1] See: LRB File No. 186.10

Employer had indicated it has prepared a new comprehensive set of collective bargaining proposals but had decided not to provide these proposals to the Union. The Union takes the position that, without intervention by the Board, it is unlikely that the parties will achieve a first collective agreement on their own.

Relevant Statutory Provisions:

[7] The relevant provisions of *The Trade Union Act*, R.S.S. c.T-17, 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);*
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> > *(b) the trade union and the employer have bargained collectively and have failed to conclude a first collective bargaining agreement; and*
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> > *(c) one or more of the following circumstances exists:*
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> > > *(i) the trade union has taken a strike vote and the majority of those employees who voted have voted for a strike;*
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> > > *(ii) the employer has commenced a lock-out;*
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> > > *(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);*
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> > > *(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.*
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> *(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.*
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> *. . .*
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> ***Powers and duties of board***
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> *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:

[8] Section 26.5 was enacted as part of the October 1994 amendments[2] to *The Trade Union Act*. The provision provides a statutory vehicle for the Board to intervene in a newly-formed collective bargaining relationship. In effect, the provision is an acknowledgment of the peculiar problems that can arise following certification as the parties attempt to define their new relationship through negotiation of their first collective agreement. In most cases, the parties are able to resolve these problems on their own. However, from time to time, for example, in the case of roadblocks created by inexperienced negotiators or through obduracy of

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

one party or another (such as in the case of an employer determined to thwart or ignore a newly-certified trade union), collective bargaining can breakdown before a first collective agreement can be achieved. Section 26.5 provides a vehicle for intervention by the Board, not as a substitute for vigorous collective bargaining, but in circumstances where the conduct of the parties and the state of their relationship requires intervention.

[9] In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Prairie Micro-Tech Inc.*, [1996] Sask. L.R.B.R. 36, LRB File No. 201-95, the Board considered s.26.5 for the first time and adopted a two (2) stage procedure for hearing and making determinations with respect to first collective agreement applications. The first stage involves the appointment of an agent. The mandate of the Board agent is to perform two (2) separate yet related tasks. Initially, the Board agent's function is that of a conciliator. He/she attempts to assist the parties in their collective bargaining process by encouraging (and often helping) them to resolve whatever collective bargaining issues may be in dispute and by encouraging (and often suggesting) the kind of compromises that are necessary to obtaining a first collective agreement. If, after working with the Board agent, the parties are still unable to agree on the terms of a first collective agreement, the Board agent's function then becomes that of an *amicus* to the Board. In this latter capacity, the agent reports to the Board on the progress of collective bargaining and the status of the relationship between the parties. The Agent also makes recommendations on whether or not the Board should intervene to assist the parties to conclude a first collective agreement (through impositions of specific terms) and, if so, the terms of such intervention. The Board agent only has the power to make recommendations regarding potential intervention by the Board and this only occurs if the parties are unable to come to their own agreement. Furthermore, the Board agent may well conclude that further intervention by the Board is premature for any number of reasons.

[10] The second stage in the process occurs following receipt of the Board agent's report. 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 the second stage in the process.

[11] In the present application, the Employer's argument (that the Union's desire for assistance from the Board may be premature) is not without merit. Certainly, little in the form of collective bargaining has occurred between these parties and they have made little progress toward concluding a collective agreement on their own in the two (2) years since the Union was certified. This Board has recently had occasion to review its jurisprudence regarding first collective agreement applications, including the difficult question of whether or not (and when) this Board should intervene in collective bargaining in any form, including merely the appointment of an agent.

[12] In *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp.,* LRB File No. 166-10, the applicant trade union ("UFCW") sought first collective agreement assistance from the Board notwithstanding that very little in the form of collective bargaining had occurred between the parties prior to its application. At the time of the UFCW's application, the parties had only met for collective bargaining on two (2) occasions, the culmination of which had been the exchange of some initial collective bargaining proposals on non-monetary items. The Board noted that the circumstances of that particular application were unusual. For example, while UFCW had been certified approximately two (2) years previous to the Union's first collective agreement application, for much of that time, the Union's certification Order had been tied up in protracted legal proceedings. UFCW's ability and desire to represent its members during this period had been frustrated. Relying on the Board's jurisprudence at the time (which suggested that a Board agent should be routinely appointed in the first stage of hearing a first collective agreement application if the Board was satisfied that the statutory preconditions had been satisfied), an agent of the Board was appointed. See: *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp.,* 2011 CanLII 27607 (SK LRB) ("*Wal-Mart FCA Stage 1*").

[13] In the *Wal-Mart* case, the Board's agent met with the parties on eight (8) different occasions. In his report, the Board's agent recounted his experience working with the parties and he commented on his impressions as to the status of collective bargaining and the efforts made by the parties to achieve a collective agreement. The agent also provided his recommendations with respect to further intervention by the Board, recommending that we do so but being unable to make recommendations on many of the issues in dispute. After reviewing the agent's report and after hearing from the parties, the Board concluded that further intervention by the Board pursuant to s. 26.5 was premature and dismissed UFCW's first

collective agreement application. See: *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp.*, [2012] 208 C.L.R.B.R. (2nd) 220 ("*Wal-Mart FCA Stage 2*"). In dismissing UFCW's application at this stage, the Board made the following comments with respect to first collective agreement applications and the determination of whether or not to appoint a Board agent:

> ***[57]*** *As these proceedings have unfolded, it has become apparent that some basic threshold level of collective bargaining appears necessary before this Board ought to intervene in any form pursuant to s. 26.5, including through the appointment of a Board agent. With the best of intentions, the appointment of a Board agent prior to meaningful bargaining occurring between the parties appears to have caused the very "narcotic" or "chilling" effect that labour boards have sought to avoid. Collective bargaining can be very frustrating and is often punctuated by many disappointments for the participants. However, first contract arbitration is not, and has never been intended as, a substitute for collective bargaining. The imposition of a first contract is not automatically available to either party. Rather, it is a tool used sparingly by this Board in the event collective bargaining reaches an impasse and intervention by the Board is necessary because the parties are either unable or unwilling to fulfill their primary responsibilities under the Act; namely to conclude a collective agreement on their own.*

[14] In the present application, it is difficult to assess whether or not sufficient collective bargaining has occurred between the parties to justify and enable meaningful intervention by the Board. Certainly, the parties have accomplished little on their own at the bargaining table. Furthermore, the Employer's reluctance to provide its most recent set of proposals to the Union may well be an indication of the "chilling' or "narcotic" effect of first collective agreement applications (wherein parties tend to position themselves for arbitration and become reluctant to engage in meaningful collective bargaining). On the other hand, we note that the parties herein have spent more time at the bargaining table at this stage than the parties had in the *Wal-Mart* case. More importantly, the parties herein have begun negotiations on both monetary and non-monetary items. They have exchanged offers and have developed and exchanged counter-proposals on matters of both language and substance. They have staked out their respective positions at the table and have achieved some common ground on a number of issues. Having considered the evidence before us, we are satisfied that the parties have completed a basic threshold of collective bargaining sufficient to justify intervention by this Board through the appointment of a Board agent.

[15] We do, however, caution the parties that the appointment of an agent does not necessarily mean that further intervention by the Board will be necessary or appropriate. In

dismissing UFCW's application for first collective agreement assistance in the *Wal-Mart* case, the Board noted that certain conclusions could be drawn from a review of this Board's jurisprudence involving previous applications (see: *Wal-Mart FCA Step 2*) and we repeat these conclusions for the benefit of the parties:

> ***[42]*** *Certain conclusions can be drawn from a review of these and other cases regarding the circumstances under which this Board will intervene in collective bargaining pursuant to s. 26.5 of the Act.*
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> ***[43]*** *Firstly, intervention by the Board takes two (2) forms. The first form of intervention is the appointment of a Board agent who, at least initially, performs the function of a conciliator and whose initial mandate is to assist the parties in concluding their own collective agreement. The second form of intervention involves the Board imposing the terms of a first collective agreement on the parties or appointing an arbitrator to do so (also known as "first contract arbitration"). See: Prairie Micro-Tech, supra.*
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> ***[44]*** *Secondly, different tests are used by this Board depending on the form of intervention. Generally speaking, at the first stage, this Board has been willing to routinely appoint an agent whenever the threshold requirements of s. 26.5(1.1) are satisfied. In this regard, it should be noted that in United Food and Commercial Workers Union, Local 1400 v. Sobeys Capital Inc., [2005] Sask. L.R.B.R. 483, 2005 CanLII 63023 (SK LRB), LRB File No. 128-05, the Board telegraphed that an agent could even be appointed by an in camera panel of the Board if no serious issues existed, and that the pending application satisfied the requirements of the Act. However, in notable contrast, intervention by imposing the terms of a first collective agreement is neither routine nor automatic. Rather, at the second stage of an application, the imposition of the terms of collective agreement by the Board is reserved for circumstances where negotiations between the parties have broken down (or reached an impasse) and where there are sound labour relations reasons that justify intervention by the Board. In this regard it is noted that first agreement arbitration is intended to reinforce, but not to replace, good faith collective bargaining by the parties. See: Prairie Micro-Tech, supra. As this Board stated in the Madison Development Group case, first contract arbitration was not intended to provide a means of escape from the difficulties of vigorous collective bargaining or as a means of achieving better terms or conditions in a first contract than one might expect as the result of bargaining in a new relationship. Because of these concerns, this Board has demonstrated reluctance to intervene through imposition of the terms of a first collective agreement except in the clearest of cases.*
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> ***[45]*** *The third conclusion that may be drawn from these cases is that intervention by the Board (in the form of imposing the terms of a collective agreement) has generally only occurred following extensive, if not protracted, negotiations by the parties. See: Saskatchewan Indian Gaming Authority Inc., supra. This Board has been unwilling to impose the terms of a first collective agreement where one party or the other is merely disappointed with or frustrated by progress at the bargaining table. See: Tisdale School Division, supra. Similarly, the Board has been unwilling to impose the terms of a first collective agreement where the parties have failed to engage[] in meaningful collective bargaining but rather have merely positioned themselves for what they hope is a better deal from the Board. See: Temple Gardens Mineral Spa, supra.*

> ***[46]*** *Fourthly, although the nomenclature may imply otherwise, this Board does not have a history of imposing the whole of a first collective agreement. In the Prairie Micro-Tech, supra, this Board theorized that, while it was possible for the Board to impose an entire collective agreement under the authority of s. 26.5, it would take seriously egregious conduct on the part of an employer and/or a particularly bleak outlook as to the state of collective bargaining, before such a remedy would be contemplated by the Board. Intervention by the Board (in the form of imposing the terms of a collective agreement) has generally only involved the few remaining items in dispute between the parties when an impasse occurs. See: R.M. of Coalfieds, supra, Saskatchewan Indian Gaming Authority Inc., supra, and R.M. of Estevan, supra. Arguably, the time constraints for intervention imposed on this Board and on an arbitrator by s. 26.5 make impracticable the imposition of terms on anything other than a few, focused issues.*
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> ***[47]*** *Finally, while the report of the Board agent provide[s] valuable assistance in understanding the state of collective bargaining and the efforts the parties have made toward concluding an agreement on their own, the Board is not required to follow the recommendations of the Board agent. See: Namerind Housing, supra.*

[16] As indicated, the Board finds it appropriate to appoint an agent in these proceedings. The function of the agent shall be firstly to attempt to assist the parties in concluding their own collective agreement. In the event such is not possible, the function of the agent shall then be to reports to the Board on the status of collective bargaining and the relationship between the parties. The Agent shall also report to the Board on the issues of: (1) whether or not the Board should intervene in the collective bargaining process through imposition of the terms of a first collective agreement; and (2) if so, the specific terms that should be imposed by the Board.

[17] 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.

DATED at Regina, Saskatchewan, this **3rd** day of **May, 2013.**

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson