The Labour Relations Board
Saskatchewan

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIES AND SERVICE WORKERS INTERNATIONAL UNION (o/a United Steelworkers Union, Local 1-184), Applicant v. ROBERT BUYAKI and EDGEWOOD FOREST PRODUCTS INC., Respondents

LRB File No.: 062-13; May 23, 2013
Vice-Chairperson, Steven Schiefner; Members: John McCormick and Ken Ahl

For Applicant Union:	Mr. Peter J. Barnacle
For Mr. Buyaki:	Mr. Jon W. Danyliw
For Edgewood Forest Products:	Ms. Laurie Robson

Practice and Procedure – Direction for Vote – Executive Officer orders pre-hearing vote in rescission application – Applicant trade union asking panel of the Board to quash or stay Executive Officer's Order – Board affirms but modifies Order of Executive Officer.

The Trade Union Act, ss. 2(k) and 6.

REASONS FOR DECISION
REVIEW OF ORDERS OF EXECUTIVE OFFICER

[1] **Steven D. Schiefner, Vice-Chairperson**: The United Steelworkers Union, Local 1-184 (the "Union") filed an application with the Saskatchewan Labour Relations Board (the "Board") on or about April 2, 2013 asking this Board to either quash or stay an Order of this Board's Executive Officer dated March 26, 201[3].[1] The substance of the impugned Order of the Executive Officer was to direct a pre-hearing vote in a rescission application[2] that had been filed by Mr. Robert Buyaki. Mr. Buyaki is an employee of Edgewood Forest Products Inc. (the "Employer") and, by reasons of a decision of this Board dated March 15, 2013 in LRB File No. 011-12, is a member of the Union. For the reasons stated herein, we are satisfied that the Executive Officer was correct in ordering a pre-hearing vote but believe the Executive Officer's Order ought to be modified to clarify that, as Mr. Buyaki's application is now contested, the ballot box shall remain sealed and the tabulation of the ballots from this vote should not take place until further Order of this Board.

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[1] It would appear that the Executive Officer's Order was inadvertently dated "2012". No significance was attached to this error and all parties agreed that the incorrect date appeared to be a typo.

[2] See: LRB File No. 029-12.

Background:

[2] The Union filed a successorship application[3] with the Board on January 24, 2012. In its application, the Union asserted that the Employer was the successor to previous certification Orders of this Board naming the Union as the exclusive bargaining agent for the employees of a previous employer. On February 21, 2012 (after the Union filed its successorship application but before that application had been heard by the Board), Mr. Buyaki (then an employee of the unit for whom the Union claimed to hold successorship rights) filed a rescission application with the Board. Faced with these two (2) applications, the Registrar of the Board advised the parties by email dated February 28, 2012 that the Board would not hear Mr. Buyaki's rescission application until after the Union's successorship application was dealt with.

[3] The Union's successorship application was heard by the Board starting in December of 2012 and, on March 15, 2013, the Board determined that the Employer was a successor, that the Union was the bargaining agent for the unit of employees that the Board determined to be appropriate for collective bargaining, and that the Employer was required to bargain collectively with the Union.

[4] On March 26, 2013, the Board's Executive Officer issued a Direction for Vote directing that a pre-hearing representational vote be conducted of employees in the workplace pursuant to Mr. Buyaki's rescission application. The representational vote was conducted by Registered mail-in ballot during the period April 3, 2013 to April 24, 2013. The ballots have not been tabulated and they remain sealed in a ballot box awaiting further direction from the Board.

[5] The Union filed its Reply to Mr. Buyaki's rescission application on April 2, 2013. In its Reply, the Union contests Mr. Buyaki's rescission application.

[6] On or about April 2, 2013, Mr. Barnacle, counsel on behalf of the Union, filed an application with the Board asking this Board to either quash or stay the Executive Officer's Order respecting the pre-hearing vote arising out of Mr. Buyaki's rescission application.

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[3] Application bearing LRB File No. 011-12.

[7] The Union's application for review of the Executive Officer's Order was heard by the Board on May 3, 2013 in Regina, Saskatchewan.

Position of the Parties:

[8] Mr. Barnacle argued on behalf of the Union that the Executive Officer's Orders ought to be set aside, either quashed or stayed until all issues arising out of the Union's successorship application have been determined by the Board or resolved by the parties. The primary argument of Counsel was that the Executive Officer's impugned Order was premature because the Union understood that Mr. Buyaki's rescission application would not proceed until after the Union's successorship application was complete. While the Union acknowledged that this Board had ruled on the substance of the successorship application, the Union took the position that its successorship application was not yet wholly complete because a number of issues remain unresolved by the parties and the Board had not made determinations with respect to all of the remedial relief requested by the Union. Mr. Barnacle noted that issues such as potential monetary compensation and/or entitlement to benefits remained unresolved, as well as the not-insignificant issue of who, if anyone, will be responsible for payment of union dues for the period prior to March 15, 2013 (i.e.: the employees or the Employer). It was the position of the Union that, until all of these issues are resolved, it continues to be premature for the Board to Order a representational vote in the workplace.

[9] Mr. Barnacle argued that resolution of these issues is not only a pre-condition to proceeding with Mr. Buyaki's rescission application but that it is unfair for the Board to ask the employees to decide the representation question without permitting them to see the results of the Union's representations on their behalf.

[10] For these reasons, the Union asked that the Executive Officer's Order dated March 26, 2013 be either stayed or quashed.

[11] Mr. Danyliw, counsel on behalf of Mr. Buyaki, argued that everything that could be done (and certainly everything that needed to be done) by the Board pursuant to the Union's successorship application was completed with the Board's decision of March 15, 2013. Mr. Danyliw acknowledged that this Board may well be called upon to resolve certain remedial issues flowing from the Board's successorship determination in the event the parties are unable to do so. However, Mr. Danyliw took the position that all of these issues are merely collateral to

the main determination of the Board in the Union's successorship application; that being, that the Employer was a successor to the previous certification Orders of the Board. Mr. Danyliw argued that the determination of successorship was the only "pre-condition" to the Board's processing of his client's rescission application and since that issue is now resolved, the Executive Officer was correct in ordering a pre-hearing vote. Mr. Danyliw argued that none of the residual remedial issues that may arise out of the Union's successorship application justify further delaying the conduct of a representation vote to determine whether or not the members of the bargaining unit wish to continue to be represented by the Union.

[12] Ms. Robson, counsel on behalf of the Employer, indicated that the Employer was more than willing to work with the Union in the ordinary course and, in fact, has begun meeting with representatives of the Union. However, the Employer echoed Mr. Buyaki's position that all that could be done and all that needed to be done by the Board pursuant to the Union's successorship application was completed with the Board's decision of March 15, 2013. The Employer argued that no further action will be required by the Board unless the parties are unable to resolve the remaining collateral issues flowing from the decisions of the Board (confirming that the Employer is the successor to the Union's certification Order). While the Employer acknowledged that the Board maintained jurisdiction with respect to these issues, the Employer took the position that none of these remaining issues could in any way be considered conditions precedent to proceeding with Mr. Buyaki's rescission application.

[13] Both Mr. Buyaki and the Employer took the position that the Union's application to stay or quash the Executive Officer's Direction for Vote should be dismissed.

Relevant Statutory Provisions:

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

> *18 The board has, for any matter before it, the power:*
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> *(v) to order, at any time before the proceeding has been finally disposed of by the board, that:*
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> *(i) a vote or an additional vote be taken among employees affected by the proceeding if the board considers that the taking of such a vote would assist the board to decide any question that has arisen or is likely to arise in the proceeding, whether or not such a vote is provided for elsewhere; and*

> *(ii) the ballots cast in any vote ordered by the board pursuant to subclause (i) be sealed in ballot boxes and not counted except as directed by the board;*
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> *. . .*

6(1) Subject to subsections (1.1) and (2), in determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, in addition to the exercise of any powers conferred upon it by section 18, the board must direct a vote to be taken by secret ballot of all employees eligible to vote to determine the question.
(1.1) No vote shall be directed pursuant to subsection (1) unless the board is satisfied, on the basis of the evidence submitted in support of the application and the board's investigation in respect of that evidence, that at the time of the application at least 45% of the employees in the appropriate unit support the application.
(1.2) The board must require as evidence of each employee's support mentioned in subsection (1.1) written support of the application, as prescribed in the regulations made by the Lieutenant Governor in Council, made within 90 days of the filing of the application.
(2) Where a trade union:

> *(a) applies for an order of the board determining it to represent the majority of employees in an appropriate unit for which there is an existing order of the board determining another trade union to represent the majority of employees in the unit; and*
>
> *(b) shows that 45% or more of the employees in the appropriate unit have within 90 days preceding the date of the application indicated that the applicant trade union is their choice as representative for the purpose of collective bargaining*
>
> *the board shall, subject to clause 5(k), direct a vote to be taken by secret ballot of all employees eligible to vote, but the board may, in its discretion, refuse to direct the vote where the board:*
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> *(c) **Repealed**. 2008, c. 26, s. 3.*
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> *(d) has, within six months preceding the date of the application, upon application of the same trade union, directed a vote of employees in the same appropriate unit.*

*(3) **Repealed**. 1983, c. 81, s.5.*

Standard of Review:

[15] The parties argued, and this Board agrees, that the standard to be utilized by the Board in reviewing the orders of the Executive Officer exercising the delegated authorities of that Office is correctness. See: *Saskatchewan Regional Council of Carpenters, Drywall, Millwrights and Allied Workers, et. al. v. Construction Workers Union (CLAC), Local 151 & Tercon Industrial Works Ltd.*, [2012] 212 C.L.R.B.R. (2d) 134, LRB File Nos. 162-10, 163-10 & 164-10.

Analysis and Conclusion:

[16] On a number of recent occasions this Board has been asked to delay the conduct of a representational vote arising out of a rescission application. For example, in *Colin Lesyk v. United Food and Commercial Workers, Local 1400 & Barrich Farms, et. al*. 2009 CanLII 44583 (SK LRB), [2010] 181 C.L.R.B.R. (2d) 47, LRB File Nos. 094-09 & 111-09, this Board was asked to delay the conduct of a representational vote pending the completion of a first collective agreement with the respondent employer. A similar argument was advanced by the subject trade union in *Gordon Button v. United Food and Commercial Workers, Local 1400 & Wal-Mart Canada Corp.*, 2010 CanLII 90104 (SK LRB), LRB File Nos. 096-04, 038-05, 001-09, 166-10, 177-10 &184-10. In both cases, the Board declined these requests and articulated its policy that representational votes ought to be conducted as soon as possible and without delay following the receipt of <u>any</u> application wherein the representational question arises, including both certification and rescission applications. Understanding the rationale that underlies this policy may be of assistance.

[17] Throughout modern history, individuals have formed associations for the pursuit of common purposes or the advancement of common causes. Freedom of association is one of the fundamental freedoms protected by the *Canadian Charter of Rights and Freedoms*. At its most basic, freedom of association is society's recognition that some aspects of an individual's interest in self-actualization and fulfillment can only be realized through combination with others and are of sufficient substance and import to be worthy of protection. Thus, s. 2(d) is meant to protect, among other things, an individual's association with others in the pursuit of certain types of common goals. Collective bargaining through a trade union of one's choosing is a protected associational activity for employees. For example, employees have the fundamental right to decide the question of whether or not they wish to be represented by a trade union and do so free from interference or coercion. These rights are not unlimited but they are fundamental rights protected by *The Trade Union* Act and now the *Canadian Charter of Rights and Freedoms*.

[18] In *Saskatchewan v. Saskatchewan Federation of Labour, et. al.* 2013 SKCA 43 (CanLII), the Saskatchewan Court of Appeal confirmed that delays in the conduct of a representational vote can give rise to a violation of an employee's s. 2(d) freedoms. In *Saskatchewan Federation of Labour* case, the Saskatchewan Federation of Labour ("SFL") and various other trade unions and labour organizations commonly argued before the Court of

Appeal that *The Trade Union Act* had been rendered unconstitutional when the *Act* was amended in 2008 to introduce mandatory votes for certification applications without also prescribing time limits for the conduct of such votes. The SFL and others pointed to the concern that delays in the conduct of representational votes created opportunities for intimidation and coercion of employees. In rejecting the argument that *The Trade Union Act* was unconstitutional, Richards J.A., speaking on behalf of a unanimous Court, made the following observations on this point:

> *[114] While a statutorily prescribed time limit for conducting certification votes might be the preferable approach, I am not persuaded that the failure to include such a provision in the TUA Amendment Act makes the Act itself constitutionally infirm. This is because discretionary statutory powers must be exercised consistently with the demands of the Charter. See: Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038 at pp. 1078-79.*
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> *[115] This imperative suggests that if, in any particular case, the Labour Relations Board delays so long in conducting a vote that employees' s. 2(d) freedoms are demonstrably infringed, those employees would be able to obtain legal redress in relation to that specific failure of the Board. None of this would mean, however, that the TUA Amendment Act itself violates s. 2(d) because it fails to prescribe a time limit for conducting votes.*

[19] In other words, employees not only have a right to decide the representational question without coercion or interference, but excessive delay in permitting them to express their wishes can give rise to a *Charter* breach. We can see no reason in law or policy that the rights of employees in deciding the representational questions on rescission applications ought to be subject to any different considerations than the rights of employees on certification applications. As was noted by Ball J. in *Saskatchewan Federation of Labour, et. al. v. Saskatchewan, et. al.*, 2012 SKQB 62 (CanLII), Q.B.G. No. 1059 of 2008, the freedoms enjoyed by employees to organize in, form or assist trade unions for the purpose of pursuing workplace goals as protected by s. 2(d) of the *Charter* also includes the freedom not to associate for such purposes. See also: *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 SCR 211, 1991 CanLII 68 (SCC), 81 DLR (4th) 545. A natural application of this conclusion is that it is also a fundamental associational right of employees to decide whether or not they wish to continue to be represented by a trade union.

[20] It has long been recognized by labour boards that representational votes ought to be conducted as soon as possible following receipt of an application wherein the representational question arises. Pre-hearing votes are an accepted means of capturing the

wishes of employees on a timely basis and preserving that information for the point in time when the Board is able to make its determinations on the representational question. Pre-hearing votes shield employees from undue influences and the inevitable pressures associated with representational campaigns in the workplace pending determinations by the Board. In our opinion, these same considerations apply in equal measure to rescission applications as they do with certification applications. With all due respect, it is disingenuous to argue that prescribed time limits are constitutionally necessary for the conduct of certification votes but that delay is permissible, let alone necessary or appropriate, for representational vote on rescission application.

[21] In the present application, the Union argued that the employees need to know whether or not any remedial relief will be agreed to by the parties or Ordered by the Board before being asked to decide the representational questions. In the *Lesyk* and *Button* cases, the subject trade unions argued that employees needed to experience the benefits of collective bargaining (through achievement of a first collective agreement) before being asked whether or not they wished to continue to be represented by the subject trade union. In the present case and the *Lesyk* and *Button* cases, the respective trade unions took the position that it would be "unfair" to ask the members to decide the representational question without the benefit of this particular knowledge. But in each of these cases, the respective trade unions saw little necessity to protect employees from the influences and the potential for coercion or interference arising out of a protracted and potentially antagonistic representational campaign in the workplace pending the completing of these desired tasks. It can take months; sometimes years, for a first collective agreement to be negotiated. It could take the parties herein a significant period of time to determine if any remedial relief is necessary and/or appropriate following this Board's successorship determination, let alone for the Board to make a determination if called upon to do so. In the interim, the employees are denied their right to decide the representational question and they become vulnerable to influences and coercion.

[22] Having considered the arguments of the parties, we are not persuaded that the employees' right to decide the representational question ought to be withheld or that it would be "unfair" to ask the employees to decide the representational question without the knowledge that the Union believes they require. In our opinion, representational votes ought to be conducted as soon as possible following receipt of an application wherein the representational question arises, including <u>both</u> certification <u>and rescission</u> applications. Employees unquestionably have the right

to periodically revisit the representational question and these opportunities may well arise before a trade union has had a fulsome opportunity to demonstrate the benefits of collective bargaining through negotiation of a first collective agreement or settlement of grievances or other proceedings. In our opinion, it is far more important that employees be shielded from the influences and pressures that can arise as a result of a representational campaign in the workplace. There may well be different points in time when employees will have better information than when an application is filed with the Board. However, unless s. 9 of the *Act* is engaged, it is both reckless and inappropriate for this Board to attempt to delay the representational question in an effort to optimize the information available to employees or to withhold the representational question in the belief that employees are not able to decide what is best for themselves. For these reasons, this Board has adopted a general policy that a pre-hearing representational vote shall be conducted as soon as possible following receipt of <u>any</u> application wherein the representational question arises and where the application appears on its face to be in order. Our policy objective is to have representational votes conducted within days (preferably within as few as 5 to 10 days) following receipt of such applications. Doing so captures the wishes of employees on a timely basis and provides the best protection from undue influence and coercion.

[23] In the present case, we are satisfied that the determination of whether or not the Union was a successor was a pre-condition to Mr. Buyaki's rescission application and it was entirely appropriate and, in fact necessary, for a determination to be made by the Board on that issue prior to proceeding with Mr. Buyaki's application. Prior to the decision of the Board on March 15, 2013, it was unclear whether or not the Employer was a successor to the certification Order(s) that Mr. Buyaki now seeks to rescind through his rescission application. As such, it was unclear whether or not Mr. Buyaki's application was in order; for example, whether or not he was a member of the bargaining unit he sought to decertify. In our opinion, these were threshold questions that had to be resolved before a representational vote could be conducted and it was necessary and appropriate to withhold the representational question until those issues were resolved.

[24] However, in our opinion, the residual issues that may arise from the Union's successorship application are not of the same import. As much as the Union may desire their resolution prior to members of the bargaining unit being asked to decide the representational questions, in our opinion, neither the existence of these unresolved issues nor their outcome can

justify withholding through delay the representational vote from the members of the bargaining unit. As we have indicated, employees have the right to revisit the representational question from time to time and when they seek to do so through application to this Board, we must respect that right for it is not only a right protected by *The Trade Union Act* but it is now also a right derivative from a fundamental freedom protected by the *Charter*.

[25] In our opinion, following resolution of the successorship issue, the Executive Officer was correct in directing a prehearing vote on Mr. Buyaki's rescission application. On the other hand, having reviewed the Executive Officer's Order, we note that it does not contain the usual language sealing the ballot box following the representation vote pending further direction from the Board. Such language would typically be present in any disputed application wherein the representational question arises and a pre-hearing vote is directed. Such language clarifies for all parties that the ballots from the representational vote shall not be tabulated until such time as the Board has made determinations on the matters in dispute relevant to the representational questions. The absence of such language likely arose because of the late filing of the Union's Reply to Mr. Buyaki's rescission application. At the time the Executive Officer issued the Direction for Vote, Mr. Buyaki's rescission application may well have appeared uncontested. Nonetheless, the absence of such language now creates unnecessary confusion and we are satisfied that the Executive Officer's Order ought to be amended to read as follows:

> *3(c) upon completion of the vote, the Agent of the Board shall seal the ballot box and retain possession thereof until such time as the Board directs the Agent to file a report in accordance with Clause 27 of Saskatchewan Regulations 164/72.*

[26] Having considered the argument of the parties, we are satisfied that the Executive Officer's Orders of March 26, 2013 should remain in force. However, we are also satisfied that paragraph 3(c) of this Order should be amended in the manner indicated.

DATED at Regina, Saskatchewan, this **23rd** day of **May, 2013.**

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson