1988 S.H. No. 63228

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

B E T W E E N:

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1252; and the UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, CLC and AFL-CIO

APPLICANTS

- and -

NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA); LABOUR RELATIONS BOARD (NOVA SCOTIA); A.C.A. COOPERATIVE ASSOCIATION LTD. (POULTRY DIVISION); and FISHERY PRODUCTS INTERNATIONAL LIMITED

RESPONDENTS

HEARD in Chambers at Halifax, Nova Scotia before the Honourable Mr. Justice Nathanson, Trial Division, on May 31, 1988.

DECISION May 31, 1988 (oral)

COUNSEL

N.B. MacDonald, Esq.) Susan D. Coen, Esq.)	- for the applicants
Terry Louise Roane, Esq.	- for the respondent, Nat. Auto., Aero. and Agr. Imp. Workers Union of Can. (CAW-Can.)
J.J. Ashley, Esq.	- for the respondent, Labour Relations Bd. (Nova Scotia)
J. Plowman, Esq.	- for the respondent, A.C.A. Coop. Assoc. Ltd. (Poultry Div.)

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NATHANSON, J.: (orally)

It is not necessary to call upon you, Ms. Roane, Mr. Ashley and Mr. Plowman. I am not satisfied from the evidence in the affidavits filed and from the argument that has been presented on behalf of the applicant that a case has been made out for the exercise of the Court's discretion by way of certiorari.

In two applications for certification by a new union to replace an incumbent union, the name of the incumbent union was wrongly stated on the ballots

in both votes, although on the ballot with respect to the second vote the correct name was added in brackets after the wrong name. The wrong name is in fact the correct name of another union elsewhere in Canada which may be known to union members in Nova Scotia. The error had been discovered too late for the first vote, but in time for the second vote. It was brought to the attention of an official of the Labour Relations Board of Nova Scotia, which was supervising the conduct of the votes, but he declined to make any change other than to add the proper name of the incumbent union in brackets after the incorrect name. At the time of voting, no employee objected or indicated in any way that he or she was confused about the identity of the incumbent union. A scrutineer for the incumbent union signed a certificate, at least with respect to one of the votes, indicating that everything had been conducted in a proper manner.

During the course of intervention hearings, the Board ruled that it would not hear arguments as to possible confusion arising from the names on the ballots, but would limit itself to hearing evidence that the incumbent union might wish to present with respect to actual confusion that may have existed. Witnesses testified, but none gave evidence as to actual confusion. The Board asked some witnesses whether their votes reflected their true wishes; each of them responded in the affirmative.

The position of the Board is that the error with respect to the incumbent union's name was a technical irregularity which did not invalidate the votes because of s.7 of the Trade Union Act, S.N.S. 1972, Ch.19 as follows:

> **"Irregularity Does Not Invalidate Proceeding**
> 7 No proceedings under this Act, including arbitration or other proceedings in accordance with Section 40 and arbitration in accordance with Section 103 are invalid by reason of any defect in form or any technical irregularity."

For its part, the incumbent union submits that the Board acted beyond its jurisdiction.

The jurisdiction of the Board is set out in the Act. The Board is required to supervise the whole of the process of certification, which is a proceeding under the Act. The taking of a vote is part of that process and that proceeding. In supervising the vote, the Board was doing exactly what it was required to do by its governing statute. It was therefore acting within its jurisdiction.

A technical irregularity may be defined as a deviation from what is strictly required. The Board was of the opinion that, although the correct name of the incumbent union should properly have been on the ballots, what occurred was a deviation from that strict requirement. It was a technical irregularity and, as such, it was governed by s.7 of the Act.

It was submitted that confusion in the minds of employees voting vitiated the vote. The Board did not agree, and neither do I. My perusal of the affidavit of Deborah Smith, filed in support of the Originating Notice (Application Inter Partes), reveals that there is no factual basis for the allegation of confusion. Ten of the thirty-three paragraphs of that affidavit begin with the words: "**THAT** I do verily believe ...". See paragraphs 8, 9, [10], 11, 12, 13, 14, 16, 30 and 31. There is therefore no evidence of actual confusion in the minds of the voting employees. Even if such evidence existed, it was not before the Board. All that was presented to the Board were allegations, submissions and beliefs. The Board insisted upon facts. I am at a loss to understand why the Board should be expected to act in circumstances where there is no evidence upon which to base its actions. The burden of proof is always upon the alleging party, and it was proper for the Board to require the incumbent union to fulfill the burden of proof which was upon it.

The actual finding of the Board with respect to s.7 of the Act was that the wrong name being on the ballots for the two votes was prima facie a technical error. That gave the opportunity to the incumbent union to come forward and prove that it was more than a technical error, that there had been some real actual confusion in the minds of the employees. That was a right which the Board was not required to give to

the incumbent union. But it did so. And the union was unable to prove what it alleged.

The incumbent union made a strong pleas that it is impossible and improper to inquire into how employees vote, that the voting process is and should be strictly secret. I agree that it should be secret before the vote is taken, but after the vote is taken I see nothing wrong with the Labour Relations Board requiring a party that alleges confusion to do what is done in all court actions and proceedings before tribunals, that is, to bear the burden of proof.

The question that the Board put to the witnesses arose directly from a provision of the Act that imposes upon the Board a duty to ascertain the wishes of the employees:

> **"Vote of Employees**
> **24** (1) Where a trade union makes application for certification ... the Board shall take a vote of the employees in the unit applied for to determine their wishes with respect to the certification of the applicant trade union as their bargaining agent."

Against the background of that provision, it can hardly be said that the Board was wrong or patently unreasonable in basing its decision upon the answers to the question it put to the employees who testified at the intervention hearings.

The Board acted correctly, reasonably and

I decline to exercise my discretion to grant certiorari, and I refuse the application.

The unsuccessful applicant will pay the costs of the application to the respondent, after taxation thereof.

J.

Halifax, Nova Scotia
May 31, 1988