Labour Relations Board
Saskatchewan

GRAIN SERVICES UNION (ILWU – Canada), Applicant v. SASKATCHEWAN WHEAT POOL, HEARTLAND LIVESTOCK SERVICES (324007 ALBERTA LTD.) and GVIC COMMUNICATIONS INC., Respondents

LRB File No. 003-02; February 21, 2003
Vice-Chairperson, James Seibel; Members: Don Bell and Maurice Werezak

For the Applicant:	Ronni Nordal
For the Respondent, Saskatchewan Wheat Pool:	Rob Garden, Q.C.
For the Respondent, GVIC Communications Inc.:	Susan Barber
For the Respondent, Heartland Livestock Services:	Jeff Grubb, Q.C.

> **Unfair labour practice – Duty to bargain in good faith – Refusal to bargain – Board reviews limited circumstances in which parties are required to engage in mid-term collective bargaining – Board identifies requirement for explicit consensus to bargain in mid–term absent contractual or legislative obligation – Board finds that correspondence and discussion on predecessor and successor employers' obligations with respect to pension plan not sufficient to establish consensus – Board finds no obligation on employer to engage in mid-term bargaining and finds employer did not refuse to bargain – Board dismisses application.**
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> ***The Trade Union Act,*** **ss. 5(d) and 11(1)(c)**

REASONS FOR DECISION

Background and Issues:

[1] Grain Services Union (ILWU – Canada) (the "Union") applied to the Board for an order finding Saskatchewan Wheat Pool ("SWP") in violation of s. 11(1)(c) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"). The Union alleges that on the closing of the sales of its partnership interest in Heartland Livestock Services ("Heartland") to 324007 Alberta Ltd. on September 21, 2001, and its Western Producer Publications Division ("Western Producer") to GVIC Communications Inc. ("GVIC") on January 9, 2002, SWP terminated the membership of affected employees in the Saskatchewan Wheat Pool/Grain Services Union Pension Plan (the "SWP/GSU Pension Plan" or the "Pension Plan"). The Union alleges that the termination adversely affected the pension benefits of the former SWP employees, and had the effect of unilaterally amending the collective agreements between the parties covering the employees. The Union

amended its application to include 324007 Alberta Ltd., operating as Heartland Livestock Services, and GVIC as Respondents, and to include a reference to a violation of s. 37 of the *Act*, the successorship provision.

[2] The Union applied for an interim order preserving the status quo with respect to the pension issue until final hearing by the Board, and directing the Respondents to negotiate with the Union. The Board granted the interim Order on January 22, 2002, with Reasons for Decision reported at [2002] Sask. L.R.B.R. 47.

[3] The Board heard the main application over four days. At the commencement of the hearing, counsel for the Union and for 324007 Alberta Ltd. and GVIC advised that they agreed that those Respondents were successors to SWP and had agreed to commence bargaining forthwith. These parties agreed that the Board should neither proceed to hear whether either Respondent had committed a violation of the *Act* nor make any order respecting them pursuant to s. 37 of the *Act* at this time. These Respondents attended the hearing as observers.

[4] While the majority of SWP employees come under federal jurisdiction with respect to labour relations, the Union is designated by this Board as the bargaining agent for some of its employees, including those employed by Heartland and Western Producer.

[5] Effective September 21, 2001, SWP sold its interest in Heartland to 324007 Alberta Ltd., which operates the business as Heartland Livestock Services ("HLS"). An amended certification Order dated October 1, 2001 (LRB File No. 198-01) reflected the change of employer. The collective agreement between Heartland and the Union had a term from August 1, 1999 to July 31, 2002 (the "Heartland Agreement").

[6] The sale by SWP of Western Producer to GVIC closed on January 9, 2002. The parties extended the collective agreement between SWP and the Union that covered the Western Producer employees with a term from August 1, 1998 to July 31, 2001 – referred to as the "Country Services (Operations) Agreement" (the "Country Services Agreement") – to July 31, 2002.

[7] Both groups of affected employees were members of the SWP/GSU Pension Plan. The Pension Plan is registered and regulated federally. The Pension Plan is a "defined benefit" plan[1]. Article 9 of each of the Heartland Agreement and Country Services Agreement referred to above provides that the Pension Plan forms part of each collective agreement. Participation in the pension plan by the employees affected by the sales was mandatory. Article 9 provides in each case, in part, as follows:

> ***ARTICLE 9 – PENSION PLAN***
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> *1. The Saskatchewan Wheat Pool/Grain Services Union (ILWU–Canada) Pension Plan, effective January 1, 1981, arises out of and forms part of the Collective Agreement between the Company and the Union.*
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> *2. Ninety (90) days from the date of employment with the Company, all employees engaged on or after January 1, 1981 shall, as a condition of employment, join the Saskatchewan Wheat Pool/Grain Services Union (ILWU – Canada) Pension Plan.*

[8] A board of trustees comprising an equal number of SWP and Union representatives administers the SWP/GSU Pension Plan. Under federal regulation the plan must file an actuarial valuation report with the federal Office of the Superintendent of Financial Institutions ("OSFI") every three years, except upon the earlier occurrence of certain emergent conditions regarding solvency. The next regular report is due as at December 31, 2003.

[9] SWP did not advise the Union of the sale of Heartland until after it had taken place, at which time it also advised the Union that employee pension benefit accruals and contributions to the SWP/GSU Pension Plan ceased on the closing of the sale on September 20, 2001, and that the purchaser, HLS, was required by the terms of the sale agreement to establish an identical pension plan, albeit registered and regulated provincially.

[10] Concerned that SWP had violated the collective agreement and unilaterally changed the terms of the collective agreement and the SWP/GSU Pension

[1] In a "defined benefit plan", where the members and employer contribute at a defined rate to an aggregate fund, the level of benefits upon retirement is defined, but the specific cost to provide such benefits is not. By

Plan as set forth in Article 9, *supra*, the Union filed a grievance with both SWP and HLS. SWP takes the position that because it is no longer the employer of the Heartland employees now employed by HLS the grievance against it is not arbitrable.

[11] On December 21, 2001, SWP announced the sale of the Western Producer to GVIC, prior to the closing date of the sale. The Union filed the present application prior to this closing date, but the closing date was subsequently advanced to January 9, 2002, and the sale became effective before the Board heard the interim application. Again, it was a term of the sale that the purchaser, GVIC, establish an identical pension plan. Again, the Union expressed its concern regarding unilateral action by SWP affecting pension benefit accrual, contribution to, and continuation of the membership of affected employees in, the SWP/GSU Pension Plan.

[12] In the fall of 2002, SWP requested that the Union agree to change the SWP/GSU Pension Plan to allow an aggregate transfer of contributions and accrued interest in respect of the affected employees to a new HLS "mirror" pension plan. The Union refused. The Union expressed, and continues to express, its opposition to SWP unilaterally transferring assets from the SWP/GSU Pension Plan to either a HLS or GVIC pension plan without negotiating with the Union and obtaining its approval. Part of the Union's concern is regarding a surplus in the Pension Plan that has historically been used to increase the unit value benefit, to fund improvements to the Pension Plan and a contribution "holiday" for SWP and, more recently, to offset a service cost shortfall by effectively subsidizing contribution rates. The Union is concerned that the transferred employees will not derive any benefit from the surplus and will potentially pay substantially higher contributions to fund a mirror plan than they currently pay to the SWP/GSU Pension Plan, while SWP has enjoyed a contribution holiday and continues to enjoy a subsidy of the contribution rate from the surplus created in part from the contributions of the transferred employees.

[13] The issues raised with the Board on the interim application concerned the potential transfer of pension assets to the mirror plans and the interim treatment of contributions.

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contrast, in a "defined contribution" plan, where each employee and the employer contribute to an individual account, the contribution rate is defined, but the level of pension benefit it will provide is not.

[14] In the Reasons for Decision, *supra,* at 56-57, the Board granted an interim Order in the following terms:

> *(1) Saskatchewan Wheat Pool is restrained from requesting the transfer of any funds from the SWP/GSU Pension Plan to pension plans established by the successor employers, Heartland Livestock Services (324007 Alberta Ltd.) and GVIC, until the final application filed herein is heard and determined by the Board, or agreement is reached between the Union and the successor employers on the transfer of such funds;*
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> *(2) Saskatchewan Wheat Pool, Heartland Livestock Services (324007 Alberta Ltd.) and GVIC are directed to commence negotiations with the Union with respect to the SWP/GSU Pension Plan and the manner of carrying out the pension plan obligations contained in the collective agreements between the Union and Heartland Livestock Services and the Union and Saskatchewan Wheat Pool respecting the employees of Western Producer Publications Division;*
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> *(3) Heartland Livestock Services (324007 Alberta Ltd.) is directed to continue to collect pension contributions from employees of Heartland Livestock Services and to hold all such pension contributions in trust for the benefit of the employees in question until the Union and Heartland Livestock Services (324007 Alberta Ltd.) agree on the manner of carrying out the pension obligations set out in article 9 of the collective agreement between Heartland Livestock Services and the Union;*
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> *(4) GVIC is directed to continue to collect pension contributions from employees of the former Western Producer Publications Division and to hold all such pension contributions in trust for the benefit of the employees in question until the Union and GVIC agree on the manner of carrying out the pension obligations set out in article 9 of the collective agreement between Saskatchewan Wheat Pool and the Union respecting employees of Western Producer Publications Division; and*
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> *(5) The Board Registrar is directed to set a hearing date of the application no sooner that 30 days after the parties have commenced negotiations as set out in paragraph (2) above on the request of any party.*

Subsequent negotiations did not resolve the situation.

[15] SWP takes the position that it was not required to bargain collectively with the Union with respect to the pension issues raised by its sales of Heartland or Western Producer. Mr. Garden, counsel for SWP, raised a preliminary issue that the Board did not have jurisdiction to hear the application, arguing that by operation of law under s. 37 of the *Act*, SWP is not the employer and was not obliged to negotiate with the Union. He submitted that the Union should look to the successor employers to enforce its rights. Mr. Garden referred to several decisions regarding the issue of the obligation to engage in mid-term bargaining. Counsel requested that the Board defer to the grievance and arbitration process set in motion by the Union, as by filing the grievance the Union had admitted that the issue was one of alleged violation of the collective agreement.

[16] In response to these assertions, Ms. Nordal, counsel for the Union, submitted that the affected employees were terminated from participation in the SWP/GSU Pension Plan while SWP was still their employer before the sales of the two divisions took place. Counsel submitted that the Board has jurisdiction to consider whether SWP was obliged to bargain the termination of the employees from the Pension Plan, and to consider, pursuant to s. 37(2)(f) of the *Act,* whether to make directions as to the application of the collective agreements.

[17] We determined to reserve decision on the preliminary issue and to proceed to hear the case.

Evidence:

[18] Some of the evidence adduced at the hearing was duplicative or superfluous to the issue before the Board and we have not included it in the summary that follows.

[19] Hugh Wagner has been the Union's general secretary for many years. Since 1986, he has been a trustee of the SWP/GSU Pension Plan and is presently co-chair of the Pension Plan's board of trustees. He testified that the Union and SWP have had a bargaining relationship dating back to a 1936 voluntary recognition respecting elevator workers and office workers. Over the years, various groups of employees acquired and ceded representation by the Union. There was voluntary recognition of some groups and this Board and the federal labour relations board issued some formal

certification orders for other groups. At the time material to this application, the Union and SWP had five collective agreements, including the Heartland and Country Services Agreements referred to above.

[20] According to Mr. Wagner, the Union insisted that the SWP/GSU Pension Plan be incorporated as part of its collective agreements with SWP effective January 1, 1981, to ensure that it could not be changed without the Union's consent. Referring to the text of the Pension Plan, Mr. Wagner pointed out that, according to Section 0.01 of the Pension Plan, its purpose is to provide pension benefits to members of the Union pursuant to the collective agreements. Mr. Wagner also pointed out that the first six clauses of Article 9 of each of the Heartland Agreement and the Country Services Agreement are virtually identical. However, clauses 7 and 8 of the Heartland Agreement provide that effective February 1, 2000, pension plan administration and investment costs are paid by the pension plan, and the retirement allowance benefit was eliminated for employees with less than fifteen (15) years service. Identical provisions were incorporated in the Country Services Agreement by a letter of understanding.

[21] The Union was voluntarily recognized as the bargaining agent for the employees in SWP's Livestock Division in 1983. In 1994, the Livestock Division was merged into Heartland Livestock Ltd., a partnership between SWP and others. At that time, the Union and SWP negotiated "Amendment No. 4" to the SWP/GSU Pension Plan to include Heartland in the definition of "Company". The Amendment also increased the unit benefit amount. The Union obtained a certification Order for Heartland in 1996.

[22] The Union had been the bargaining agent for the employees in SWP's Western Producer Publications Division since 1954. This included the employees of Modern Press. M. C. Graphics Inc. was formed out of the merger of Modern Press and Central Graphics in 1988. M.C. Graphics' employees left the SWP organization when it was later transferred to PrintWest Communications Ltd. ("PrintWest"). The Union and SWP negotiated "Amendment No. 11" to the SWP/GSU Pension Plan in April 1997, to accommodate the transferred employees. The parties agreed to delete M.C. Graphics from the definition of "Company" under the Pension Plan, and to afford Plan members then employed by PrintWest the opportunity to elect to remain "inactive" members of the SWP/GSU Pension Plan (i.e., cease to make contributions) or transfer an amount in

respect of all accrued benefits out of the Pension Plan to another registered pension plan or a prescribed RRSP. In the case of members electing to transfer, the transfer amount was determined as the greater of twice the sum of the member's contributions plus credited interest and the actuarial present value of the member's accrued entitlements.

[23] All PrintWest employees eventually transferred out of the Pension Plan, but not until a new pension plan was bargained and the Union and SWP negotiated their transfer as an entire group. In the interim, the affected employees and PrintWest continued to contribute to the SWP/GSU Pension Plan. According to Mr. Wagner, the treatment of the pension funds of employees affected by the transfer of M. C. Graphics to PrintWest demonstrates an historical precedent between the parties for the negotiation of the treatment of employees vis à vis pension entitlements in the case of the transfer of a business by SWP.

[24] By agreement between SWP and the Union, as of May 1, 2001, new employees are not allowed to join the SWP/GSU Pension Plan. Such new employees, of whom there is at present only a handful, are part of a new defined contribution pension plan[2], called the "Saskatchewan Wheat Pool and Affiliated Companies Accumulation pension plan" (the "accumulation pension plan"). SWP also has a pension plan for certain out-of-scope employees, the "Saskatchewan Wheat Pool Out of Scope Defined Benefit pension plan" (the "out of scope plan").

[25] Pursuant to Section 14.01(1) of the SWP/GSU Pension Plan, when a member of the pension plan transfers to one of the designated out-of-scope positions and becomes a member of the out of scope plan, the SWP/GSU Pension Plan transfers an amount equal to the aggregate of the actuarial reserve held in the Pension Plan in respect of all benefits accrued by the transferring member and twice the sum of the member's contributions plus credited interest, subject to the solvency restrictions imposed by the *Pension Benefits Standards Act, 1985*, R.S.C. 1985, c. 32, and the maximum transfer values under the *Income Tax Act*, R.S.C. Again, according to Mr. Wagner, the provisions for transferring pension assets of employees going out-of-scope

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[2] See, f.n. 1, *supra*.

illustrates that twice the sum of contributions and interest is a reasonable basis for a transfer out of the Pension Plan in the present case where the businesses were sold.

[26] Section 2.04 of the Pension Plan text provides that a Plan member remains a "member" so long as they are employed by SWP or are in receipt of or entitled to a benefit under the Plan. According to Mr. Wagner, this includes not only persons actually in receipt of pension benefits, but also persons on long-term disability and "deferred pensioners". According to Mr. Wagner, the only ways that one ceases to be a member of the Pension Plan is if one transfers to the out of scope plan or the accumulation plan, or takes a cash payout from the Pension Plan. Indeed, pursuant to Section 14.01(2) of the Pension Plan text, members of the SWP/GSU Pension Plan who transfer to a position where they become members of the accumulation plan have the choice of remaining as an "inactive member" of the SWP/GSU Pension Plan or transferring the value of accrued benefits out of the Pension Plan.

[27] Referring to the contribution rates set out in the Pension Plan, Mr. Wagner stated that the rates have remained the same for many years, except for a recent "contribution holiday" for SWP negotiated for a three year period from 1999 to September 30, 2001, in exchange for other improvements to the Pension Plan. However, the present contribution rate is not sufficient to cover costs and the shortfall is being made up from a surplus (an excess of assets over liabilities) in the Plan (the "plan surplus"). An actuarial valuation report for the Pension Plan as at December 31, 2000 (the "2000 Actuarial Report") discloses that:

> *The required contribution rates set in the Plan are not sufficient to cover the cost of accruing benefits of the Plan. The contribution shortfall is estimated to be $5,243,000 for the three years ending December 31, 2003. There is sufficient surplus at December 31, 2000 to provide for this contribution shortfall.*

[28] The plan surplus at the time of the 2000 Actuarial Report was approximately $25 million. To cover the Pension Plan costs out of contributions over the three year period referred to in the Report would require a combined employee/employer rate of approximately 10.75%, which would have to be achieved through collective bargaining. Otherwise, if the Pension Plan actuary determines that a deficiency is likely to continue that cannot be funded out of the surplus, the trustees of the Plan must direct

SWP and the Union to increase the contribution rate sufficiently within 90 days, failing which future service benefits will decrease.

[29] In the past, the plan surplus has also been used to enhance the early retirement bridge benefit, increase the benefit unit value, progressively move from an early retirement “rule of 90” to the present “rule of 80,” and to provide SWP with the contribution holiday referred to above.

[30] The Union learned of the sale of Heartland on the closing date through an SWP press release. There had been no prior discussion with the Union about the effect of the sale on the affected employees. Shortly after the announcement of the sale, Mr. Wagner sought to have a discussion with SWP but he was rebuffed. He corresponded with Mr. Posyniak of SWP’s human resources department and submitted that the affected employees should continue to be members of the Pension Plan and have an interest in the plan surplus, then estimated at approximately $17 million. He received a reply to the effect that SWP was aware of its legal obligations, but there was no offer to meet with the Union. The Union did not learn that HLS was required to set up a “mirror plan” under the terms of the sale until sometime in October 2001.

[31] SWP sent Mr. Wagner proposed amendments to the Pension Plan for his signature, but he refused to sign them. The proposed amendments covered the Heartland employees and employees affected by any future divestiture. SWP did not seek the Union’s consent before terminating the affected employees’ continued contributions to the Pension Plan. Mr. Wagner learned sometime later that SWP ceased making contributions to the Pension Plan in respect of the affected Heartland employees effective the closing date of the sale. The Union filed grievances with both SWP and HLS. As of the date of the hearing of the present application, the employers had not named nominees to respective boards of arbitration.

[32] At the time of the Heartland sale, the Union was aware that SWP was seeking a buyer for its Western Producer division, but SWP would neither confirm nor deny the information. The Union provided written notice to SWP that its position on the sale of any business by SWP was that affected employees should continue to be members of the SWP/GSU Pension Plan until the conditions of their exit from the Plan

were bargained. Upon hearing of the pending sale of the Western Producer on December 24, 2001, Mr. Wagner advised Mr. Posyniak that the Union wanted to bargain pension plan issues with respect to the affected employees. On December 28, 2001, Mr. Posyniak replied that it was expected that the purchaser, GVIC, would provide a pension plan with a benefit calculation identical to the SWP/GSU Pension Plan.

[33] The problem, according to Mr. Wagner, is that because the SWP/GSU Pension Plan contribution rates are being subsidized out of the plan surplus, the transferred employees (and their successor employers, HLS and GVIC) will be required to pay substantially higher contributions to a mirror plan with no surplus for the same benefits. Indeed, the successor employers are already balking and want to negotiate a "defined contribution" plan rather than a "defined benefit" plan.

[34] In April 2002, at the request of SWP, actuarial consultants Aon Consulting ("Aon") provided an interim valuation report for the Pension Plan as at December 31, 2001 ("the 2001 Actuarial Report"). The 2001 Actuarial Report indicated that, for reasons described later in these Reasons, the plan surplus had decreased to approximately $11.4 million, on a "going-concern surplus" basis. On a hypothetical "wind-up" or "solvency" basis, the actuary estimated a deficiency in the Pension Plan of some $1.7 million.[3] According to Mr. Wagner, the Pension Plan has had a going-concern surplus for all but one of its 21 years, but this was the first time it had a winding-up shortfall. The Pension Plan once had a winding-up surplus of more than $50 million – indeed, it was some $29 million only one year before. Aon described the significance of the situation in a letter to SWP dated June 10, 2002, as follows:

> *Circumstances have changed since* [the 2000 Actuarial Report] *was prepared. We have subsequently prepared a valuation of the Plan as at December 31, 2001, in our report dated April 9, 2002. This valuation disclosed a surplus on the going-concern basis of $11,421,000. However, on a solvency basis, there is a shortfall or deficiency of $1,734,000. If there was not going to be a transfer of assets to other pension plans there would be no requirement by the Pension Benefits Standards Act ("PBSA") that this report be filed with OSFI. However, if it is filed with OSFI, Regulation 9(7) of the PBSA would be invoked to require contributions made to the*

[3] The "going-concern" valuation uses a set of assumptions to determine whether there are sufficient assets to fund the on-going costs of the pension plan. The "winding-up" valuation determines the solvency status of the pension plan in the event it is wound up.

> *Plan to be equal to the normal actuarial cost plus special payments which would amortize the solvency deficiency over a five year period commencing January 1, 2002. As this level of required contribution exceeds the current fixed rate contributions being made to the Plan, the Trustees of the Plan would have to request that the Company and the Union negotiate an increase in the current contribution rates. If this does not occur within 90 days, then the Plan requires the Trustees to reduce the future benefits such that the current fixed rate contributions will be sufficient to comply with Regulation 9(7). This would involve a reduction in the Bridge benefit amount and/or a reduction on the Pension benefit amount in respect of service accruing in the future.*

[35] Mr. Wagner described four kinds of members in the Pension Plan: (1) actively contributing members; (2) inactive members, e.g., persons who no longer contribute to the Plan, but remain in the employ of SWP, in out-of-scope positions or with an affiliate who have elected not to transfer out of the Plan, and persons on layoff subject to recall; (3) totally disabled employees who do not make contributions to the Plan; and, (4) deferred pensioners, who are no longer employed by SWP but are entitled to pension benefits in the future. Mr. Wagner testified that it is not clear what will happen to the inactive members and deferred pensioners in the Heartland and Western Producer affected employee groups following the sales.

[36] Mr. Wagner acknowledged that the cost for the new employers to establish an identical defined benefit pension plan is significant. He said that the termination from the SWP/GSU Pension Plan of the 70 affected Heartland employees and approximately 35 Western Producer employees means that they are deprived of the use of the plan surplus to reduce contribution rates and fund pension improvements.

[37] Despite the interim Order of the Board that directed SWP, GVIC and HLS to negotiate with the Union respecting the pension issues raised on the sales, no resolution has been achieved.

[38] Mr. Wagner testified that, by definition, the transferred employees can no longer contribute as active members to the SWP/GSU Pension Plan as it now exists – they are no longer employees of SWP. At the time of the sales, however, SWP could

have negotiated with the Union as to how the employees would be treated, as they did in the case of the PrintWest employees.

[39] In April 2002, SWP proposed that transferred employees remain as inactive members of the SWP/GSU Pension Plan, and receive the same adjustments received by active members to the date of the sales; also they could elect a one-time transfer from the SWP/GSU Pension Plan to the purchasers' plans at a transfer value equal to the greater of the going-concern liability or winding-up liability. However, Mr. Wagner said that the Union wants the Board to make the necessary amendments to the collective agreements and the SWP/GSU Pension Plan to provide that the transferred employees be allowed to choose one of three options, described by the Union in a letter to SWP dated June 21, 2002. The options are as follows:

(1) to become deferred pensioners or inactive SWP/GSU Pension Plan members with access to the early retirement bridge benefit and any further benefits provided to pension plan members;

(2) to cash out of the SWP/GSU Pension Plan and transfer an amount to a new pension plan equal to the greater of two times the member's contributions plus accrued interest or the commuted value[4] of the member's earned pension benefits; or,

(3) to continue to participate in the SWP/GSU Pension Plan as an active member.

[40] In testifying with respect to these options, Mr. Wagner said that if the now HLS and GVIC employees were to remain as active members of the SWP/GSU Pension Plan, as per the third option, the Plan definition of "Company" would have to be changed to include the successor employers, and that such a multi-employer situation would require other amendments to the Pension Plan. However, he said that while HLS and GVIC employees cannot presently contribute to the Pension Plan, SWP and the Union

[4] "Commuted value" is a lump sum amount representing the present value of the benefits promised to an individual member over that member's lifetime.

could agree to the mechanisms necessary to allow them to do so, and SWP has simply refused to negotiate.

[41] Similarly, allowing employees to transfer funds out of the Pension Plan, as per the second option, would require amendments to the Pension Plan, and would result in increasing the contribution deficiency for the members that remain in the Plan, requiring an increase in contributions or a reduction in benefits. Aon confirms this in its June 10, 2002 correspondence to SWP, as follows.

> *The results of the December 31, 2001 actuarial valuation report must now be used in determining the effect of any asset transfer on the SWP/GSU Plan. The Supplementary Actuarial Opinion and Cost Certificate that we had prepared as part of the Asset Transfer Report in respect of the Heartland sale can no longer be used. It is our opinion that asset transfers for Heartland and Western Producer sales would result in a solvency deficiency in the SWP/GSU pension plan of about $2,500,000 to $3,000,000 (after the transfers) using the transfer rates referred to above. Obviously, the greater the amount transferred from the SWP/GSU pension plan the larger the solvency deficiency involved would become. Such disclosure to OSFI would trigger the operation of Regulation 9(7) and require either an increase in current contribution rates or a significant decrease in the future benefit accrual rates for the SWP/GSU Plan if no agreement is reached on increasing the contribution rates.*

[42] With respect to the first option, whereby employees could choose to remain in the SWP/GSU Pension Plan as "inactive" members with respect to their present interest in the Plan and join a second plan provided by their respective successor employer, Mr. Wagner said it was an attractive option for employees who have at least 25 years of pensionable service, but otherwise it is not. However, this option is the one recommended by Aon in its letter of June 10, 2002, as follows:

> *On the basis of the December 31, 2000, valuation it made sense to transfer assets to the pension plans which were to be created by the new owners of Heartland Livestock and Western Producer Publications. However, under the December 31, 2001, valuation it is now preferable from the point of view of the SWP/GSU pension plan for the Heartland and Western Producer transferred employees to become Inactive Members of the Plan since this approach would not require filing reports with OSFI. If no reports are filed with OSFI then there is no requirement to change the current contribution rates. As Inactive Members the transferred*

> *employees could either remain as inactive members or utilize individual transfer rights to transfer the value of their accrued benefits to a LIRA or a successor employer pension plan.*

If the transferred employees are not allowed to choose between these options, Mr. Wagner said they should be allowed to remain as active members of the Pension Plan.

[43] Aon Consulting has been the actuary for the SWP/GSU Pension Plan since 2000. Wayne Berney has been a qualified actuary since 1976 and is a consulting actuary and a senior vice-president of Aon Consulting in Saskatoon. The parties agreed that counsel for each should be allowed to cross-examine him as an expert witness regarding pension plans in general and the SWP/GSU Pension Plan in particular.

[44] With respect to the variation in the solvency position of the SWP/GSU Pension Plan between the 2000 and 2001 Actuarial Reports, Mr. Berney surmised that the deterioration was caused by a number of factors: a decrease in the yield of long-term Government of Canada bonds and a decrease in the market value of the Plan assets influenced by generally falling investment markets and the events of September 11, 2001. Based on current conditions, he expected the solvency position to remain more or less constant. At December 2000, there was sufficient surplus in the Plan to cover current service costs for 2001, 2002 and 2003.

[45] According to Mr. Berney, if the purchaser of a business does not assume the liabilities in the Pension Plan, no asset transfer takes place. The transferred employees remain as inactive members of the Plan, and SWP and the purchaser must each recognize the service with the other for the purposes of vesting and early retirement eligibility in their respective plans. If, however, liabilities for past service are transferred to the purchaser, the purchaser must establish a pension plan that replicates the benefits in the SWP/GSU Pension Plan, in the present case, a defined benefit plan for both past service with SWP and future service with the purchaser.

[46] Mr. Berney testified that a pension plan actuarial valuation report to the OSFI is required whenever a change occurs that affects the plan status or current service contribution rates or every three years, whichever first occurs. In the event that assets/liabilities were transferred out of the SWP/GSU Pension Plan to HLS and GVIC

mirror plans, an "asset transfer report" would have to be submitted to the OSFI. The OSFI ensures that there are sufficient assets to support the transfer and assesses the effect of the transfer on the viability of the remainder of the Plan.

[47] Based on the 2000 Actuarial Report referred to above, Mr. Berney thought that the OSFI would have approved of a transfer of assets to an HLS mirror plan with no deleterious effect on the ongoing funding of the SWP/GSU Pension Plan. However, based on the 2001 Actuarial Report, Mr. Berney thought that the OSFI would not approve transfers to HLS and GVIC plans without requiring increases in the contribution rates to the SWP/GSU Pension Plan, in view of the solvency position of the Plan. Similarly, if new plans are established without any surplus, they could not support the current unit benefit and could not be registered unless the contribution rate was increased sufficiently to cover current service costs. The first payer of any increased contribution rate would be the successor employers. Because the demographics of the two groups of affected employees are different, the current service cost for each group is not the same – that is, because the HLS group is generally older, its service cost is higher. Therefore, to ensure that the benefits of the mirror plans are the same as those of the SWP/GSU Pension Plan (i.e., the same unit benefit and bridge benefit), significantly higher contribution rates would be required, and they would be different for each successor employer and its complement of affected employees.

[48] No transfer can take place until the purchasers have their plans in place and registered with the Saskatchewan Superintendent of Pensions and have the approval of the SWP/GSU Pension Plan trustees and of the OSFI. According to Mr. Berney, under Saskatchewan law, the purchasers are responsible for any initial shortfall in current cost funding. Any increase in contribution rates would have to be negotiated with the Union.

[49] In Mr. Berney's opinion, under the terms of the SWP/GSU Pension Plan, after the closing date of the sale of each business, it was not permissible for SWP to deduct and remit contributions to the Pension Plan on behalf of the affected employees.

[50] Mr. Berney commented on the three options proposed by the Union in its June 21, 2002 letter referred to above. The first option – that transferred employees

remain as inactive members of the SWP/GSU Pension Plan – is, in his opinion, in the best interests of the transferred employees if the successor employers do not assume the assets and liabilities of the SWP/GSU Pension Plan in respect to them, and in the best interests of the SWP employees remaining in the Plan. It would require an amendment to the Plan to distinguish the inactive member employees transferred to HLS and GVIC from other inactive members, so that their service with the successor employers will count for purposes of vesting and early retirement eligibility. HLS and GVIC each would still have to negotiate a pension plan for the employees on a "go forward" basis. This is the option recommended by Aon and supported by SWP.

[51] The second option – that transferred employees be allowed to transfer the greater of twice their contributions plus interest or the commuted value of their earned pension benefits – is not advisable, according to Mr. Berney, as the funded position of the SWP/GSU Pension Plan would deteriorate to the detriment of the remaining members, and it would trigger the requirement to file an asset transfer report with the OSFI, which would almost certainly require changes to be made to increase contribution rates and/or decrease benefits.

[52] The third option – that transferred employees remain as active members of the SWP/GSU Pension Plan which would be converted to a multi-employer plan – would require amendment of the terms of the Plan to allow for a four-party governance structure. While admitting that such a multi-party plan would be possible, Mr. Berney said that its governance would be complicated, given that each employer would have trustee nominees, and the employers would have to jointly bargain changes with the Union. Potentially difficult subjects would include operation of the plan and rights on termination of the fund, or if one employer and its employees wanted to withdraw from the plan. However, Mr. Berney admitted that there are several multi-employer plans in Saskatchewan, such as that in the construction industry. But, he said, such a plan is not recommended where the employers are at arm's length.

[53] In Mr. Berney's opinion, while the first two options could be offered to employees for individual selection, it is not feasible to allow individual choice of the third option as well – one would not want to create a multi-employer plan unless all employees participated.

[54] Len Posyniak, SWP vice-president of human resources, has been an employer trustee of the pension plan for three years. He testified that SWP's divestiture of non-core assets has been ongoing since 2000 as the company is going through difficult times. Mr. Posyniak was privy to the information that Heartland was likely to be sold, but securities regulation restrictions did not allow advance public discussion of such plans. However, Union officials were generally aware that asset sales were contemplated. In the past, SWP has bargained with the Union outside of the ordinary period of negotiation for contract renewal[5] with respect to diverse matters including restructuring, "downsizing" and pension matters, as the need arose.

[55] SWP sought advice from Aon regarding pension issues that would arise on the sale of Heartland and Western Producer. Initially, Aon's recommendation was that the purchasers each set up replica plans, and that an aggregate transfer be made from the SWP/GSU pension plan to each such plan. That is what SWP intended would happen until Aon changed its recommendations in light of the winding-up deficiency situation disclosed by the 2001 Actuarial Report.

[56] A short time after the sale of Heartland to HLS, Mr. Posyniak received a letter from Mr. Wagner, on behalf of the Union, in which Mr. Wagner raised his general concern about treatment of the affected employees' pensions and suggested that negotiations take place. The letter, dated October 4, 2001, bearing the caption "Potential Sale of Western Producer Newspaper and/or Other Company Assets", stated, in part, as follows:

> *GSU does not object to members of the Union's bargaining units continuing to participate in the SWP/GSU pension plan after the sale of a business to a new owner, but some amendments to the text of the pension plan will have to be made.*
>
> *On the other hand, if there is an agreement to have employees depart the SWP/GSU pension plan (as one example), provision will have to be made for the transfer of assets and liabilities to an agreed upon carrier or vehicle.*

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[5] See, s. 33(4) of the *Act*.

[57] By letter dated October 10, 2001, Mr. Posyniak responded with the recommendation that the Union contact the purchaser of Heartland directly "regarding the process for benefits and pension coverage" of the affected employees. In a further letter to Mr. Wagner dated October 11, 2001, Mr. Posyniak simply advised that if SWP divested itself of any business it had no interest in sharing participation in the SWP/GSU Pension Plan with the purchaser. Mr. Posyniak testified that the Union knew that SWP had a current desire to withdraw from the defined benefit pension plan, as evidenced by the recent creation of the accumulation pension plan – a defined contribution plan – for new employees hired after May 1, 2001.

[58] In a letter to Mr. Posyniak dated October 12, 2001, Mr. Wagner expressed his dissatisfaction with Mr. Posyniak's response. Mr. Wagner's position was that the collective agreement required that the affected employees continue to participate in the Pension Plan "until such time as there is an agreement to provide alternative arrangements." During the two weeks following, Bill Pilot, SWP manager of pensions and benefits, reporting to Mr. Posyniak, had some communication with Mr. Wagner regarding the issue. In correspondence to Mr. Pilot dated October 25, 2001, Mr. Wagner reiterated the Union's October 12, 2001 position and threatened to file an unfair labour practice application.

[59] On October 31, 2001, Mr. Wagner met with Mr. Posyniak, Mr. Pilot and Mr. Dale Hallson, SWP director of employee relations. Neither party changed its position. The Union filed a grievance dated November 2, 2001, alleging that SWP and HLS violated certain provisions of the collective agreement as follows:

> *. . . by unilaterally ceasing employees' pension benefit accruals and contributions in and to the …pension plan.*
>
> *It is further grieved that the aforementioned employers are attempting to amend the SWP/GSU pension plan without the agreement of the union and in violation of the agreement establishing the pension plan as well as the five collective agreements the pension plan arises out of and forms part of.*

[60] The parties met again on November 4, 2001, but made no headway towards resolving the dispute. SWP's reply to the grievance, dated November 11, 2001,

simply denied that SWP was the employer and that it had any obligations under the collective agreement.

[61] By an e-mail dated December 14, 2001, Mr. Wagner advised Mr. Posyniak that the Union referred the grievance to arbitration and of the Union's appointee to a board of arbitration.

[62] On December 21, 2001, SWP announced that it had entered into an agreement to sell Western Producer. SWP had no prior discussion with the Union regarding the consequences of the sale with respect to the Pension Plan. On December 24, 2001, by e-mail to Mr. Posyniak, Mr. Wagner warned SWP "against taking steps to amend the SWP/GSU Pension Plan," and expressed the availability of Union representatives to meet to discuss the issue. By letter dated December 28, 2001, Mr. Posyniak replied, *inter alia*, that SWP had complied with the *Act*. By an e-mail dated January 4, 2002 to Mr. Posyniak's assistant, Mr. Wagner confirmed a meeting of the parties for January 14, 2002, and reiterated the Union's position that the issue had to be negotiated. The Union filed the present application the same day. By letter dated January 7, 2002 to Mr. Wagner, Mr. Posyniak confirmed the closing date of the sale of Western Producer to GVIC – January 9, 2002 – and described the issue from SWP's point of view as follows:

> *Also, I wish to confirm that current employees of Western Producer who are members of the SWP/GSU pension plan will continue to have the rights provided to them under the terms of the pension plan and the Pension Benefit Standards Act. When their employment with SWP ends their new employer GVIC Communications Inc. will assume the obligation to provide a pension plan essentially the same as that enjoyed by the employees prior to the date of the sale. The new plan is subject to provincial regulation while federal regulations applied to the SWP/GSU pension plan.*
>
> *Beyond the sale date, WPP employees are not able to contribute to the SWP/GSU pension plan and neither SWP nor GVIC is able to contribute to the SWP/GSU pension plan on their behalf. The SWP/GSU pension plan itself does not permit contributions by individuals who are not employee as of SWP, nor does it permit other employers to contribute to the plan. GVIC is a provincially regulated employer and SWP is federally regulated, making a federally regulated multi-employer pension plan unworkable from*

a legal point of view as well as thoroughly undesirable to SWP for business reasons.

The advice received by SWP from its actuaries was that SWP should include a provision in the purchase and sale agreement with GVIC requiring GVIC to create a new pension plan and a further provision for the transfer of assets from the SWP/GSU pension plan in respect of past service. This was seen as the best way to ensure that employees would enjoy the same pension benefits from the GVIC pension plan as they received as employees of SWP from the SWP/GSU pension plan.

The asset value transfer rate that was deemed the most appropriate was equal to the greater of the on-going concern liabilities and the solvency liabilities in respect of the affected employees. …

As I indicated to you, the transfer of assets must be approved and reviewed by the SWP/GSU pension plan trustees. If such approval is withheld by the trustees, the practical result is that affected employees become deferred pensioners in the SWP/GSU pension plan, and will become members in the new defined benefit pension plan to be established by GVIC. In that scenario they would get two pensions when they retire, one from the SWP/GSU pension plan and one from the new GVIC plan.

SWP has complied with its legal obligations under the Trade Union Act and the Pension Benefit Standards Act. That said, we have always been ready to engage in discussions with the GSU concerning transitional matters at this time of change for the Company and its employees. I reiterate my invitation of January 4th to discuss this matter further.

[63] By a letter to Mr. Wagner dated January 11, 2002, Mr. Hallson expressed SWP's willingness to meet with the Union to discuss the pension asset transfer issues concerning the sales of Heartland and Western Producer. The remainder of the letter essentially summarized the result if the trustees of the Pension Plan declined to transfer assets to the mirror plans to be created by HLS and GVIC.

[64] On January 14, 2002, Mr. Wagner wrote to Mr. Hallson explaining that he had just received Mr. Hallson's letter of January 11, 2002 that day. Mr. Wagner's letter continued as follows:

This is to confirm that GSU will not be attending any "discussions" in relation to this subject. We are prepared to engage in collective

bargaining that is not limited to the question of asset transfer. In our view, collective bargaining legitimately includes the question of surplus distribution, contribution rates, the continued participation in the SWP/GSU pension plan, and – if the parties agree – the subject of asset/liability transfers. As far as we are concerned, the Company's unilateral decision to engage in a process not involving the Union offends our collective bargaining rights and jeopardizes the ongoing pension interests of the employees in question.

Only a clear acknowledgement by Management that the Company will engage in collective bargaining and rescind any unilateral steps affecting the employees' pension rights would cause us to meet in the present environment. The continued use of the word "discussions" by you and Mr. Posyniak indicates that collective bargaining is not on your agenda.

[65] Mr. Posyniak testified that at this time he did not believe that SWP had any obligation to bargain collectively with the Union with respect to the pension plan issue for two reasons: (1) the parties were not in the "open period" for notice to commence negotiations under s. 33(4) of the *Act*; and, (2) in any event, once the sale closed, SWP was no longer the employer.

[66] The sale agreements regarding the sales to HLS and GVIC provided that the purchasers were to provide "replacement plan[s] substantially identical in all respects" to the SWP/GSU Pension Plan. Mr. Posyniak testified that the purchasers were aware prior to the sales that there would be a contribution rate deficiency in any new plan that they would be responsible to make up.

[67] By a memorandum dated January 21, 2002 from Mr. Hallson, SWP requested the trustees of the Pension Plan to approve the transfer of pension assets and liabilities to a new HLS pension plan in respect of the affected Heartland employees as at immediately prior to the sale, at the greater of the going-concern or winding-up liability. However, the attached valuation report prepared by Aon was as at September 18, 2001. At that date there was apparently sufficient transfer value to cover accrued obligations. Of course, as the parties would later learn, the 2001 Actuarial Report prepared as at December 31, 2001 showed a different state of affairs.

[68] The Board issued its interim Order preserving the *status quo* on January 22, 2002. On January 28, 2002, SWP withdrew its request to the trustees to transfer pension assets.

[69] At a meeting of the parties on February 22, 2002, the Union made a change to its proposal that the transfer rate to the new pension plans, for those employees electing to do so, be reduced from two times contributions to 1.8 times contributions. On March 14, 2002 SWP amended its proposal to indicate that employees could remain in the SWP/GSU Pension Plan as deferred or inactive members and enjoy any improvements to the Plan received by the remaining members up to the date they transferred employment to the purchaser. In a letter to Mr. Wagner dated March 5, 2002 Mr. Hallson stated as follows:

> *In the event that you agree to a new form of pension with the new employers and if the employees, the employers and the GSU prefer to have the transferred employees remain as inactive members of the SWP/GSU pension plan, then SWP would not oppose this arrangement. Further, SWP would agree that if, in the future, active members of the SWP/GSU pension plan receive any increases to their pension, then the inactive members who are employed with the purchasers would receive the same increases with respect to their service up to the date of the closing of the sale. In short, these employees would be treated differently than other employees who leave the employ of SWP voluntarily.*

[70] In other words, SWP's position changed from that of an aggregate transfer to that of an individual choice by affected employees as to whether to transfer out of the SWP/GSU Pension Plan in respect of service prior to the sale, or to remain as an inactive member. SWP did not make any offer with respect to transferring any portion of the plan surplus, other than to take the position that it be dealt with on any winding-up as per the Plan text.

[71] The parties did not become aware of the funding deficiency in the Pension Plan until the letter from Aon of June 10, 2002 referred to above.

Arguments:

The Union's Argument

[72] Ms. Nordal, counsel for the Union, argued that SWP had breached the *Act* and the collective agreement by failing to bargain collectively with the Union regarding the treatment of the exiting employees' pension plan status and transfer. She asserted that SWP unilaterally terminating contributions to the pension plan by and on behalf of the affected employees was tantamount to amending Article 9 of the collective agreement.

[73] The affected employees had significant interests in the Pension Plan, both in terms of contributions and interest and the surplus. SWP could have disclosed the impending sales to the Union by use of non-disclosure agreements and commenced bargaining with respect to pension issues at the time when it was still the employer. Instead, it created a situation where an aggregate transfer is not advisable and the affected employees are denied the benefits of present use of the surplus to subsidize contribution rates or fund future enhancements.

[74] The Union seeks either of two remedies: (1) reinstatement of the affected employees as active members of the SWP/GSU Pension Plan; or, (2) the individual option to transfer the greater of two times contributions and interest or commuted value. The latter was what was done for the employees transferred to PrintWest and is done for employees who go to out-of-scope employment with SWP.

[75] Ms. Nordal filed a written brief that we have reviewed.

SWP's Argument

[76] Mr. Garden argued that SWP complied with the requirements of the *Act*. The successors have admitted that they are bound by the s. 37 transfer of obligation provisions. SWP required them to agree to establish pension plans that replicate the benefits of the SWP/GSU Pension Plan.

[77] Counsel stated that the duty to bargain within the meaning of s. 2(b) of the *Act* arises in two situations: upon the occurrence of the s. 33(4) "open period", and

for the settlement of disputes and grievances. A third situation – technological change – is not relevant to the present case. SWP accepted and processed the grievance filed by the Union, and discussed it with the Union. However, it was not required to bargain, in mid-contract, the effects of potential or negotiated sales of assets with the Union – what counsel termed "effects bargaining". If, however, there was such a duty, counsel asserted that SWP had bargained with the Union, and that it would be improper for the Board to intervene or influence the course of bargaining, even if it is at an impasse – the Board does not have a role as an interest arbitrator in this situation.

[78] Citing the decision of the Board in *Service Employees' International Union, Local 333 v. Battlefords Ambulance Care Ltd., et al*., [1996] Sask. L.R.B.R. 604, LRB File No. 202-95, counsel asserted that the *Act* does not require the predecessor employer to ensure that the successor employer complies with the requirements of the *Act*. Once the sales of the respective businesses closed, SWP ceased to be the employer. When the affected employees ceased to be its employees, SWP simply applied the provisions of the Pension Plan to stop their further contribution. Counsel stated that SWP had an interest in ensuring that as many assets as possible remained in the Plan for the employees that remain as members.

[79] Citing the decisions of the Board in *International Brotherhood of Electrical Workers, Local 2067 v. Luscar Ltd*., [2001] Sask. L.R.B.R. 349, LRB File No. 288-00, and *International Brotherhood of Electrical Workers, Local 2067 v. Saskatchewan Power Corporation*, [2002] Sask. L.R.B.R. 268, LRB File No. 010-02, and the decision of the Saskatchewan Court of Appeal in *United Food and Commercial Workers, Local 1400 v. Westfair Foods Ltd., et al*. (1992), 95 DLR (4th) 541, counsel further argued that because the allegation against SWP is that it breached the collective agreement, the grievance and arbitration procedure that has been initiated is the appropriate avenue for determining the issue raised by the Union as to whether the affected employees should continue to be active members of the SWP/GSU Pension Plan. Counsel exhorted the Board to defer to the arbitration process.

[80] Counsel argued that the Board has no jurisdiction to grant the remedies sought by the Union. Rather than asking the Board for an order directing SWP to

bargain collectively with respect to the issue, the Union is asking the Board to settle a dispute of interpretation of the collective agreements.

[81] Mr. Garden filed a written brief that we have reviewed.

Statutory Provisions:

[82] Relevant provisions of the Act include the following:

> *2. In this Act:*
>
> *(b) "bargaining collectively" means negotiating in good faith with a view to the conclusion of a collective bargaining agreement, or a renewal or revision of a bargaining agreement, the embodiment in writing or writings of the terms of agreement arrived at in negotiations or required to be inserted in a collective bargaining agreement by this Act, the execution by or on behalf of the parties of such agreement, and the negotiating from time to time for the settlement of disputes and grievances of employees covered by the agreement or represented by a trade union representing the majority of employees in an appropriate unit;*
>
> *. . .*
>
> *5 The board may make orders:*
>
> *(c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;*
>
> *(d) determining whether an unfair labour practice or a violation of this Act is being or has been engaged in;*
>
> *(e) requiring any person to do any of the following:*
>
> *(i) refrain from violations of this Act or from engaging in any unfair labour practice;*
>
> *(ii) subject to section 5.1, to do any thing for the purpose of rectifying a violation of this Act, the regulations or a decision of the board;*
>
> *. . .*

11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:

> *(c) to fail or refuse to bargain collectively with representatives elected or appointed, not necessarily being the employees of the employer, by a trade union representing the majority of the employees in an appropriate unit;*
>
> *(d) to refuse to permit a duly authorized representative of a trade union with which he has entered into a collective bargaining agreement or that represents the majority of employees in an appropriate unit of employees of the employer to negotiate with him during working hours for the settlement of disputes and grievances of employees covered by the agreement, or of employees in the appropriate unit, as the case may be, or to make any deductions from the wages of any such duly authorized representative of a trade union in respect of the time actually spent in negotiating for the settlement of such disputes and grievances;*

. . .

33(4) Either party to a collective bargaining agreement may, not less than 30 days or more than 60 days before the expiry date of the agreement, give notice in writing to the other party to negotiate a revision of the agreement and where a notice is given the parties shall forthwith bargain collectively with a view to the renewal or revision of the agreement or the conclusion of a new agreement.

. . .

37(1) Where a business or part thereof is sold, leased, transferred or otherwise disposed of, the person acquiring the business or part thereof shall be bound by all orders of the board and all proceedings had and taken before the board before the acquisition, and the orders and proceedings shall continue as if the business or part thereof had not been disposed of, and, without limiting the generality of the foregoing, if before the disposal a trade union was determined by an order of the board as representing, for the purpose of bargaining collectively, any of the employees affected by the disposal or any collective bargaining agreement affecting any of such employees was in force the terms of that order or agreement, as the case may be, shall, unless the board otherwise orders, be deemed to apply to the person acquiring the business or part thereof to the same extent as if the order had originally applied to him or the agreement had been signed by him.

> *37(2) On the application of any trade union, employer or employee directly affected by a disposition described in this section, the board may make orders doing any of the following:*
>
> *(a) determining whether the disposition or proposed disposition relates to a business or part of it;*
>
> *(b) determining whether, on the completion of the disposition of a business, or of part of the business, the employees constitute one or more units appropriate for collective bargaining and whether the appropriate unit or units will be:*
>
> *(i) an employee unit;*
> *(ii) a craft unit;*
> *(iii) a plant unit;*
> *(iv) a subdivision of an employee unit, craft unit or plant unit; or*
> *(v) some other unit;*
>
> *(c) determining what trade union, if any, represents a majority of employees in the unit determined to be an appropriate unit pursuant to clause (b);*
>
> *(d) directing a vote to be taken among all employees eligible to vote in a unit determined to be an appropriate unit pursuant to clause (b);*
>
> *(e) amending, to the extent that the board considers necessary or advisable, an order made pursuant to clause 5(a), (b) or (c) or the description of a unit contained in a collective bargaining agreement;*
>
> *(f) giving any directions that the board considers necessary or advisable as to the application of a collective bargaining agreement affecting the employees in a unit determined to be an appropriate unit pursuant to clause (b).*

Analysis and Decision:

[83] The Union's application as against SWP alleges that SWP committed an unfair labour practice in violation of s. 11(1)(c) of the *Act* by failing or refusing to bargain collectively in regard to the treatment of employees affected by the sales of Heartland and Western Producer with respect to their membership and participation in the SWP/GSU Pension Plan.

[84] The facts and circumstances alleged to constitute such a violation of the *Act* may also constitute a breach of the Heartland collective agreement, as is alleged by the Union in its grievance, but it must be asked whether the latter allegation ought to be deferred to arbitration under the collective agreement. An unfair labour practice is a quasi-criminal offence; a breach of the collective agreement is not. The Board's power to make orders rectifying violations of the *Act* is broad and is not related to an arbitrator's authority to grant remedies for breaches of a collective agreement. While the ranges of the sanctions that may be imposed under the respective authorities to rectify and grant remedies may overlap, they are derived from different sources, and are intended to resolve different contraventions: one of statute and the other of contract.

[85] The Saskatchewan Court of Appeal set out the pre-conditions for deferral to arbitration of an issue that is an unfair labour practice in *United Food and Commercial Workers, Local 1400 v. Saskatchewan (Labour Relations Board)* (1992), 95 D.L.R. (4th) 541, as follows:

> *Morris Rod Weeder speaks of "an alternative remedy of the same grievance" and makes clear the principle that where a trade union elects both the grievance-arbitration procedure provided for in the collective agreement between the parties and an application to the Board for an unfair labour practice order to resolve the same dispute, the Board may consider the trade union's election to use the grievance–arbitration procedure as a relevant factor in determining whether to dismiss the application. The case is authority for the proposition that for such an elective to constitute a relevant (as opposed to an "extraneous" or "irrelevant") consideration three preconditions must coexist: (i) the dispute put before the Board in the application for an unfair labour practice order and this dispute intended to be resolved by the grievance-arbitration procedure provided for in the collective agreement must be the same dispute; (ii) the collective agreement must make possible (i.e. empower) the resolution of the dispute by means of the grievance-arbitration procedure, and (iii) the remedy under the collective agreement must be a suitable alternative to the remedy sought in the application to the Board.*

[86] This is not a case of determining whether to defer determination of what is both an unfair labour practice and a breach of the collective agreement to arbitration. In this case, while the issues raised on the unfair labour practice application to the Board and the grievance submitted to arbitration might in some ways be similar, they are not co-extensive. In the one case, the issue is whether SWP had a duty to bargain

collectively with the Union and unlawfully failed to do so. In the other case, the issue is whether SWP violated the existing collective agreement and/or incorporated pension plan. The latter issue is not bound up with the former such that the Board should exercise its discretion to determine it. The Board can discretely determine the former issue without interpreting the collective agreements; an arbitrator can determine the latter issue without interpreting *The Trade Union Act*.

[87] The options for transferred members of the Pension Plan in the event of a disposition of the business are governed by the Pension Plan. Neither the Board nor an arbitrator has the jurisdiction to amend the collective agreements or the incorporated Pension Plan. The treatment of the affected employees under the terms of the Pension Plan, the allegations made by the Union that SWP breached Article 9 of the collective agreement between the parties and unilaterally amended the Plan as stated in its grievance, and SWP's response that it did not do so and that the grievance is not arbitrable in any event, are all fundamentally matters of collective agreement interpretation that can be determined in whole under the agreement by an arbitrator.

[88] We wish to point out that while counsel for SWP posited that, because the affected employees ceased to be employees of SWP upon the closing of each sale, the grievance against SWP is not arbitrable, that is an issue for an arbitrator to determine. While the affected employees may have ceased to be employees of SWP at that point for the purposes of *The Trade Union Act*, that does not necessarily mean that they did not remain employees for the purposes of the administration of the Pension Plan under Section 1.13 thereof – that too is an issue for an arbitrator to determine.

[89] In certain cases a refusal to bargain may be a breach of an extant collective agreement, as where the agreement contains a provision for mid-term bargaining in certain circumstances. However, with few exceptions – for example, negotiating for the settlement of disputes and grievances, failure to comply with which is a violation of s. 11(1)(c) of the *Act*, and pursuant to s. 43, the technological change provisions of the *Act* – the *Act* does not expressly require an employer to bargain collectively with a certified union during the term of a collective agreement. Otherwise, under the *Act*, the parties are bound to bargain collectively only upon notice during the "open period" in the circumstances described in s. 33(4) for the renewal or revision of the

agreement, or in the case of a first collective agreement imposed by the Board, s. 26.5(9).

[90] But those provisions do not deal with the situation where parties *voluntarily* enter into mid-term bargaining. While the parties to a collective agreement may voluntarily bargain during the term of the agreement, they are not required to do so, even if it would make eminent good sense. In *Halton Forming Ltd.*, [1990] OLRB Rep. May 553, the Ontario Board observed as follows:

> *10. When bargaining a collective agreement, an employer takes into account its current and expected costs of doing business and a trade union takes into account the current and expected costs of living and working of the employees it represents. Once agreement is reached, ensuing economic and social changes may create differences between expected and actual costs of doing business and costs of living and working. Changes in income taxes and other taxes may and often do have that effect, as may changes in government economic and social programs. The bargain the parties make must nevertheless stand for a period of time before either party can require the other to renegotiate it.*

[91] Section 37 of the *Act* deals with the problems related to the sale of a business and attempts to minimize the effect of a sale on the employees. The acquiring entity is bound by all orders and proceedings of the Board made and taken before the acquisition and which continue, "as if the business … had not been disposed of." Where a collective agreement was in force, the certification Order and the collective agreement are deemed to apply to the acquiring entity, unless the Board orders otherwise. The Board is empowered to make certain orders deemed appropriate in the circumstances including amendment of the certification Order and providing directions as to the application of the collective agreement.

[92] However, while it might be fair, reasonable and in its own best interests for an employer contemplating a disposition of all or part of its business to negotiate the effects of the transition with the certified union outside of the open period, it is not bound to do so except in those circumstances where it is required by the *Act* as described above.

[93] While the Union in the present case did not assert that SWP's actions, such as in forwarding draft amendments to the Pension Plan to the Union to allow an aggregate transfer, constituted a request to engage in mid-term bargaining, it is an arguable point. In *Health Sciences Association of Saskatchewan v. Saskatchewan Health-Care Association et al.*, LRB File Nos. 032-84 and 033-84 (oral reasons for decision, March 1, 1984, unreported), the union alleged that the employer became obligated to bargain collectively during the term of the collective agreement by reason of the cumulative effect of certain discussions and correspondence between their principals. While agreeing that such an obligation could be created by correspondence and discussion so as to alter the contractual obligations to bargain collectively, or to require mid-term bargaining in advance of the statutory open period, the Board held that it would require a consensus of the parties that is something more than an "expressed willingness to talk" about certain items. The Board stated that any more relaxed approach would discourage parties from engaging in open and frank discussions to resolve mid-term differences and would not promote the industrial peace and stability that is a by-product of such communication.

[94] The Board recognized the harshness of the obligation to bargain only pursuant to a notice given during the open period under s. 33(4) of the *Act* in *Communications Workers of Canada v. Northern Telecom Canada Limited, et al.*, [1995] October Sask. Labour Rep. 46, LRB File No. 062-85. The Board held that the provision abrogated any contractual capacity to vary the statutory time frame and concluded, at 48, that the employer's "willingness to negotiate" despite the union's untimely notice to revise did not create a duty to bargain.

[95] These decisions may be contrasted to a certain extent with *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. WaterGroup Canada Ltd., et al.*, 1st Quarter Sask. Labour Rep. 111, LRB File No. 197-92. In that case, following certification, but prior to the conclusion of a first collective agreement, the employer undertook a corporate reorganization involving the layoff of a number of employees. The Union took the position that the changes were part of an attempt to weaken the confidence of the employees in collective bargaining as a means of negotiating terms and conditions of employment. The union alleged that the employer had committed a number of unfair labour practices, including failure to bargain

collectively pursuant to s. 11(1)(c) of the *Act*. The evidence was not disputed that the employer had agreed to allow Union representatives to make an alternative proposal on the manner of layoffs. After the union presented some information to the employer regarding alternatives, but before the process was completed, the employer informed the union that it was proceeding with its original plan. While deciding that the decision to reorganize did not violate the "statutory freeze" on changes to terms and conditions, the Board held, at 117-18 that the employer violated an obligation to bargain collectively, as follows:

> *It is thus a matter for debate whether, in the absence of a collective agreement, the Employer was required to enter into discussions with representatives of the Union over this particular issue, or whether this was a matter which lay exclusively within the unilateral decision-making power of the Employer. Though it was natural enough for the Union to seek to persuade the Employer not to carry out the decisions as to lay-offs, it is arguable that the Employer might have taken the position that this was not an issue on which it would entertain representations from the Union. The Employer did agree, however, to enter into discussions with the Union, and to consider alternative ways of making the lay-off decisions. Entering into such discussions does not by any means commit the Employer to accepting any of the proposals which the Union might ultimately have made, or indeed to continue to entertain Union suggestions indefinitely. To break off the discussions, however, with such abruptness and before the Union was able to complete the investigation to which the Employer had agreed, does in our view constitute an unfair labour practice within the meaning of Section 11(1)(c).*

[96] However, the Board's response in *WaterGroup*, *supra*, appears to be predicated, in large measure, upon the fact that the actions complained of occurred prior to the conclusion of a first collective agreement. That is, in such circumstances, s. 33(4) is not germane and other considerations apply. At 117, the Board's Reasons continued as follows:

> *We have pointed out earlier that the Union is in a peculiarly vulnerable position during the period before the first collective agreement is concluded. Having obtained the support of employees for the certification application, the Union is under pressure to demonstrate that positive change can be achieved through collective bargaining. Though the Union must achieve those gains through its own efforts, it is entitled to whatever*

> *protection* <u>*The Trade Union Act*</u> *offers for the integrity of the bargaining process itself.*
>
> *Whether or not the decision to reorganize the Regina plant was part of a larger and legitimate business plan affecting the company as a whole, the planned lay-off of a number of employees in August of 1992 posed a serious initial test for the Union as a bargaining agent for this infant bargaining unit. To allow the Employer to purport to treat seriously a Union request to negotiate over these lay-offs, and then arbitrarily and unilaterally to cut these discussions off, would be to permit the Employer to demonstrate to the employees that Union representation was ineffectual.*

[97] In the present case, the parties have a mature bargaining relationship of many years standing. The considerations that led the Board to decide that there was an unlawful refusal to bargain in *WaterGroup*, *supra*, do not pertain in this case. Nor do we find that there is sufficient evidence to lead to the conclusion that the correspondence and discussions between the parties created a consensus to engage in mid-term collective bargaining. The Union's complaint is not that SWP sought to do so and then resiled therefrom, but that it refused to agree to the Union's entreaties to do so. In all of the circumstances, SWP had no obligation to engage in collective bargaining with respect to the Pension Plan. As stated earlier in these reasons, any issue as to whether SWP has breached the collective agreements or the Pension Plan is a matter for arbitration.

[98] For the reasons above, the application in respect of an unfair labour practice against SWP is dismissed.

[99] At the request of the parties, that part of the application concerning allegations and relief as against HLS and GVIC is adjourned *sine die*.

[100] Board member, Maurice Werezak dissents from these Reasons for Decision. A written dissent will be forwarded to the parties in due course.

DATED at Regina, Saskatchewan this **21st** day of **February, 2003.**

LABOUR RELATIONS BOARD

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James Seibel,
Vice-Chairperson