The Labour Relations Board
Saskatchewan

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 3078, Applicant v. BOARD OF EDUCATION OF THE WADENA SCHOOL DIVISION No. 46 OF SASKATCHEWAN, Respondent

LRB File Nos. 101-03 & 130-03; October 7, 2003
Vice-Chairperson, Wally Matkowski; Members: Maurice Werezak and Joan White

For the Applicant: Peter Barnacle
For the Respondent: Geraldine Knudsen

Duty to bargain in good faith – Disclosure – During negotiations there is onus on employer to disclose decisions which will have significant impact on bargaining unit – Union did not receive any notice of employer's plan to eliminate up to one-half of bargaining unit positions – Employer failed to bargain in good faith and committed unfair labour practice.

Unfair labour practice – Dismissal for union activity – Lay-off – Following difficult negotiations, during strike action and without notice to union, employer laid off entire contingent of teacher assistants – Employer argued that lay-off was part of *bona fide* staffing plan and that timing was unfortunate coincidence – Employer did not provide good and sufficient reason for lay-off – Employer committed unfair labour practice within meaning of s. 11(1)(e) of *The Trade Union Act*.

Unfair labour practice – Interference – Dismissal – Board utilizes objective test and concludes that employer's actions in permanently laying off bargaining unit members, while they were taking strike action, without notice, violated s. 11(1)(a) of *The Trade Union Act*.

Unfair labour practice – Remedy – Reinstatement and monetary loss – Board orders employer to reinstate and make whole employees who were laid off by employer contrary to *The Trade Union Act*.

***The Trade Union Act*, ss. 5(f), 5(g), 11(1)(a), 11(1)(c) and 11(1)(e).**

REASONS FOR DECISION

Background:

[1] Canadian Union of Public Employees, Local 3078 (the "Union") filed two unfair labour practice applications against the Board of Education of the Wadena School Division No. 46 of Saskatchewan (the "Employer"). The first application, LRB File No. 058-03, arose as a

result of a board member of the Employer directly approaching Union members on April 2, 2003 and discussing outstanding bargaining issues with them. The Employer filed a memo, which it had sent to all non-union staff on June 10, 2003, with the Board. In the June 10, 2003 memo, the Employer instructed its non-union staff not to discuss bargaining issues directly with Union members. As a result of the Employer's actions the Union withdrew its application in LRB File No. 058-03. The Employer agreed that the Union could refer to the facts and circumstances surrounding LRB File No. 058-03 in the Union's evidence and submissions relating to the second application, LRB File No. 101-03, and that the June 10, 2003 memo could be marked as an exhibit in the hearing of LRB File No. 101-03.

[2] In LRB File No. 101-03, which was filed on May 29, 2003, the Union alleged that the Employer had committed unfair labour practices in violation of ss. 11(1)(a), (c), (e) and (i) of *The Trade Union Act*, R.S.S.1978, c. T-17 (the "*Act*"), and asked for reinstatement of and monetary loss for Linda Haeusler, Gail Gryba, Sharon Sametts, Sandra Gaultois, Jane Meiklejohn, Jody Martin and Hilary Govan pursuant to ss. 5(f) and (g) of the *Act*.

Facts:

[3] Three witnesses testified on behalf of the Union and their evidence was not subject to cross-examination by the Employer. Sharon Lockwood, the national representative who represented the Union during collective bargaining, described the affected bargaining unit as consisting of teacher assistants, caretakers, maintenance staff, clerical workers, library and case workers. She painted a picture of a long and difficult round of collective bargaining that commenced in February, 2001 and resulted in strike action in April, 2003. As at the date of this hearing, the parties had still not achieved a new collective agreement.

[4] On April 7, 2003 the Union filed LRB File No. 058-03 with the Board. On April 9, 2003 the Union commenced rotating strikes.

[5] On May 22, 2003 the Employer verbally advised the teacher assistants at Quill Lake School that they were being permanently laid off, effective the end of the school year, and that they would not be recalled as was the normal practice. Teacher assistants were also advised that the lay-offs were part of a plan implemented three years earlier when three teacher assistants were replaced by one special education teacher.

[6] Teacher assistants make up approximately 49% of the bargaining unit and the seven teacher assistants at Quill Lake School account for approximately 10% of the bargaining unit (this percentage is slightly higher if casual employees are not included).

[7] During the last round of collective bargaining, the Employer had not advised the Union that it would be permanently laying off all of the teacher assistants at Quill Lake School and the Employer has yet to formally contact the Union and advise it of the lay-offs and the reasons for same.

[8] While Ms. Lockwood had no first hand knowledge, she was advised by two teacher assistants that some teacher assistants had been permanently laid off three years earlier, but were recalled because the Employer's plans were not working.

[9] Gail Gryba and Hilary Govan, teacher assistants employed by the Employer, testified before the Board. Ms. Govan also has a child who attends one of the Employer's schools and receives special care from teacher assistants.

[10] Both Ms. Gryba and Ms. Govan confirmed that the Employer held a meeting with the Quill Lake School teacher assistants on May 22, 2003 and advised them that their jobs were terminated. The teacher assistants had no prior knowledge that they would be losing their jobs and there had been no discussions with Ms. Govan, as a parent of a special needs student, as to who would be replacing the teacher assistants.

[11] There was no review conducted by the Employer as to teacher assistant job duties and how they would be transferred to a special education teacher.

[12] By correspondence dated June 9, 2003 the teacher assistants received written notice of their permanent lay-off.

[13] The teacher assistants were in shock and devastated by the news that they received at the May 22, 2003 meeting. They believed that the decision to permanently lay them off was directly related to the difficult round of collective bargaining which had resulted in strike action.

[14] Ms. Gryba testified that, three years earlier, three out of six permanent teacher assistants were permanently laid off at Quill Lake School and replaced by a special education teacher. However, the teacher assistants were all hired back because they were needed by the Employer.

[15] Ms. Govan's evidence was that the Employer had hired a special education teacher to replace three teacher assistants approximately three years earlier at Quill Lake School and that, as a result, her hours were reduced from full time to half time. She was then brought back to work full time and it was her belief that the Employer had changed its plans.

[16] Teacher assistants at Quill Lake School assist students who are both designated and non-designated. When a student is designated, the Employer receives special funding for that student. From the perspective of Ms. Gryba and Ms. Govan, it did not make any sense for the Employer to replace six teacher assistant positions (filled by seven employees) with two special education teachers given the high degree of one-on-one care which a number of the designated students required. Both Ms. Gryba and Ms. Govan testified in some detail about the designated students at Quill Lake School and their respective special needs.

[17] Teacher assistants are part of a team responsible for assisting designated students in achieving desired educational outcomes. Parents of these students are also part of the team, which ultimately prepares a "personal program plan" for each designated student.

[18] John Treso, director of education for the Employer, was the only witness called by the Employer. Mr. Treso attended the vast majority of the collective bargaining meetings, including those with a conciliator. When he missed a collective bargaining meeting, one of his replacements was John Neudorf, superintendent of student services.

[19] Mr. Treso admitted that the Employer did not advise the Union of the Employer's decision to permanently lay off the teacher assistants once that decision was made in April, 2003. Mr. Treso advised the Board that the Employer had a plan to replace teacher assistants with special education teachers and that the Union was aware of this plan. The Employer's logic behind the plan was that special education teachers were able to provide students with a better level of education than teacher assistants.

[20] As evidence of the Employer's plan, Mr. Treso produced minutes from a meeting of the Employer's board which provide in part:

> *That the Board approve the following C.U.P.E. permanent lay offs effective June 30, 2000 due to program restructuring: Lisa McMartin, Lynda Simon, Lynn Ziola, Sandra Gaultois, Jane Meiklejohn, Rhoda Pylatuke, Cathy Bartlett, Sheila Bindig, Donnella Rachkewich, and Hilary Govan (reduced to half-time)*
>
> *Carried*

[21] The June 30, 2000 lay-offs covered employees at Wadena's elementary school and Quill Lake School. Mr. Treso conceded that laid off teacher assistants were then recalled, but his explanation was that new students received the designated status.

[22] When questioned by the Board as to when the Union would have been made aware of the Employer's plan, Mr. Treso indicated that he had sent out a newsletter to the staff, which would have outlined the plan. No newsletter was provided as evidence to the Board and Mr. Treso confirmed that the newsletter was not sent directly to either the Union or Ms. Lockwood.

[23] In February, 2003 Mr. Treso started planning on how to staff for the 2003-04 school year. He prepared a staffing proposal document dated March 12, 2003 indicating that three teacher assistants would be replaced by one special education teacher at Quill Lake School.

[24] At the Employer's board budget meeting on April 29, 2003 Mr. Neudorf provided a letter to the board which stated:

> *Dear Board Members*
>
> *Some students are better served through intensive interventions by qualified Classroom Teachers than through the reinforcement of skills by Teacher Associates. We have noted this at Quill Lake School and at Wadena Elementary School for the past few years. There are some exceptions where Teacher Associates are more appropriate. One example is students with multiple disabilities.*
>
> *For students in High School in particular, it is more effective to utilize classroom Teachers for making adaptations to the regular program and*

> *Alternate programs. Classroom Teachers are better qualified to do the teaching that is necessary for the students who need to be in Alternate, Modified, or in Functionally Integrated Programs. Teacher Associates can not do the specialized teaching which is necessary for these students to progress academically. Special programs are more effective when planned, taught and delivered by professionals rather than by paraprofessionals.*
>
> *By replacing Teacher Associates with Classroom Teachers we are not sacrificing inclusion but are enhancing it. This form of delivery is more conducive to inclusion, tutorial pull-out and community and extracurricular activities. This move will also encourage independence and enhance programming with more involvement by professionals.*
>
> *I make the following recommendations with the above observations in mind: two full-time Classroom Teachers to replace six full-time Teacher Associates at Quill Lake School, one half-time Teacher to replace one and a half-time Teacher associates at Rose Valley School and one half-time Classroom Teacher equivalent to replace one and a half-time Teacher Associates at Wadena Composite.*
>
> *These changes would not mean an increase in spending for the school division since the cost of placing one full time Teacher equivalent to replace one and a half-time Teacher Associate at Wadena Composite.*
>
> *These changes would not mean an increase in spending for the school division since the cost of placing one full time Teacher equivalent is approximately the same as placing three Teacher Associates.*

[25] The minutes of the April 29, 2003 budget meeting prepared by the Employer read in part:

> *That the Board of Education of the Wadena School Division approve the Special Needs Staffing as proposed by the Superintendent of Student Services.*
>
> *Carried*

[26] Immediately prior to this minute entry is a notation that the Employer's board met with a delegation from the teacher's association and discussed the Union's ongoing job action.

[27] The Employer's board had both Mr. Treso's March 12, 2003 staffing proposal document and Mr. Neudorf's April 29, 2003 letter before it when it made its decision to permanently lay off all of the teacher assistants at Quill Lake School.

[28] Mr. Treso did not immediately advise the teacher assistants of the Employer's decision in part due to the poor relations between the Union and its members and the Employer. Mr. Treso recognized that the Employer's decision would have a great impact on the staff.

[29] Mr. Treso denied that there was any connection between the permanent lay-off of the teacher assistants and the ongoing strike action and maintained that it was just an unfortunate coincidence.

[30] Jody Martin, one of the Quill Lake School teacher assistants was hired as a permanent full time teacher assistant at Quill Lake School on October 2, 2002. Mr. Treso did not testify that he informed Ms. Martin that her permanent position was in jeopardy given an Employer policy or plan relating to teacher assistants.

Relevant statutory provisions:

[31] Sections 11(1)(a), (c) and (e) state:

> *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:*
>
> > *(a) to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any right conferred by this Act, but nothing in this Act precludes an employer from communicating with his employees;*
> >
> > *. . .*
> >
> > *(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;*
> >
> > *. . .*
> >
> > *(e) to discriminate in regard to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including discharge or suspension or threat of discharge or suspension of an employee, with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in a proceeding under this Act, and if an employer or an employer's agent discharges or suspends an employee from his employment and it is shown to the satisfaction of the board that employees of the employer or any of them had exercised or were exercising or*

> *attempting to exercise a right under this Act, there shall be a presumption in favour of the employee that he was discharged or suspended contrary to this Act, and the burden of proof that the employee was discharged or suspended for good and sufficient reason shall be upon the employer; but nothing in this Act precludes an employer from making an agreement with a trade union to require as a condition of employment membership in or maintenance of membership in the trade union or the selection of employees by or with the advice of a trade union or any other condition in regard to employment, if the trade union has been designated or selected by a majority of employees in any such unit as their representative for the purpose of bargaining collectively;*

Employer's arguments:

[32] Counsel for the Employer accepted that the Employer held the onus of proof to demonstrate that its failure to recall the teacher assistants had nothing to do with the strike, as dictated by s. 11(1)(e) of the *Act*. Counsel also agreed with the case law presented by the Union in regard to the application of s. 11(1)(e). With respect to s. 11(1)(c), counsel argued that the Union had *de facto* knowledge of the Employer's plan to replace teacher assistants with special education teachers and, as such, there was no breach of s. 11(1)(c). In the alternative, counsel argued that the change was not significant so that the Employer was not obligated to advise the Union.

Union's arguments:

[33] Counsel for the Union argued that the Employer breached s. 11(1)(e) of the *Act* when it permanently laid off the teacher assistants and that, based on the evidence presented, the motive for the Employer's actions had to do with the difficult collective bargaining history between the parties, which culminated in strike action approximately four weeks prior to the Employer's decision. With regard to s. 11(1)(c), Counsel argued that it was incumbent on the Employer to advise the Union of the Employer's plan to replace teacher assistants with special education teachers.

Analysis:

Section 11(1)(c)

[34] Both parties agreed that, during negotiations, there is an onus on an employer to disclose information to the union relating to decisions made by the employer which will have a "significant impact on the bargaining unit." The evidence of Ms. Lockwood was that she had received no such information from the Employer with regard to a plan to replace teacher assistants with special education teachers. The evidence of Mr. Treso was that the Union would have received this information through a newsletter submitted to staff. However, Mr. Treso conceded that the newsletter was not sent directly to the Union. Further, as this newsletter was not submitted as evidence before the Board, it is impossible to determine exactly what it said. The Employer's limited evidence cannot override the unchallenged evidence of Ms. Lockwood that the Union did not receive any notice of a plan on the part of the Employer to replace teacher assistants with special education teachers.

[35] With respect to whether this information would have a significant impact on the bargaining unit, the Board finds that it would have made an impact on the bargaining unit. The facts indicate that approximately 50% of the bargaining unit is made up of teacher assistants. An Employer policy seeking to eliminate up to one-half of the bargaining unit has a significant impact on the bargaining unit. As such, we conclude that the Employer did fail to supply the Union with evidence which was crucial to the collective bargaining process and that, by failing to advise the Union, the Employer committed an unfair labour practice within the meaning of s. 11(1)(c) of the *Act*.

Section 11(1)(e)

[36] The Board's finding that the Employer failed to advise the Union of its plan to replace teacher assistants with special education teachers affects the Board's decision with respect to s. 11(1)(e). Counsel for the Union asked the Board to consider the timing, urgency and secrecy of the Employer's actions in terminating an entire contingent of teacher assistants at Quill Lake School.

[37] With regard to the timing of the Employer's actions, they occurred after very long and difficult contract negotiations which culminated in strike action.

[38] With regard to the secrecy of the Employer's actions, counsel for the Union argued that the Employer took the action it did without advising the Union, without consulting with the parents of children who utilize teacher assistants for designated children and without consulting or advising the teacher assistants. This lack of consultation was inconsistent with the Employer's team approach to dealing with designated students.

[39] With regard to the urgency issue, counsel for the Union pointed out that, as of March, 2003, Mr. Treso wanted to replace three teacher assistants with one special education teacher. In April, 2003, the Employer replaced the entire contingent of teacher assistants at Quill Lake School. Counsel for the Union argued that no adequate explanation was provided for this sudden shift. When taking all of these factors into consideration, counsel for the Union argued that the Employer had not met the heavy burden imposed upon it, pursuant to s. 11(1)(e) of the *Act*, to provide good and sufficient reason why the entire contingent of teacher assistants was eliminated at Quill Lake School.

[40] The minutes of the Employer's April 29, 2003 board meeting indicate that a discussion took place relating to the Union's strike action immediately prior to the decision to eliminate 10% of the bargaining unit. For there to have been no discussion by the Employer's board and no recognition of the serious consequences of this decision defies logic. Mr. Treso himself recognized that it was an unfortunate coincidence that all the teacher assistants at Quill Lake School were, in effect, let go while they were taking strike action and admitted that he was reluctant to immediately advise the teacher assistants of the news given the ongoing labour dispute.

[41] The Employer's evidence fell far short of providing good and sufficient reason why the entire contingent of teacher assistants at Quill Lake School was permanently laid off. The Board did not receive the necessary evidence to fully understand why the Employer switched from Mr. Treso's March, 2003 staffing proposal (which called for the elimination of three teacher assistant positions at Quill Lake School) to its decision to permanent lay off all of the teacher assistants at Quill Lake School.

[42] Mr. Treso testified that the Employer's board relied on the letter it received from Mr. Neudorf when making its decision to lay off all of the Quill Lake teacher assistants.

However, no one from the Employer's board testified before this Board, thus preventing counsel for the Union from challenging the reasons for the Employer's ultimate decision.

[43] The Board also considered the fact that, approximately six months prior to the Employer's decision, the Employer hired Ms. Martin as a permanent full time teacher assistant at Quill Lake School. The Employer did not lead any evidence to the effect that this employee was advised that her position was in jeopardy due to an Employer policy which sought to eliminate teacher assistants and replace them with special education teachers.

[44] The Board therefore concludes that the Employer did commit an unfair labour practice pursuant to s. 11(1)(e) of the *Act* when it laid off the entire contingent of teacher assistants at Quill Lake School. Orders will issue requiring the Employer to reinstate all of the affected employees pursuant to s. 5(f) of the *Act*.

Section 11(1)(a)

[45] Under normal circumstances, an Employer is left with the power to make staffing decisions. However, in this case, the Board's role is to consider whether or not the termination of the Quill Lake School teacher assistants, while they were engaged in lawful strike activity, interfered with, coerced, intimidated, threatened or restrained an employee in the exercise of any right conferred by the *Act*.

[46] The Board can understand why the Union and its members would be excited by the Employer's decision to, in effect, terminate 10% of the bargaining unit. Likewise, the Board can also understand that the remaining employees might, as a result of the Employer's decision, ask the Union to lower its contract demands or agree to language concessions sought by the Employer. In the circumstances of this case, the Employer did violate s. 11(1)(a) of the *Act* when it laid off the teacher assistants.

[47] As stated earlier, there was limited evidence as to why the Employer decided to permanently lay off 10% of the bargaining unit. Counsel for the Union argued that, based on the evidence presented before the Board, it could be inferred that the Employer was deliberately attempting to interfere with the employees' ability to exercise rights granted under the *Act*. Determining the Employer's motivation for terminating the entire contingent of Quill Lake School teacher assistants is not necessary. The Board concludes, utilizing an objective test, that the

Employer's actions in permanently laying off approximately 10% of bargaining unit employees, while they were taking strike action, without notice, was in breach of s. 11(1)(a) of the *Act*.

Section 11(1)(i)

[48] The Employer did not breach s. 11(1)(i) of the *Act* as it did not threaten to shut down or move any part of a plant, business or enterprise.

Conclusion:

[49] Accordingly, the Board finds that the Employer committed an unfair labour practice in violation of ss. 11(1)(a), (c) and (e) of the *Act*. An Order will issue accordingly. The Board also orders the reinstatement of Linda Haeusler, Gail Gryba, Sharon Sametts, Sandra Gaultois, Jane Meiklejohn, Jody Martin and Hilary Govan. The Employer shall make these employees whole for all monetary loss suffered as a result of their termination, taking into account the normal summer lay-offs and recalls which would have occurred. If the parties are unable to agree upon the amount to be paid to the employees within thirty (30) days of the date of the Board's Order, the Board reserves jurisdiction to determine the amount payable on the application of either party.

[50] Board Member Joan White concurs with the Board's finding that the Employer violated ss. 11(1)(c) and 11(1)(e) of the *Act* but dissents from the Board's finding that the Employer committed an unfair labour practice in violation of s. 11(1)(a) of the *Act*.

DATED at Regina, Saskatchewan, this **7th** day of October, 2003.

LABOUR RELATIONS BOARD

Wally Matkowski,
Vice-Chairperson