United Food and Commercial Workers, Local 1400, Applicant v. K-Bro Linen Systems Inc., Respondent

LRB File No. 072-14; May 8, 2015
Chairperson, Kenneth G. Love Q.C.; Members: Maurice Werezak and Joan White

For the Applicant: Dawn McBride
For the Employer: Larry Seiferling, Q.C.

Certification – Union applies for Province-wide unit of employees – Employer supports the application – Board hears evidence of large anticipated build-up of employees in Employer's province wide operation.

Build up principle – Board considers build up principle and conflict between rights of current employees vs. future employees – Board determines that certification of province wide unit is an appropriate unit, but certified unit on an interim basis subject to a vote among larger group of employees following build-up

REASONS FOR DECISION

Background:

[1] Kenneth G. Love, Chairperson: This is an application by United Food and Commercial Workers, Local 1400 (the "Union") to be certified by this Board for a unit of employees of K-Bro Linen Systems Inc. (the "Employer") described as follows:

> *All employees of K-Bro Linen Systems Inc., in the Province of Saskatchewan, except Supervisors, persons above the rank of Supervisor, persons doing sales work, and persons doing office work.*

[2] The application was not opposed by the Employer, who did not file a reply to the application. The Employer was satisfied with the bargaining unit description and consented to the Board issuing the requested Order.

[3] At the time of the Application,[1] the Union indicated that there were (8) eight employees in the proposed unit. These employees were engaged at the Employer's distribution centre in Saskatoon, Saskatchewan. At the time of the hearing, the number of employees in Saskatoon had increased to (14) fourteen employees consisting of (4) four truck drivers and (10) ten laundry pickers.

[4] The Board was aware as a result of testimony heard both in this case and in LRB File No. 350-13 that the Employer had received a contract to build and operate a laundry facility in the City of Regina to process laundry for health regions across the province. As a result of this operation, the employee compliment was anticipated to rise to 120 employees (more or less), when the laundry facility was operational.

[5] The Board dealt with a preliminary matter related to this application by Order dated January 21, 2015, which Order dismissed applications by other unions for intervener status with respect to this application.[2] The primary issue in respect of the application was the determination as to whether or not the unit applied for was an appropriate unit of employees for the purposes of collective bargaining.

[6] During the course of the Board's deliberations regarding this issue, it became clear that the build-up principle should be considered by the Board. As this question had not been addressed in the briefs filed by the parties at the hearing, the Board requested supplemental briefs which were filed on April 15, 2015.

Facts:

[7] The Board heard testimony from Linda McCurdy, the President and CEO for the Employer. Darren Kurmey, Secretary-Treasurer of the Union also testified. Ms. McCurdy described the current operations of the Company and the proposed operations once the new laundry facility in Regina became operative. Mr. Kurmey testified about the benefits to employees of a province wide certification.

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[1] April 9, 2014

[8] Ms. McCurdy testified that at present, the Employer operated a distribution centre in Saskatoon which employed 14 persons. 4 were truck drivers and 10 were linen pickers, responsible to fill laundry carts as ordered by the Saskatoon Health Region. Those laundry carts were then loaded on to delivery trucks and transported by the drivers to the various facilities.

[9] The laundry that was currently being distributed from Saskatoon was processed by the Employer's laundry facility in Calgary, Alberta. This arrangement for laundry processing in Calgary was necessitated by the closure of the laundry facility in Saskatoon formerly operated by the Saskatoon Health Region.

[10] Ms. McCurdy testified that when the Regina plant came on stream that the processing of Saskatoon's laundry would be done in that facility and trucked to the Saskatoon distribution facility. She testified that two other distribution facilities would be established – one in Regina employing (8) eight drivers and (20) twenty linen pickers, and the other in Prince Albert employing (4) four drivers and (10) ten linen pickers. She testified that the laundry distribution plan would likely be modified as operational conditions dictated.

[11] The Regina laundry facility was expected to employ (5) five maintenance employees and 70 general help personnel. At present there was only one General Manager employed in Regina. Additionally, they proposed to have a Warehouse Manager in Saskatoon, a Distribution Manager in Regina, a Distribution Manager in Prince Albert and a Human Resources Manager located in Regina.

[12] Ms. McCurdy testified that a common collective agreement would be beneficial to the Employer so that employee terms and conditions of employment and benefits would be uniform across the various facilities in the Province.

[13] Mr. Kurmey testified that a provincial certification would provide efficiencies for the Employer as there would be no fragmentation of seniority and that terms and conditions of employment would be common throughout the business.

[14] He provided the Board with examples of province wide certifications which had been granted by the Board to the Union in other instances.

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[2] See LRB File No. 094-14

Relevant statutory provision:

[15] Relevant Statutory provisions are as follows

6-1(1) In this Part:

(a) "bargaining unit" means:

(i) a unit that is determined by the board as a unit appropriate for collective bargaining; or

. . .

6-9(1) A union may, at any time, apply to the board to be certified as bargaining agent for a unit of employees appropriate for collective bargaining if a certification order has not been issued for all or a portion of that unit.

. . .

6-11(1) If a union applies for certification as the bargaining agent for a unit or a portion of a bargaining unit or to move a portion of one bargaining unit to another bargaining unit, the board shall determine:

(a) if the unit of employees is appropriate for collective bargaining; or

. . .

6-13(1) If, after a vote is taken in accordance with section 6-12, the board is satisfied that a majority of votes that are cast favour certification of the union as the bargaining agent for a unit of employees, the board shall issue an order:

(a) certifying the union as the bargaining agent for that unit; and

(b) if the application is made pursuant to subclause 6-10(1)(b)(ii), moving a portion of one bargaining unit into another bargaining unit.

(2) If a union is certified as the bargaining agent for a bargaining unit:

(a) the union has exclusive authority to engage in collective bargaining for the employees in the bargaining unit and to bind it by a collective agreement until the order certifying the union is cancelled; and

(b) if a collective agreement binding on the employees in the bargaining unit is in force at the date of certification, the agreement remains in force and shall be administered by the union that has been certified as the bargaining agent for the bargaining unit.

Employer's arguments:

[16] The Employer argued that the nature of its business, being province wide, lent itself to a province wide certification as requested by the Union. The Employer argued that it would be beneficial for all employees to be in the same unit insofar as they would share a community of interest with one another. The Employer also argued that a province wide unit would promote industrial stability.

[17] The Employer noted that the Board must be cognizant of the potential infringement of the rights of future employees at the Regina plant. The Employer argued that this concern should be balanced by the need for industrial stability in having a province wide unit in place where terms and conditions of employment were established prior to employees being hired.

[18] While noting that employees who eventually take positions in the Regina and Prince Albert facilities will be denied the right to choose their bargaining representative, they nevertheless retain the option to choose another bargaining representative pursuant to the provisions of *The Saskatchewan Employment Act*, S.S. 2013, c.S-15.1 (the "*S.E.A.")*, or to decertify should they choose not to be represented. On balance, the Employer argued that industrial stability should be favoured.

[19] The Employer also argued that the Board should not utilize the "build up principle"[3] in this case. In support of its position, the Employer cited *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Brown Industries (1976) Ltd., Pro-More Industries and Lo-Rider Industries Inc.*[4] In support for its argument that the build up principle has been rendered inapplicable in this situation.

[20] The Employer also argued that the provisions of the *S.E.A.* imposed an obligation on the Board to provide the benefits of unionization to employees without delay. The Employer further argued that Mr. Justice Ball in *Saskatchewan Federation of Labour v. Saskatchewan*[5] supported this obligation to provide speedy certification for employees.

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[3] During its deliberations, the Board felt that further submissions should be considered regarding the "build up principle" and its applicability to this case. The Board convened a hearing with the parties by telephone on March 31, 2015 and requested the parties provide further submissions on this issue by April 15, 2015.
[4] [1995] SLRBD No. 19, LRB File No. 010-95
[5] [2012] SKQB 62, 390 Sask R. 196

[21] Alternatively, the Employer argued that the principle should not be applied in this case. The Employer argued that the principle should be used only sparingly and only in compelling circumstances. Furthermore, the Employer argued, the rights of current employees should outweigh the rights of future employees, given the provisions of the *SEA* which provided for mechanisms whereby employees could effect change to the choice of bargaining agent. The Employer also argued that there was a sufficient cross-section of employees who wish to be represented to make a reasoned decision on choice of bargaining agent.

Union's arguments:

[22] The Union also argued in favour of its proposed province wide bargaining unit. It argued that a province wide certification would provide employees with mobility options, would provide for the Employer's province wide business activities, and would allow for expansion and change to the Employer's operations as necessary.

[23] The Union echoed the concerns of the Employer regarding the loss of choice of bargaining representative by future employees. It too, concluded that the benefit of industrial stability should override any concerns regarding future employee's choice of bargaining representative.

[24] In respect of the build-up principle, the Union argued that the principle should not be applied in this case because the anticipated build up is too far in time from the certification application and because the case is more properly assessed on the balancing of the interests of stability and future rights, not the build-up principle. In support, the Union also referenced *inter alia*, *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Brown Industries (1976) Ltd., Pro-More Industries and Lo-Rider Industries Inc.*[6]

[25] Alternatively, the Union argued, for reasons similar to those provided by the Employer, that the build-up principle should not be applied in this case. It cited examples from other Labour Relations Boards across Canada and their jurisprudence concerning the applicability of the principle.

Analysis:

[6] [1995] SLRBD No. 19, LRB File No. 010-95

[26] There is no disagreement between the parties, nor by the Board, that a province wide certification is appropriate for this business operation. The only issue that needs to be considered, as noted by the parties, is the impact that such an order would have on the rights of future employees to choose a bargaining representative.

[27] The "build up principle" was first enunciated by this Board in its decision in *United Steelworkers of America, CLC v. Noranda Mines Ltd.*[7] In that decision, Chairperson King, for the majority quoted from an earlier decision of the Board in *Tunnel and Rock Workers' Union No. 168 and Duval Corporation of Canada*[8] at p. 13110:

> *…The whole issue was the question as to whether the application was premature in view of the few employees that would be selecting the bargaining agent for the proposed large number of employees.*
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> *The majority of the Board, having applied the principles as set out above, were of the opinion that this application was premature and for that reason the application was dismissed.*

[28] This Board decision, which established the "build up principle" in Saskatchewan, was challenged to the Supreme Court of Canada. That court in its decision in *Labour Relations Board of Saskatchewan v. The Queen et al.*[9] confirmed the Board's jurisdiction to apply the "build up principle". Mr. Justice Martland, speaking for the Court says:

> *The Court of Appeal was of the view that the Board's order was not made within its jurisdiction, because, in the opinion of the Court, it did not thereby determine that the proposed unit of employees was not appropriate for collective bargaining, or that the Union did not represent a majority of the employees in the unit. In the view of the Court, "what the Board in fact did, was to dismiss the application because, in its opinion, the time for making the same was not appropriate". In so doing, it was said, it failed to give effect to the legal rights of the employees conferred by the statute, which it was under a legal obligation to do.*
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> *With respect, I do not share this view. In my opinion, the Board has jurisdiction under the Act to determine whether or not it considers a proposed unit of employees to be appropriate for collective bargaining. In determining that issue the Board is not subject to any directions contained in the Act and it can, therefore, consider any factors which may be relevant. The application to the Board asked it, inter alia, to determine that the unit described in the application was an appropriate one. The application was dismissed, thereby demonstrating*

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[7] Decisions of the Saskatchewan Labour Relations Board, LRB File No. 178-68 issued January 11, 1969 and Court Cases arising therefrom, Volume III p. 128
[8] 68 CLLC 16038
[9] [1969] SCR 898, CanLII 104 (SCC)

> *that the Board was not prepared to make that determination in the Union's favour. The Board ruled on a matter over which it had exclusive jurisdiction.*
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> *The reasons which were given by the Board for this exercise of its jurisdiction were that the number of employees employed by Noranda at the time the application was made did not constitute a substantial and representative segment of the working force to be employed by Noranda in the future. In my opinion, the Board had full discretion under the Act to take that factor into consideration when considering the application. The expected increase in Noranda's work force, in the year 1969, from 25 to approximately 326 was a factor of great weight in deciding whether the proposed unit was appropriate and, as provided in s. 5(b), in "determining what trade union, if any, represented a majority of employees in an appropriate unit of employees".*
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> *That the Board should consider this factor in cases of this kind, in the interests of employees, seems to me to be logical. A union selected by a handful of employees at the commencement of operations might not be the choice of a majority of the expected large work force. The selection of a union at that early stage could be more readily subject to the influence of an employer. A large work force, when a plant went into operation, might comprise employees in various crafts for whom a plant unit, comprising all employees, other than management; might not be appropriate. In my view the Board not only can, but should, consider these factors in reaching its decision when asked to make a determination under s. 5(a) and (b).*
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> *To summarize the position, in my opinion, with respect, the Court of Appeal erred when it held that the Board had dismissed the application on a ground which was wholly irrelevant and had declined to exercise its jurisdiction. What the Board did do was to take into consideration, when determining whether the proposed unit of employees was appropriate for collective bargaining, and whether the Union represented a majority of employees in that unit, the nature of Noranda's business, the fact that it was at its inception, and the fact that it was expected to increase its labour force enormously within a year. This it was entitled to do, and its decision, based on those and other factors, is not subject to review by the Court.*

[29] This Board was precluded from utilizing the "build up principle" following an amendment to *The Trade Union Act*[10] in 1972.[11] That prohibition was subsequently repealed in 1983.[12]

[30] However, as noted by George W. Adams in his *Canadian Labour Law* (2d edition), while the courts have "strongly endorsed" the importance of the proper application of the "build up principle", labour boards across Canada do not automatically assert the principle in all cases. At para 7.1870, the author notes:

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[10] R.S.S. 1978 c. T-17 (now repealed and replaced by *The Saskatchewan Employment Act*)
[11] S.S. 1972 c. 137
[12] S.S. 1983 c. 81

> *Canadian courts have strongly endorsed the importance of the proper application of the buildup principle. The British Columbia board will not grant a certification where there is an imminent buildup of the workforce pending unless there is already at the date of application a substantial and representative group of employees present in the unit. Alberta takes a similar approach. The Canada board will apply the buildup principle in a proper case but has stated that it has "serious concerns" about the principle and will apply it with great care in the Canada Labour Code to limit the life of a certification order to a particular development phase. The Prince Edward Island Labour Act specifically enables the board in that province to apply the buildup principle. In contrast, the NDP government in Saskatchewan had legislatively excluded the buildup principle and the Saskatchewan board had commented upon its rare applicability in the construction industry regardless of statute, but the legislative exclusion was later repealed by a subsequent Conservative government. The buildup principle is seldom applied in the construction industry. The buildup principle is an exception to the statutory entitlement to collective representation and it should be applied sparingly and only in compelling circumstances. A board denies or defers collective representation reluctantly and only where the buildup is "so dramatic in terms of numbers or classifications" that the "essential representative character" of the trade union is brought into question. Thus, the Alberta board refused to apply the principle when the bargaining unit was anticipated to grow 2.5 times over the ensuing six months, in contract to the expected workforce increases of 4 to 10 times in earlier cases where the principle had been applied.*

[31] The Alberta Board dealt with the "build up principle" and noted its beginnings in *Unite Here, Local 47 v. SNC Lavalin O & M Logistics Inc.*[13] In that case, the Alberta board distinguished cases where the expected build up was 2 ½ times the present complement of employees vs. a buildup of between 4 and 10 times the number of employees.

[32] At paragraphs [20] *et seq.*, the Alberta board summarized its rationale in that particular case:

> *[20] The build-up principle addresses a concern that the group of employees who applied for certification may not be representative of the ultimate workforce and will make a decision regarding unionization that does not reflect the needs and desires of the ultimate workforce. However, boards have also recognized the countervailing interest of an existing group of employees to be collectively represented regarding their working terms and conditions without delay.*
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> *[21] The Employer's workforce has steadily grown to approximately 100 employees over the six months from September 2011 and is expected to continue to grow steadily to approximately 270 employees by October 2012. Accepting the Employer's position, the employees hired in September 2011 would not be entitled to seek collective representation for over one year after their date of hire. We conclude that proposition does not adequately balance the competing interests in this case. The "build up principle" is an exception to the statutory entitlement to collective representation and it should be applied sparingly and only in compelling circumstances. In RE: International Association*

[13] [2012] CanLII 26870 (ABLRB)

> *of Machinists and Aerospace Workers, Local Lodge No. 99 and O.E.M. Remanufacturing Company Inc., et. al., [2011] A.L.B.R.D. No.1, the Board discussed the circumstances that would warrant the application of the principle as follows:*
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> > *116 …The Board can dismiss or defer a certification application because of an imminent large build-up in the workforce, again using its power to consider "other relevant matters": Rocky Mountain Ski Ltd. and U.M.W.A., Local 1656, [1994] Alta. LRBR 475. The Board denies or defers efforts to acquire collective representation only reluctantly, however, and only where the build-up is so dramatic in terms of overall numbers or the classifications in the workforce that it would call into question the essential representative character of a trade union that gains support among the current workforce. Had a build-up issue based on the projected Finning transfer been raised with the Board at the time of the CLAC certification application, we think that the overwhelming likelihood is that the Board would have dismissed the objection, on grounds that a representative workforce was already in place at OEM and the Board's powers to sort out a competition between bargaining agents in a successorship are adequate to deal with the transaction if and when it happens.*
> > *(emphasis added)*
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> *[22] This is not a situation where the build-up is so "dramatic" in terms of numbers or classifications that we are concerned about the "essential representative character" of the Union. We have no reason to believe that the current workforce of 100 employees is unrepresentative of the next 150 employees who may be hired to do the same work in the same location and in the same classifications.*
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> *[23] Accordingly we decline to apply the "build-up principle" in this case and conclude the application is not premature.*

[33] We concur with the Alberta board that the "build up principle" should be applied sparingly and only in compelling circumstances. In the *SNC Lavalin* case, there were also additional considerations that were applied by the Board.

[34] As noted by both the Employer and the Union, the Board must balance the rights of future employees to choose their bargaining agent with the benefits of a stable workplace environment with industrial stability.

[35] Notwithstanding its long standing roots and the temporary statutory interdiction imposed by the Legislature, the Board has not often employed the "build up principle" to declare applications for certification to be premature. As noted by the Board in *United Steelworkers of*

America, CLC v. Noranda Mines Ltd.,[14] "each application will depend on its particular facts. That requirement can also be found in the Alberta board decision in *SNC Lavalin*.

[36] Both the Employer and the Union point to the statutory provisions for, either changing a bargaining agent (raiding), or decertification of the bargaining unit after (2) two years of representation. They argue these provisions in the *SEA* are a sufficient balance to the certification of a bargaining agent when the workforce is not at its full (or near full) complement.

[37] In this case, there were 8 employees in the unit at the date of the application. As of the date of the hearing the workforce had increased to (14) fourteen. The number of employees is anticipated to increase by another 117 for a total workforce of 131 who would be covered by the proposed certification order. This is more than a 16 fold increase from the (8) eight employees when the certification application was filed, and a more than a 9 fold increase from the present compliment of (14) fourteen employees.

[38] If required to join an existing bargaining unit, even though these new employees have the legal right to choose a new bargaining representative, or to decertify, in practice, utilizing those rights is a difficult thing to accomplish. Employees are ill equipped to make the necessary application to this Board to decertify should they not wish to be represented.

[39] The conflict between establishing a stable bargaining unit versus the rights of future employees was described by the Ontario board in its seminal decision in *Emil Frant and Peter Waselovich.*[15] In that decision, the Ontario board says:

> *In cases such as the present, the Board is faced, among other things, with the task of balancing the right, on one hand, of persons presently employed to collective bargaining and the right, on the other hand, of future employees to select a bargaining agent of their own choice. In the case of the first mentioned group, a refusal to certify or direct an immediate vote, as the case may be, tends to deprive them of their right to collective bargaining and, incidentally, their right to strike, for an indefinite period of time. But in the case of the latter group, an immediate certification or direction for a vote prevents them from exercising their right to select their own bargaining agent for a considerable period of time because of the provisions of The Labour Relations Act relating to termination of bargaining rights.*
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> *Faced with this conflict of interests, the Board has, in the past, in some cases, refused to certify or order an immediate vote—and has directed that a vote be taken at a later date—where, on all the evidence, it appeared to the satisfaction*

[14] Decisions of the Saskatchewan Labour Relations Board and Court Cases arising therefrom, Volume III p. 128 at page 129
[15] [1957] 57 CLLC 18,057

> *of the Board that the employees did not constitute a substantial and representative segment of the work force to be employed. Of course, in such cases it must be established that there is a real likelihood that the increase in the work force will take place within a reasonable period of time and, if it appears that the build-up depends on factors beyond the control of the employer such as the saleability of products, the presence of sufficient workers, or the availability of materials for say, the purpose of plant expansion, the Board, instead of directing a vote to be held in the future, may certify or order an immediate vote depending on the membership position of the applicant.*

[40] The newly enacted *SEA* provides no clear direction to the Board concerning the ongoing availability or use of the build-up principle. Clearly, there are cases where applications are so premature as to require its application. This case is dangerously close to that line. While not wishing to interfere with the rights of present employees to choose their bargaining representative, we must also consider the rights of those employees who will have no choice but to accept the bargaining unit chosen by a minority and either seek to have another union or no-one represent them.

[41] While the Employer and the Union argue that there will be industrial stability if certification occurs now, considerable instability could occur if the Union does not enjoy the support of the larger group of employees and hence cannot achieve a legitimate mandate in collective bargaining. This factor must also be considered, along with the instability which will be created if various factions attempt to have their choice of collective bargaining agent certified by this board to represent the larger group of employees.

[42] The Ontario Board in *Emil Frant and Peter Waselovich*[16] resolved this conflict by ordering a vote of the employees after the build-up had occurred. We believe that that resolution would also be of benefit in this case. While we are required to hold a vote in a timely fashion when an application for certification is made,[17] the Board also has the ability to make interim orders[18] and to provide for additional votes by employees.[19] We will utilize those authorities in this case to insure that future employees are allowed a choice of bargaining representative and also to insure that the bargaining agent enjoys the support of those future employees.

[43] Subject to support being shown by employees, the application by the Union is granted on an interim basis. If certification is approved, a vote will be conducted by the Board

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[16] [1957] 57 CLLC 18,057
[17] Section 6-12 of *The Saskatchewan Employment Act*
[18] Section 6-103(d)
[19] Section 6-111(1)(v)(i)

among the larger employee group on June 1, 2016, or on such earlier or later date, within 30 days of June 1, 2016, as shall be agreed upon by the Employer and the Union and as ordered by the Board, to determine if the Employees continue to wish to be represented by the Union for collective bargaining purposes.

[44] This panel of the Board shall remain seized of this matter. The ballots cast by employees shall be counted as soon as possible and an appropriate order issued following the determination of support by the employees for this application.

[45] This is a unanimous decision of the Board.

DATED at Regina, Saskatchewan, this **8th** day of **May, 2015.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson