CONSTRUCTION WORKERS UNION (CLAC), LOCAL 151, Applicant v. TECHNICAL WORKFORCE INC., Respondent

LRB File No. 037-16 July 15 , 2016
Chairperson, Kenneth G. Love Q.C.; Members: Maurice Werezak and Laura Sommervill

For the Applicant: Richard F. Steele
For the Respondent: Michael H. Vos

Application for Certification – Union applies to Board to be certified as the bargaining representative of an "all employee" unit of employees. Board made aware through affidavit that there will be a rapid build-up of employees subsequent to the application.

Build up principle – Board reviews jurisprudence regarding build-up principle – Board finds that while build-up principle would not usually be an issue with respect to a craft based unit of employees, that it would be applicable with respect to an "all employee" group of employees.

Build up principle – Board finds application for certification to be premature based upon eminent build-up from 7 employees to 140 employees over the course of several months.

REASONS FOR DECISION

Background:

[1] Kenneth G. Love Q.C., Chairperson: Construction Workers Union (CLAC), Local 151, (the "Union") applied to the board to be certified to represent an "all employee" group of employees of Technical Workforce Inc. (the "Employer") described as follows:

> *All employees of Technical Workforce Inc. in Saskatchewan except Supervisors, office staff and management personnel.*

[2] Two issues arose out of the application for certification. The first issue was whether or not there were any supervisory employees included within the proposed bargaining unit. The second issue was whether or not the proposed build-up of the bargaining unit was such that the Board should consider the application premature.

Facts:

[3] The Union applied to be certified to represent the group of employees set out above by application dated March 4, 2016. At the time of the application there were 7 employees which fell within the scope of the bargaining unit. The Board conducted a vote among the 7 employees by mail in ballot. The results of that vote were in support of the Union's application.

[4] On June 15, 2016, the Employer filed an affidavit of Mr. Robert Manual. In that affidavit, Mr. Manual deposed that that the workforce to be employed would increase from the initial 7 employees to approximately 140 employees who would be added as the project geared up during the summer months of 2016.

[5] Mr. Manual testified at the hearing of this application that the initial scope of work for which the company was engaged and was working on when the application for certification was made was limited and did not require more than the number of employees at that time. He testified that the scope of the work expanded after that initial work, which required additional employees to be required.

[6] The project for which the Employer was engaged is the construction of a bi-pass around the City of Regina. This project is expected to take several years to complete. The project involves construction of numerous overpasses, service roads, a four lane highway, and the twinning of an existing highway.

[7] The project is being undertaken by a Joint Venture composed of Carmaks Enterprises Ltd., Parsons Canada Ltd., Vinci Infrastructure Canada Limited, Graham Intrastructure LP and Graham Infrastructure Ltd. The Employer acts as a labour broker and contractor to the Joint Venture.

Relevant statutory provision:

[8] The following provisions of the SEA are relevant to this application:

> ***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.*
>
> *(2) When applying pursuant to subsection (1), a union shall:*
>
> *(a) establish that 45% or more of the employees in the unit have within the 90 days preceding the date of the application indicated that the applicant union is their choice of bargaining agent; and*
>
> *(b) file with the board evidence of each employee's support that meets the prescribed requirements.*
>
> …
>
> ***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*
>
> *(b) in the case of an application to move a portion of one bargaining unit to another bargaining unit, if the portion of the unit should be moved.*
>
> *(2) In making the determination required pursuant to subsection (1), the board may include or exclude persons in the unit proposed by the union.*
>
> *(3) Subject to subsections (4) to (6), the board shall not include in a bargaining unit any supervisory employees.*
>
> *(4) Subsection (3) does not apply if:*
>
> *(a) the employer and union make an irrevocable election to allow the supervisory employees to be in the bargaining unit; or*
>
> *(b) the bargaining unit determined by the board is a bargaining unit comprised of supervisory employees.*
>
> *(5) An employee who is or may become a supervisory employee:*
>
> *(a) continues to be a member of a bargaining unit until excluded by the board or an agreement between the employer and the union; and*
>
> *(b) is entitled to all the rights and shall fulfil all of the*

responsibilities of a member of the bargaining unit.

(6) Subsections (3) to (5) apply only on and after two years after the date on which subsection (3) comes into force.

(7) In making the determination required by subsection (1) as it relates to the construction industry within the meaning of Division 13, the board shall:

(a) make no presumption that a craft unit is the more suitable unit appropriate for collective bargaining; and

(b) determine the bargaining unit by reference to whatever factors the board considers relevant to the application, including:

(i) the geographical jurisdiction of the union making the application; and

(ii) whether the certification order should be confined to a particular project.

…

***6-111**(1) With respect to any matter before it, the board has the power:*

(m)to bar from making a similar application, for any period not exceeding 12 months after the date an unsuccessful application is dismissed:

(i) an unsuccessful applicant;

(ii) any of the employees affected by an unsuccessful application;

(iii) any person or union representing the employees affected by an unsuccessful application; or

(iv) any person or organization representing the employer affected by an unsuccessful application;

Union's arguments:

[9] The Union advised the Board at the hearing that it had agreed with the Employer to make an irrevocable election to permit supervisory employees to be included within the proposed bargaining unit. It undertook to file the necessary irrevocable election with the Board forthwith.

[10] In respect of the issue of build-up, the Union argued that the principle should not be applied in this case. It argued that a number of factors should be considered including:

1. The nature of the employer's operations;
2. Whether or not a build-up was eminent;
3. The nature and degree of the build-up; and
4. The representational character of the employees.

[11] The Union argued that employees had a constitutional right as well as a statutory right pursuant to *The Saskatchewan Employment Act* (the "*SEA")* to join and form unions of their own choosing. The Union also argued that the build-up principle should not be utilized in the construction sector citing the Alberta Labour Relations Board decision in *International Union of Operating Engineers, Local 955 and Devon Sand & Gravel Ltd.*[1] and *K.A.C.R. v. International Union of Operating Engineers, Local 870*[2]

[12] The Union argued that the test for build-up was not met in this case and the application should be allowed. Alternatively, the Union argued that the Board should grant an interim order with a second vote to be held as was done by the Board in *U.F.C.W. v. K-Bro Linen Systems Inc.*[3]. Finally, again, in the alternative, in the event the Board determined the application to be premature, that the Union not be estopped from bringing a subsequent application pursuant to section 6-111(m) of the *SEA*.

Employer's arguments:

[13] The Employer did not take a position on the build-up principle and its application in this case. Mr. Vos noted that the Union was the certified bargaining representative for their employees in Alberta. He urged the Board to reach a speedy resolution to the issue.

Analysis:

[14] The Board has recently reviewed the build-up principle in its decision in *United Food and Commercial Workers Union, Local 1400 v. K-Bro Linen Systems Inc.*[4] In that decision, as here, the Board was required to balance the rights of future employees to choose their

[1] 1979 Canswell Nat 1287, [1979] Can. L.R.B.R. 326
[2] [1983] Sask. Lab. Rep. 37, 3 C.R.R.B.R. (NS) 60
[3] [2015] CanLII 43773 (SKLRB), S.L.R.B.D. No. 14, 262 C.L.R.B.R. (2d) 215, CLLC para 220-046
[4] Supra Note 3

bargaining representative over the rights of current employees to be represented by their choice of bargaining agent.

[15] In that case, the Board noted that the application of the build-up principle would depend on its particular facts and would be used sparingly and only in compelling circumstances. The factors outlined by the Union which would bring the principle into play are factors which will be considered, but should not be considered to be all of the factors which a Board may consider. Additionally some factors may weigh more heavily on a decision than others, depending on the facts at issue.

Is the Build-up Principle Applicable to the Construction Industry?

[16] The Union argued that the build-up principle, because of the transitory nature of the industry, should not apply to the construction industry. We have some sympathy with that view, but would not go so far as to say that the principle would not necessarily apply in all cases.

[17] The Union cites this Board's decision in *K.A.C.R. v. International Union of Operating Engineers, Local 870*[5] in support of this proposition. At paragraph 33 of that decision, the Board says:

> 33 *It is only rarely that the buildup principle has been applied in the construction industry by any jurisdiction in Canada even without the kind of statutory prohibition contained in Section 5(a) of The Trade Union Act. The reason for that is because of the fluctuating nature of the work force as opposed to a rapidly expanding but relatively permanent work force in an industrial setting (See International Union of Operating Engineers Local 955 and Devon Sand and Gravel Ltd. 1979 3 Can. L.R.B.R. 326.*

[18] This, the Union argues shows that the build-up principle should generally speaking, not be applicable in the construction industry. We respect we do not agree completely with that hypothesis.

[19] Another major component of the construction workforce is that it is often trade or craft based. Contractors, who are unionized contractors, utilize the union hiring hall for the purposes of hiring and dispatch of employees to the various worksites in which they are engaged. Employees dispatched from Union hiring halls are already members of the union and have chosen that trade or craft union to represent them and to dispatch them to worksites as

needed. It follows, therefore, that it would generally be unnecessary to apply the build-up principle to such worksites or employers because they are either already certified to bargain on behalf of their members or are dispatching persons who have chosen to be represented by that union, to the worksite.

[20] That is not the case, however with respect to non-craft units, such as the unit applied for here, which is an all employee unit. There is no dispatch of members represented by the Union to this worksite, but rather, unrepresented employees are the norm. An all employee unit in the construction industry is no different from an all employee unit in another sector of the economy such as retail or industrial. The employees have no pre-existing representational relationship with the Union as would be the case with standard craft units.

[21] As a result, the friction between non-represented future employees and their rights to choose a bargaining representative vs. the rights of existing employees to choose a bargaining representative needs to be considered by the Board, as it was in *U.F.C.W, Local 1400. v. K-Bro Linen Systems Inc*. At paragraph [13] of that decision, the Court says:

> *[13] The build-up principle is commented upon by the Supreme Court in Noranda Mines Ltd. v Saskatchewan, 1969 CanLII 104 (SCC), [1969] SCR 898. In that case the Supreme Court said that it was within the jurisdiction of the Board to use the build-up principle in determining whether an appropriate bargaining unit existed. The Supreme Court, at page 900, described the conundrum faced by the Board in the following fashion:*
>
> > *The problem the Board is faced with in this type of application is balancing the right of present employees to be represented by a union for the purpose of bargaining collectively and the rights of future employees to select a bargaining agent …*

[22] The *K-Bro Linens* decision of this Board was taken for judicial review by both the Employer and the Union. Those applications were dismissed by the Court of Queen's Bench[6], who upheld the Board's decision. The Queen's Bench decision was then appealed to the Court of Appeal by the Union. However, that appeal has subsequently been withdrawn.

[23] In its decision, the Court of Queen's Bench recognized that the use of the build-up principle remained available to the Board. It confirmed that the Board had the ability to balance

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[5] [1983] Sask. Lab. Rep. 37, 3 C.R.R.B.R. (NS) 60

the rights of future unrepresented employees with those of existing employees who had an interest in regularizing a bargaining relationship with their employer.

[24] This case is similar to the *K-Bro Linens* case in that the expected build up is extreme in that the workforce is anticipated to grow from 7 employees to 140 employees, a 20 fold increase. That increase, based upon the affidavit of Mr. Manual, is expected to be completed within months[7] of the date of the initial application. That is an eminent build up from the date of initial application.

[25] While Mr. Manual testified that the scope of the work to be performed as of the date of the application was limited, it is obvious from his affidavit that he and his company expected to receive additional and growing work from the joint venture to support the additional forecasted hiring.

[26] We therefore find that the application is premature and must be dismissed. In so doing, however, we will not impose a restriction, pursuant to section 6-111(1)(m), upon the Union filing a fresh application.

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

DATED at Regina, Saskatchewan, this 15th day of July, 2016.

LABOUR RELATIONS BOARD

Kenneth G. Love Q.C.
Chairperson

[6] [2016] SKQB 161 (CanLII)
[7] Final hiring of some 117 workers was to be complete by June 13, 2016.