1969
*June 16, 17
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NORANDA MINES LIMITED, Potash Division (*Respondent*) ..... APPELLANT;

AND

HER MAJESTY THE QUEEN on the relation of UNITED STEELWORKERS OF AMERICA, CLC and KENNETH A. SMITH (*Applicants*) ..... RESPONDENTS;

AND

THE LABOUR RELATIONS BOARD OF THE PROVINCE OF SASKATCHEWAN (*Respondent*) ....

THE LABOUR RELATIONS BOARD OF THE PROVINCE OF SASKATCHEWAN (*Respondent*) .... APPELLANT;

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HER MAJESTY THE QUEEN on the relation of UNITED STEELWORKERS OF AMERICA, CLC and KENNETH A. SMITH (*Applicants*) ..... RESPONDENTS;

AND

NORANDA MINES LIMITED, Potash Division (*Respondent*). .....

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Labour relations—Determination by Labour Relations Board as to whether proposed unit of employees appropriate for collective bargaining—Factors considered—Whether Board's decision subject to review—The Trade Union Act, R.S.S. 1965, c. 287, as amended 1966, c. 83.

An application by a union to the Labour Relations Board of Saskatchewan to become the representative of a unit of employees of the

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*PRESENT: Martland, Judson, Ritchie, Hall and Spence JJ.

appellant company for the purpose of bargaining collectively was dismissed, by a majority decision, on the ground that the number of employees employed by the company at the time the application was made did not constitute a substantial and representative segment of the working force to be employed by the company in the future. The union applied to the Court of Appeal for a writ of *mandamus* requiring the Board to exercise its jurisdiction under s. 5(*a*), (*b*) and (*c*) of *The Trade Union Act*, R.S.S. 1965, c. 287, as amended 1966, c. 83, in respect of the union's application; for a writ of *certiorari*; and for an order quashing the order of the Board. The application was granted and the company and the Board then appealed to this Court.

Held: The appeal should be allowed and the order of the Board restored.

Under *The Trade Union Act*, the Board had exclusive jurisdiction to determine whether or not a proposed unit of employees was appropriate for collective bargaining. In determining that issue the Board was not subject to any directions contained in the Act and it could, therefore, consider any factors which might be relevant.

The Court of Appeal erred in holding 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 the company'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, was not subject to review by the Court.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], quashing an order of the Labour Relations Board of Saskatchewan and issuing a peremptory writ of *mandamus* to the Board to determine, according to law, an application for certification. Appeal allowed and order of the Board restored.

D. K. MacPherson, Q.C., for the appellant company.

Michael Chan, for the appellant Labour Relations Board of Saskatchewan.

G. J. D. Taylor, Q.C., for the respondents.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from a judgment of the Court of Appeal for Saskatchewan[1], which quashed an order of the Labour Relations Board of the Province of

[1] (1969), 69 W.W.R. 58, 5 D.L.R. (3d) 173.

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Saskatchewan (hereinafter referred to as "the Board") and issued a peremptory writ of *mandamus* to the Board to determine, according to law, the application of the United Steelworkers of America, C.L.C. (hereinafter referred to as "the Union"), to become the representative of a unit of employees of the appellant company (hereinafter referred to as "Noranda"), for the purpose of bargaining collectively.

The Union's application to the Board was made on November 28, 1968. The proposed unit of employees comprised all employees of Noranda's Potash Division at its mine site near Colonsay, Saskatchewan, except managers, superintendents, foremen, office and clerical staff, plant security, and any person having and regularly exercising authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity.

The application asked the Board to determine: that this was an appropriate unit of employees for the purpose of bargaining collectively; and that the Union represented a majority of the employees in that unit; and to require Noranda to bargain collectively with it.

By a majority decision, the Board, on January 11, 1969, ordered that the application be dismissed. The order stated that the majority of the Board found that, in this particular case, the number of employees employed by Noranda, at the filing date of the application, did not constitute a substantial and representative segment of the working force to be employed in the future by Noranda.

In the reasons delivered by the majority of the Board, the following statement is made:

> As of November 28, 1968, the date of this application, there were 23 employees only in the bargaining unit applied for and as of the date of hearing, namely, January 7, 1969, there were 25 employees in the bargaining unit. The Respondent Company estimated that the full complement of employees in December, 1969, will number approximately 326. There was no evidence to indicate that the proposed full complement of employees would not be reached by the estimated date or that their reaching this complement depended on foreseeable factors outside the control of the Respondent that might cause them to not reach their targeted complement of employees by the said date.
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> 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 as was stated in the Emil Frants and Peter Wasilowich case, Volume 1 (1944-1959) C.L.L.C. Paragraph 18057, and applied by this Board in the International Brotherhood of Electrical Workers, Local Union No. 2038 and ITT Canada Limited case, 1967 C.L.L.C. Paragraph 16016.

The Board, in coming to its decision, must consider the type of operation, the segment of the employees employed in the proposed bargaining unit at time of application, the total number of employees estimated there will be in the proposed bargaining unit, and the date at which the proposed build-up will be achieved.

The minority of the Board took the position that the "principle" applied by the majority was in direct contradiction to the provisions of *The Trade Union Act*, R.S.S. 1965, c. 287, as amended. It was their view that:

In this case the basic requirements to obtain certification under *The Trade Union Act* were present.

1. There was an "Employer".
2. There were a number of "Employees".
3. An appropriate bargaining unit had been set out and agreed upon.
4. There was clear cut evidence of support.
5. All forms had been filed in proper order.

The Union applied to the Court of Appeal for Saskatchewan for a writ of *mandamus* requiring the Board to exercise its jurisdiction under s. 5(*a*), (*b*) and (*c*) of the above Act, in respect of the Union's application; for a writ of *certiorari;* and for an order quashing the order of the Board.

This application was granted. The reasons for so doing are stated in the following passages from the judgment of the Court:

Learned counsel for both the employer and the Labour Relations Board contended that the order of the Board must be construed as a determination by the Board that the unit of employees described in the application did not constitute an appropriate unit for the purpose of bargaining collectively; that such determination was a matter wholly within the Board's jurisdiction and therefore not subject to review, either in *certiorari* or *mandamus* proceedings.

If the order made by the Board were one within its jurisdiction, then even if wrong in law or fact, the order would not be open to judicial review. *Farrell et al. v. Workmen's Compensation Board,* [1962] S.C.R. 48. Too, if the decision of the Board could be construed as contended for by learned counsel for the employer, and the Board, a strong argument might be advanced that the decision, even if wrong, cannot be questioned in these proceedings. In my respectful view, however, the decision of the Board cannot be construed as a determination that the unit of employees described in the application do not constitute an appropriate

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unit for the purpose of bargaining collectively. Clearly, the Board dismissed the application because, in its opinion, the number of employees employed by the employer at the time of the application, did not constitute a substantial and representative segment of the working force to be employed in the future. There was no finding that the unit of employees described in the application was not an appropriate unit, nor was there any finding that the applicant union did not represent a majority of employees in such unit. What the Board in fact did, was to dismiss the application because, in its opinion, the time for making the same was not appropriate.

* * *

While the language of section 5(*a*), (*b*) and (*c*) is permissive in form, it imposes the duty upon the Board to exercise the powers when called upon to do so, by a party interested and having the right to make the application. In the present case, the right of the union to make the application, and that the union represents a majority of employees in the proposed unit, were never questioned.

When the application was made, it was the duty of the Board to hear the application and to give effect to the statutory rights of the employees. While the Board considered the application, it failed to direct its consideration to the rights of the employees as provided for in *The Trade Union Act* and rejected the application on a ground which was wholly irrelevant. By so doing, in my opinion, the Labour Relations Board declined to exercise the jurisdiction and to perform the duties imposed upon it by the section of the Act I have quoted.

From this judgment Noranda and the Board have appealed to this Court.

The relevant provisions of the Act are the following:

3. Employees shall have the right to organize in and to form, join or assist trade unions and to bargain collectively through representatives of their own choosing, and the representatives designated or selected for the purpose of bargaining collectively by the majority of employees in a unit appropriate for that purpose shall be the exclusive representatives of all employees in that unit for the purpose of bargaining collectively.

5. The board shall have power to make orders:

(*a*) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit, professional association unit or a subdivision thereof or some other unit;

(*b*) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees;

(*c*) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;

20. There shall be no appeal from an order or decision of the board under this Act, and its proceedings, orders and decisions shall not be reviewable by any court of law or by any *certiorari, mandamus,* prohibition, injunction or other proceeding whatever.

Section 3 is the primary section of the Act, giving to employees the right to organize and to bargain collectively,

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ployees 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".

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*).

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.

At the conclusion of the argument of this appeal the Court announced its decision, advising that written reasons would be delivered later. That decision was that the appeal

be allowed, that the judgment of the Court of Appeal be set aside and that the order of the Labour Relations Board be restored, with costs to both appellants in this Court and in the Court of Appeal.

Appeal allowed and order of the Labour Relations Board restored, with costs.

Solicitors for the appellant company: MacPherson, Leslie & Tyerman, Regina.

Solicitor for the appellant Labour Relations Board of Saskatchewan: Roy S. Meldrum, Regina.

Solicitors for the respondents: Goldenberg, Taylor, Tallis, Goldenberg & Schulman, Saskatoon.