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*May 9, 10
*Nov. 15

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

AND

HER MAJESTY THE QUEEN ON THE RELATION OF F. W. WOOLWORTH COMPANY LIMITED AND AGNES SLABICK *et al.* (*Applicants*) ..... — RESPONDENTS;

AND

SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION ..... — INTERVENANT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Labour—Mandamus—Right of employees to seek decertification of union—Union's failure to conclude collective agreement—Whether right affected by moral and financial help from employer—Duty of Labour Board—Trade Union Act, R.S.S. 1953, c. 259, ss. 3, 5, 14, 26.

The intervenant union was, in January, 1953, certified as bargaining agent for the employees of the respondent company but failed to conclude a collective agreement. In June, 1953, an application for decertification made by some employees, claiming to be a majority, was dismissed as premature by the appellant, the Labour Relations Board. A second application, made in December, 1953, by 13 out of the 19 employees of the company, was also rejected on the grounds that it (1) was an application of the employees in form only, being in reality made on behalf of the company and (2) was not shown to be supported by a majority of the employees. The company joined the employees in their application before the Court of Appeal for a writ of mandamus which was ordered issued directing the Board to proceed to determine the application for decertification. The Board appealed to this Court.

Held: The appeal should be dismissed.

It was conclusively established by the evidence that the application had been made and supported by a majority of the employees.

The rights of employees, under s. 3 of the *Trade Union Act,* to bargain collectively through representatives of their own choosing are not forfeited if the employees receive help from their employer in asserting those rights. The evidence furthermore directly contradicted the statement that the employees had received financial help from their employer.

In view of the union's failure to negotiate an agreement with the employer, the right of the employees to choose another representative was not suspended nor affected.

*PRESENT: Kerwin C.J., Kellock, Estey, Locke and Cartwright JJ.

Although the language in s. 5 of the Act, by which the Board was given power to rescind or amend its orders or decisions, was permissive, it imposed a duty upon the Board to exercise this power when properly called upon to do so. (*Drysdale* v. *Dominion Coal Co.* (34 Can. S.C.R. 336) and *Julius* v. *Lord Bishop of Oxford* (5 A.C. 243) referred to).

The rejection of the application was made on grounds which were wholly irrelevant and amounted to a refusal on the part of the Board to perform its duties under the Act to deal with the statutory rights of the employees, which were not affected by any disputes between the employer and the union.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), Martin C.J.A. and Culliton J.A. dissenting, ordering the Labour Relations Board to consider an application for decertification.

F. A. Brewin, Q.C. and *R. C. Carter* for the appellant.

E. D. Noonan, Q.C. for the respondent F. W. Woolworth Co. Ltd.

G. Taylor for the intervenant.

The judgment of the Court was delivered by:—

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal of Saskatchewan (1), directing that a peremptory writ of *mandamus* do issue directed to the appellant, the Labour Relations Board of that province, ordering it to proceed to determine the application of the respondents, employees of the F. W. Woolworth Company Limited in the City of Weyburn, for the decertification of the Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (hereinafter referred to as the union) as their bargaining agents. The Chief Justice of Saskatchewan and Culliton, J.A. dissented and would have dismissed the application. The respondent company joined with its said employees in applying to the Court of Appeal for the writ. The union was permitted to intervene in the appeal to this Court.

The Saskatchewan Labour Relations Board is a body composed of seven members appointed by the Lieutenant Governor in Council under the provisions of the *Trade Union Act* (c. 259, R.S.S. 1953). S. 3 of that Act declares the rights of employees (a term defined in s. 2) to bargain

(1) [1954] 4 D.L.R. 359; 13 W.W.R. (N.S.) 1.

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collectively through representatives of their own choosing and that the representatives selected for that purpose shall be the exclusive representatives of all employees in the unit of employees for such purpose. By s. 5 the Board is given power to make orders determining what trade union, if any, represents the majority of employees in an appropriate unit of employees and requiring an employer to bargain collectively. Among other powers vested in the Board by this section is that of rescinding or amending any of its own orders or decisions. S. 6 provides that in determining what trade union, if any, represents a majority of employees in an appropriate unit the Board may, in its discretion, direct a vote to be taken by secret ballot of all employees eligible to vote to determine the question. Other sections of the Act declare that certain specified acts shall constitute unfair labour practices on the part of any employer or employers agent, these including the failure or refusal to bargain collectively with the representatives elected or appointed by a trade union representing the majority of the employees in an appropriate unit, and penalties are prescribed for the commission of any such practice. S. 17 provides that there shall be no appeal from any order or decision of the Board under the Act and that its orders shall not be reviewable by any court of law or by any *certiorari, mandamus,* prohibition, injunction or other proceeding whatever.

On January 13, 1953, on the application of the respondent union, the Board made an order finding that the employees of the respondent company at Weyburn, except the Manager and Assistant Manager, constituted an appropriate unit of employees for the purpose of bargaining collectively and that the applicant represented the majority of such employees and directed the respondent company to bargain collectively with the duly appointed or elected representatives of the union in respect to the employees in the unit.

On June 9, 1953, nine of the employees of the respondent company, asserting that they were the majority of the employees, applied to the Board for an order to rescind the order of January 13, 1953, on the ground that the union was not supported by a majority of the employees in the store. This application came on for hearing before the Board on July 21, 1953 and, being opposed by the union, was dismissed on the ground that the application was premature.

On December 9, 1953 a second application was filed with the Board to rescind the order of January 13, 1953 by thirteen of nineteen employees of the respondent company at Weyburn, the grounds for the application being the same as those advanced in support of the application made in the previous June. While the employees were residents of Weyburn, the application was first heard on January 5, 1954 at Saskatoon, and adjourned at the request of the union to Regina where a hearing was held and evidence taken *viva voce* on February 9 and 10, 1954. The Board reserved its decision which was subsequently delivered on March 9, 1954 dismissing the application.

Three of the seven members of the Board agreed with the reasons for the decision delivered by the Chairman. Three other members disagreeing would have directed the taking of a vote under the powers given to the Board by s. 6 to determine the wishes of the majority of the employees.

The reasons for the decision of the majority were: firstly, that the application was that of the employees in form only, being in reality made on behalf of the company, and secondly, that it was not shown to be supported by a majority of the employees.

As pointed out in the reasons for judgment delivered by Mr. Justice Gordon, no attempt was made in the Court of Appeal to support the second of these grounds, it being common ground that the majority of the employees had supported the application, and no attempt was made to support that finding on the argument before us. On this aspect of the matter, it may be added that the fact that the application was made and supported by a majority of the employees, as that term is defined in s. 2(5) of the Act, was conclusively established by the evidence.

As to the first of the grounds upon which the decision of the majority was based, the reasons delivered by the Chairman commenced with the following statement:—

> In the light of the evidence adduced the majority of the Board is satisfied that but for the moral and financial help of the employer neither of the two applications for decertification would ever have been brought.

As this statement indicates, the majority of the Board misconceived the nature of the rights given to the employees by s. 3 of the Act, they being of the opinion that if, in endeavouring to assert those rights, they received help from

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their employer those rights were forfeited. It is also not irrelevant to point out that all of the evidence referred to directly contradicts the statement that the employees received financial help from their employer in making either of the applications, even if doing so would have affected the employees' rights. I do not know what the expression "moral help" was intended to convey. If it was intended to indicate that the employer was sympathetic to the desire of the majority of its employees to rid themselves of an unsatisfactory bargaining representative, I am quite unable to understand how that fact could affect the employees' rights.

As I have pointed out, s. 3 vests in employees the right to bargain collectively with their employer through representatives of their own choosing. S. 26 declares that where a collective bargaining agreement has been entered into it is to remain in force for a period of one year from its effective date and thereafter from year to year unless terminated in the manner prescribed by that section. A trade union claiming to represent a majority of employees other than the union which has negotiated the agreement may, not less than thirty nor more than sixty days before the expiry of the agreement, apply to the Board for an order determining it to be the trade union representing the majority of the employees in the unit.

The Act does not otherwise define the time or restrict the manner in which the rights given to the employees by s. 3 may be exercised.

The union, for reasons which are irrelevant in determining the rights of the employees, had failed to negotiate an agreement with the employer and the right of the employees to choose another representative was thus neither suspended nor affected.

The language of s. 5, in so far as it affects this aspect of the matter, reads:—

> 5. The board shall have power to make orders:—
>
> .....
>
> (i) rescinding or amending any order or decision of the board.

While this language is permissive in form, it imposed, in my opinion, a duty upon the Board to exercise this power when called upon to do so by a party interested and having

the right to make the application (*Drysdale* v. *Dominion Coal Company* (1): Killam J.). Enabling words are always compulsory where they are words to effectuate a legal right (*Julius* v. *Lord Bishop of Oxford* (2): Lord Blackburn).

By s. 14 of the Act the Board, subject to the approval of the Lieutenant Governor in Council, may make such rules and regulations not inconsistent with the Act as are necessary to carry out its provisions according to their true intent. The rules made pursuant to this power are in the record and contain nothing defining the time within which the rights of the employees given by s. 3 may be exercised. The right of the employees to choose a new bargaining representative in circumstances such as existed in the present case must, no doubt, be exercised in a reasonable manner. If, after the order of January 13, 1953 was made, the employees had applied to substitute some other bargaining representative for the union before that body had had a reasonable opportunity to negotiate a collective agreement with the employer, the Board could undoubtedly, in my opinion, defer consideration of the matter until a reasonable time to effect that object had elapsed and no court could properly intervene. This, however, is not such a case and the application was not rejected on any such ground. The application with which we are concerned was not made until some eleven months had elapsed after the order sought to be rescinded had been made. The majority of the employees clearly did not wish this union to bargain on their behalf, for reasons which need not be enquired into, being entirely the concern of the employees themselves. It was the duty of the Board to hear the employees' application and to give effect to their statutory rights. While the Board considered the application, it was rejected upon grounds which were wholly irrelevant.

In my opinion, the manner in which the employees' application was dealt with amounted to a refusal on the part of the Board to perform the duties cast upon it by the sections of the *Trade Union Act* to which I have referred.

The majority of the Board, concerning themselves with what they considered to be the merits of the various disputes between the employer and the union, appear to have

(1) (1904) 34 Can. S.C.R. 328 (2) (1880) 5 A.C. 214 at 243.
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lost sight of the fact that their duty was to deal with the statutory rights of the employees, which were not affected by the fact that there had been such disputes.

I would dismiss this appeal with costs to be paid by the appellant to the respondents, except that the appellant should be paid by the respondents its costs of the day on the adjournment of this appeal on February 16, 1955. There should be no costs to or against the intervenant.

Appeal dismissed with costs.

Solicitor for the appellant: *R. C. Carter.*

Solicitor for the respondent F. W. Woolworth Co. Ltd: *A. W. Embury.*

Solicitors for the respondents A. Slabick *et al.*: *Robinson, Robinson & Alexander.*

Solicitors for the intervenant Union: *Goldenberg & Taylor.*