The Labour Relations Board
Saskatchewan

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1400, Applicant v. SOBEY'S CAPITAL INC. operating as VARSITY COMMON GARDEN MARKET, Respondent

LRB File No. 003-04; November 10, 2004
Vice-Chairperson, Wally Matkowski; Members: Brenda Cuthbert and Bruce McDonald

For the Applicant: Rod Gillies
For the Respondent: Kevin Wilson

Duty to bargain in good faith – Refusal to bargain – Union complains about delay, bargaining tactics and supply of information - Overall tone and content of interactions between parties demonstrated mutual willingness to attempt to arrive at collective agreement – While parties disagreed on certain issues, disagreement part of bargaining process – Neither party, through its conduct, thwarted bargaining process so as to justify unfair labour practice finding.

***The Trade Union Act*, ss. 11(1)(a), 11(1)(b) and 11(1)(c).**

REASONS FOR DECISION

Background:

[1] United Food and Commercial Workers Union, Local 1400 (the "Union"), obtained a certification Order from the Board on November 7, 2003 relating to Sobey's Capital Inc., operating as Varsity Common Garden Market (the "Employer"). On January 7, 2004, the Union brought an unfair labour practice application against the Employer alleging that the Employer violated ss. 3, 11(1)(a), 11(1)(b), 11(1)(c) and 36 of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*Act*") by refusing to bargain with the Union in a timely manner or by not substituting someone as its chief negotiator when its chief negotiator became ill. Other Union complaints about employee information had been resolved prior to the hearing.

[2] The hearing commenced in Saskatoon on July 8, 2004. At that time, the Union alleged that there had been a "pattern of conduct" exhibited by the Employer which had continued after the Union filed this unfair labour practice application in January, 2004. As such, the Union wished to present evidence relating to incidents that arose after January, 2004 to establish the alleged pattern of improper conduct by the Employer.

[3] Counsel for the Employer argued that either the Union should file a new application or the Board should adjourn the July 8, 2004 hearing and require the Union to amend its application to include the post January, 2004 incidents which would substantiate the alleged "pattern of conduct."

[4] The Board adjourned the hearing over to August 24 and 25, 2004 and September 17, 2004 and allowed the Union to amend its original application to include incidents that occurred after January 7, 2004. The Union was required to provide full written particulars of the expanded allegations to the Employer. The Board relied on the decision *United Food and Commercial Workers v. Madison Development Group Inc.*, [1996] Sask. L.R.B.R. 75, LRB File No. 131-95, in making its determination.

[5] The Union provided particulars of the alleged improper conduct in a letter to the Board dated July 13, 2004. The particulars allege a pattern of delay by the Employer in setting bargaining dates and that the Employer had refused to provide the Union with information relating to the Employer's profit sharing program, the Employer's pension plan and a particular wage grid. The Union also complained that the Employer had refused to "sign off" on certain articles which were agreed upon during bargaining.

[6] At the end of the Union's case, the Employer brought forward a non-suit motion. The Board provided the following oral decision in relation to the Employer's motion:

> *The application for non-suit is dismissed. On a non-suit motion, the weight of the evidence is not in issue. So long as the Union has presented evidence to support its application, the application for non-suit must fail. The Union presented some evidence and will attempt to argue a pattern of conduct (on the part of the Employer) to support its unfair labour practice allegation. As such, the non-suit application must fail. The Board accepts the reasoning (in regard to non-suit motions) as set out in the decision Oranchuk v. CUPE, [2004] Sask. L.R.B.R. 32, LRB File No. 156-03. Board Member Cuthbert dissents and would have granted the non-suit motion.*

Facts:

[7] Donald Logan, the Union's chief negotiator responsible for bargaining with the Employer, testified on behalf of the Union, while Gerald Hayes, vice president of human

resources with the Employer, and William Humeny, the Employer's chief spokesperson at the bargaining table, testified on behalf of the Employer.

[8] Mr. Logan testified that, in relation to the Employer's delay in negotiating with the Union, the Union's first complaint arose in approximately December of 2003. At that time, the Union was requesting bargaining dates from the Employer. The Employer sent correspondence to the Union dated December 17, 2003 advising that its chief negotiator, Mr. Humeny, was ill. The Employer further stated that Mr. Humeny would require surgery in January, 2004 and that, as such, bargaining would have to be delayed until March, 2004, when Mr. Humeny would be recovered from his illness.

[9] Mr. Logan found this delay to be unacceptable. From his experience, if the Union is unable to obtain a first collective agreement with an employer in a timely fashion, the Union is often faced with a decertification. If a first collective agreement is obtained in a timely fashion, the employees are able to see what the Union has achieved for them and decertification applications are not as frequent.

[10] The Union filed its application with the Board on January 7, 2004. Later that month, Mr. Logan requested that a conciliator be appointed in order to assist with the negotiations between the parties.

[11] Mr. Hayes responded to both the appointment of a conciliator and the Union's unfair labour practice application in letters dated January 16, 2004 and January 21, 2004. With respect to the appointment of a conciliator, the Employer's position was that it made little sense to have a conciliator appointed to assist the parties with negotiations prior to the parties even commencing negotiations. The Employer nonetheless met with the Union and the conciliator during collective bargaining.

[12] With respect the unfair labour practice application, Mr. Hayes stated as follows:

> *Employee Information Request:*
>
> *As requested, attached is the following:*
>
> *a) Each current employee's name, home address, phone number;*
> *b) Employee's department, classification, wage rate and date of hire;*

> *c) Copy of full-time and part-time benefits plans currently in place and information about qualifying for such benefits.*
>
> *To the best of our knowledge, there is no other relevant information regarding wages or economic compensation. If there is something specific you are seeking in that regard, please advise*
>
> *Collective Bargaining*
>
> *The Company continues to be ready and willing to commence negotiations in an effort to obtain a first collective bargaining agreement. As you have been advised, our chief negotiator, Mr. Humeny, is unavailable to commence bargaining until after March 1, 2004, due to medical reasons. You infer in the unfair labor practice complaint that the Company only contacted Mr. Humeny once it became aware of his medical condition. Although the suggestion is somewhat surprising, I can assure you that was not the case. Mr. Humeny was contacted well prior to his being advised by his physician that he would require further, more serious surgery together with the associated recovery period. The Company is also not prepared to agree to your demand that it replace Mr. Humeny as its chief negotiator. It would not be within our Company's philosophy to terminate our contractual relationship with him because of what will hopefully be a short –term medical situation. We would extend the same courtesy to you in bargaining in similar circumstances if the roles were reversed…*
>
> *…Dates to negotiate will be provided shortly by Mr. Humeny once he is out of the hospital and is in a position to provide us with available dates.*

[13] Mr. Hayes testified that he had taken two weeks off during the Christmas season and that he was behind in responding to the Union when he sent his January 21, 2004 correspondence to Mr. Logan.

[14] Mr. Logan responded to the Employer's January 21, 2004 correspondence by letter dated January 26, 2004 which provided in part:

> *We also acknowledge receipt of some economic information, however, we note that there is no information about the present wage grid or wage progression structure. I have not had an opportunity to peruse the information thoroughly at the time of writing, however it appears there is no information regarding the pension plan. If the plan is the same as the plan covering the Yorkton employees, we have a copy of that document…and if that is the case, please advise.*

[15] During the hearing, counsel for the Union agreed to the fact that the Employer took steps to retain Mr. Humeny on November 4, 2003, prior to the certification Order being issued by the Board. In addition, Mr. Logan testified that he accepted that Mr. Humeny was ill.

[16] Mr. Hayes testified that Mr. Humeny had come highly recommended and he was aware that Mr. Humeny had experience dealing with Mr. Logan. Mr. Hayes stated that he had dealt with Mr. Logan on a previous occasion and that their styles of bargaining were not complementary. In a January 26, 2004 letter from Mr. Logan to Mr. Hayes, Mr. Logan alludes to difficulties that the Union and the Employer encountered during bargaining at the Employer's Yorkton store. He believed that Mr. Humeny and Mr. Logan were better matched so that a collective agreement could be arrived at.

[17] Mr. Hayes testified that he wanted Mr. Humeny to be involved with all of the Employer's bargaining in Saskatchewan, which would include both a more mature contractual relationship with the Union in Yorkton and a new contractual relationship at Moose Jaw.

[18] Mr. Hayes testified that he met with Mr. Humeny on March 18, 2004, so that they could prepare the Employer's bargaining proposals. Thereafter, he sent Mr. Logan a letter dated March 22, 2004, advising that the Employer was prepared to meet to exchange bargaining proposals.

[19] Mr. Humeny testified that he contacted Mr. Logan on approximately March 13, 2004 advising him that he was able to resume his duties and on March 31, 2004, in an attempt to obtain bargaining dates. Mr. Logan did not believe that Mr. Humeny contacted him on March 13, 2004 but did recall the March 31, 2004 conversation. Ultimately, the parties agreed to meet on April 26, 2004 and exchange their bargaining proposals.

[20] On April 26, 2004, the parties exchanged their bargaining proposals. At this meeting the Union requested an outline of the benefit plan, the pension plan and wage scales. The Employer agreed to provide this information to the Union. Mr. Humeny testified that it was his belief that the parties had agreed to break up the monetary and non-monetary issues during bargaining. He indicated that originally Mr. Logan had not agreed to deal with the wages last, but that he had ultimately agreed.

[21] Mr. Logan recalled that, at the April 26, 2004 meeting, Mr. Humeny was upset that the Union had applied for conciliation prior to the commencement of bargaining. Mr. Logan conceded that it was unusual to have a conciliator appointed this early in the process and this was the first case that he was involved in where a conciliator had been requested prior to the commencement of bargaining. Mr. Logan recalled Mr. Humeny advising him that the Employer had utilized portions of the Yorkton contract for its proposals and that he had asked Mr. Humeny for a copy of the pension plan and whether it was the same plan as the "Oshawa plan." Mr. Logan also asked for the present grid structure and wanted to know how many employees were full-time employees.

[22] The parties attempted to meet on May 25, 2004 but both the conciliator and one of the members of the Employer's bargaining committee were not available for that date. The parties did meet and bargained on June 10, 11 & 24, 2004.

[23] Mr. Logan put his information requests in correspondence to the Employer dated May 25, 2004. This written request provided:

> *The Union is requesting a copy of the present wage grid applicable to each job classification, and a copy of the present pension plan applicable to the employees. If the pension plan is the same Oshawa Group pension plan that the Yorkton Sobey's employees enjoy, please so advise as the Union already has a copy of that plan. When we met on April 26, 2004, the Employer said it would provide the requested information at our next meeting. At that time, it appeared our next meeting was going to take place on May 25, 2004, however, according to the cell phone message you left for me…the Employer was not available to meet on that date. We therefore, again request this information be provided to the Union forthwith….*
>
> *We have just learned that there is some form of profit sharing plan. Please provide us with a copy of that plan also.*

[24] Mr. Logan received a copy of a wage grid from Mr. Humeny during bargaining on June 24, 2004. According to the information he received from his members, the wage grid was not the same wage grid which had been placed "under glass," though none of his members had written down the contents of the "under glass" wage grid. Mr. Logan received a copy of the pension plan text and profit sharing plan on July 8, 2004.

[25] With respect to the June 24, 2004 meeting, Mr. Logan testified that the tone of the meeting was poor. He attributed some of this to the fact that the Employer was upset that the Union had filed a first contract application with the Board. Mr. Logan complained that the Employer also refused to sign off on items which it had agreed to previously and that the Employer had made a new demand, which was something that the parties had agreed not to do. He conceded that Mr. Humeny had requested the sign off process and that Mr. Humeny had wanted an entire clause agreed upon prior to signing off on it.

[26] Both Mr. Logan and Mr. Humeny testified that it sometimes takes a significant period of time for parties to arrive at a first collective agreement. Eighteen months to arrive at a first collective agreement can be on the high end of the scale, but it has happened in both their experiences. Both have been involved on files where it has taken over two years to obtain a first contract and where there have been lengthy delays between bargaining dates and setting bargaining dates after the certification Order has been obtained. During cross-examination of Mr. Logan, counsel for the Employer requested that Mr. Logan be made to produce files where he had dealt with other employers and attempted to obtain a first contract. The Board ruled that Mr. Logan did not have to produce these files. Counsel for the Employer was able to make the point during his cross-examination of Mr. Logan that first contract bargaining can be a very difficult and lengthy process, where the norm can often be that no norms exist. In any event, if the Board were to arrive at the determination that the Employer was guilty of an unfair labour practice, it would be based on the “pattern of conduct“ of the Employer in this instance, not the conduct of the Union with other employers in other circumstances.

[27] By letter dated April 28, 2004 the Union was sent information relating to the Employer’s pension plan and was given a wage scale. Mr. Logan testified that he did not receive a copy of the April 28, 2004 letter. Mr. Hayes testified that the pay scales listed in the April 28, 2004 letter covered every non-union employee for the Employer’s Western Canada stores.

[28] With respect to the “under glass” wage grid, Mr. Hayes testified that inquiries had been made into its origin or existence and that the store manager no longer had that particular document. Mr. Hayes conceded that the Employer does post compensation rates at store locations and indicated that the “under glass” wage grid should have been the same as the grid provided to the Union in April, 2004.

[29] On June 11, 2004, the Employer provided the Union with a copy of the pension plan. Mr. Humeny testified that Mr. Logan had never asked for the full pension plan text during bargaining but, in any event, the full pension plan text was provided to the Union on July 6, 2004. Mr. Hayes testified that he did not even possess the full plan text and that he had to obtain same for the Union.

[30] During the June 10 or 11, 2004 bargaining session, the Union asked for information in relation to the Employer's profit sharing plan. The Employer responded that this information was irrelevant, in that the profit sharing plan applied only to non-union stores. The Employer ultimately changed its position and provided this information to the Union on July 6, 2004.

[31] On June 24, 2004 Mr. Humeny provided the Union with a copy of a wage grid entitled "Pay Scale Information, Appendix C, effective October 25, 2003." Mr. Hayes testified that there were some minor differences between this document and the document sent to the Union on April 28, 2004 and that the April, 2004 document was the correct document.

[32] By letter dated July 7, 2004, counsel for the Employer advised counsel for the Union:

> *Further to the July 6, 2004 correspondence from Mr. Plaxton, my client was not aware that the Union wanted a full copy of the Pension Plan text, in addition to the pension plan information previously provided. Pursuant to your July 6, 2004 request, I am enclosing a copy of the same. With regard to the Profit Sharing Plan, my client advised the Union in bargaining that it did not believe the Plan was relevant since it applies to non-union employees. No further request was made and as such my client assumed the Union no longer sought a copy of the Plan. While my client continues to believe that the Plan is not relevant, as a courtesy I am providing a copy of the same. Finally, it is my understanding that the Union has been provided with copies of the available wage grid on several occasions. However, I am providing yet another copy with this correspondence. I believe this satisfies all the Union's requests for wage and monetary information. If I am incorrect, please let me know as soon as possible.*

[33] Mr. Humeny testified that he had not revoked his agreement on any article that had been agreed upon at the bargaining table. Rather, Mr. Humeny testified he suggested that an entire article be signed off once agreement was reached on the entire article. Mr. Humeny testified that he had suggested a change to an agreed upon article, but only in return for being

able to accept a union proposal to an article where agreement had not yet been reached. For example, Mr. Humeny was prepared to accept the Union's wording on Article 6.01(c) if the Union made a change to the previously agreed upon wording in Article 7.01.

[34] The parties attempted to meet in July, 2004 but, due to holiday plans on the Employer's side, dates could not be agreed upon. The Employer suggested August dates, but Mr. Logan was taking holidays in August. Mr. Logan suggested that he could have the president of the local take over for him at the table during his absence, but that offer was rejected by the Employer. It was the experience of both Mr. Hayes and Mr. Humeny that replacing the lead negotiator during the bargaining process was both confusing and counter-productive. Mr. Hayes testified that he had done this on one occasion and that the result had been a strike. As such, he was not prepared to agree to the August dates if Mr. Logan was not present. Both Mr. Humeny and Mr. Hayes testified that a level of trust has to be established during bargaining and that changing negotiators can negatively impact the trust level and the entire bargaining process.

[35] The parties agreed on the further dates of September 15, 16, 29, 30 & October 1, 2004 to resume bargaining.

Relevant statutory provisions:

[36] Relevant portions of the *Act* are as follows:

> *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;*
> >
> > *(b) to discriminate or interfere with the formation or administration of any labour organization or contribute financial or other support to it; but an employer shall not be prohibited from permitting the bargaining committee or officers of a trade union representing his employees in any unit to confer with him for the purpose of bargaining collectively or attending to the business of a trade union without deductions from wages or loss of time so occupied or from agreeing with any trade union for the use of notice boards and of the employer's premises for the purposes of such trade union;*

> *(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;*

Employer's arguments:

[37] Counsel for the Employer argued that there was no evidence to support the allegation that the Employer had committed an unfair labour practice as a result of a pattern of conduct which centered around the Employer's actions in both setting bargaining dates and during bargaining. Counsel took the position that the Employer had demonstrated a genuine and positive effort during bargaining and argued that the Applicant's application was premature and should be dismissed.

Union's arguments:

[38] Counsel for the Union argued that there was evidence presented before the Board which would support the allegation that the Employer had demonstrated a pattern of conduct which constituted a breach of the duty to bargain in good faith pursuant to s. 11(1)(c) of the *Act*. Counsel asked the Board to consider the Employer's actions in light of the decision *Madison Development, supra*, to arrive at a finding that the Employer was guilty of an unfair labour practice. Counsel argued that the Employer's delay in bargaining, the Employer's refusal to provide information and the Employer's bargaining tactics all demonstrated a pattern of conduct that could support the Union's application. Counsel argued that, as a result of the Employer's pattern of conduct, the administration of the Union had also been interfered with.

Analysis:

[39] In *Madison Development, supra*, the Board looked at the overall tone and content of the interactions between the parties in determining whether or not the employer was guilty of an unfair labour charge. The Board found that an employer must make a genuine and positive effort to resolve issues raised by a trade union on behalf of employees. In addition, the Board stated at 23:

> *What the Board must try to determine, without intervening unduly in the dynamics of the bargaining process, is whether a sincere effort is being made to conclude a collective agreement with the trade union, or whether the actions of an employer are more indicative of disrespect for the union or a wish to undermine its credibility and effectiveness.*

[40] From the overall tone and content of the interactions between the parties, the evidence demonstrated a mutual willingness to attempt to arrive at a collective agreement. Certainly, the Union was not pleased with a number of actions of the Employer. Mr. Logan would have preferred that the Employer change negotiators when Mr. Humeny became ill. Likewise, Mr. Logan would have preferred that the Employer meet with the Union in August in spite of the fact that he would not be present.

[41] For its part, the Employer was unhappy that the Union applied for a conciliator prior to the commencement of bargaining. It was the evidence of the Employer that the addition of the conciliator at such an early stage added nothing to the bargaining tone (and was a waste of the conciliator's time) and, in fact, inhibited the bargaining process as the conciliator's schedule had to be considered when the parties were attempting to agree on bargaining dates.

[42] What is evident is that disagreements are a normal part of the bargaining process. What the Board must consider is whether or not these disagreements or the actions of one party somehow thwarted the bargaining process in such a manner that an unfair labour practice charge can be made out. In our opinion, the bargaining process was not thwarted by either party's conduct so as to justify a finding of an unfair labour practice.

[43] In relation to the Union's allegation that the Employer delayed in initially bargaining with the Union, counsel for the Union conceded that Mr. Humeny's illness created a difficult situation and left no one to blame. If Mr. Humeny's illness had left him unable to work for an indefinite period of time, the Employer would have been required to hire another chief negotiator. However, that was not the case.

[44] Counsel for the Union stated that, because of the initial delay, the Employer should have made a more concerted effort to meet in July and August, 2004. There was very little evidence as to how hard the parties attempted to obtain dates in either July or August, 2004. Based on the evidence, the Employer was unavailable for most of July but was prepared to meet in August. Unfortunately, Mr. Logan was on holidays for most of August, 2004. The Employer took the position that temporarily substituting a new chief negotiator for the Union in August could cause more problems than it solved. Both Mr. Hayes and Mr. Humeny, based on their bargaining experiences, held this reasonable belief. The parties then booked multiple

bargaining dates in September and October, 2004. Given this fact pattern, there was insufficient evidence to substantiate the allegation that there existed a pattern of conduct on the part of the Employer that somehow thwarted the bargaining process when dates were being set or agreed upon.

[45] With respect to the Employer's bargaining tactics, the Board accepts the explanation provided by Mr. Humeny. Mr. Humeny's position was that he had not reneged on any agreement reached with the Union. Rather, he proposed changing an agreed upon item in response to resolving another Union issue. There was insufficient evidence to substantiate a pattern of conduct exhibited by the Employer that was designed to thwart the bargaining process.

[46] With respect to supplying requested information, the Employer continually exhibited a desire to provide information to the Union when requested by the Union. There was no evidence of an attitude on the part of the Employer not to supply information to the Union. For example, the Employer provided the Union with information relating to current employees, their department, classification, wage rate and date of hire and employee benefits in its January 21, 2004 correspondence. While it is true that the Employer did not immediately respond to the Union's information request, as set out in the Employer's January 21, 2004 letter, the Employer had never refused to provide this information to the Union and the delay was partially due to the Christmas holiday season.

[47] In relation to the full pension plan text, the Employer was not aware that the Union wanted the full pension plan text but once it became aware of the Union's desire to have the full pension plan text, the same was provided to the Union. Likewise, while the Employer did not believe the profit sharing plan was relevant, the Union did not advise the Employer at the bargaining table that it disagreed with the Employer's position on this matter. Once the Employer became aware the Union disagreed with its position, the Employer supplied the Union with information relating to the profit sharing plan.

[48] While there was some disagreement over whether or not the Union was sent or received the Employer's April, 2004 correspondence containing a wage grid, the Employer did provide a number of wage grids to the Union. It is true that there existed some very minor discrepancies as between two of the grids, but that fact, together with the other actions of the

Employer, does not lead to the conclusion that the Employer was guilty of an unfair labour practice. With respect to the "under glass" wage grid, there was no direct evidence presented to substantiate that this grid was not the same as the other grid provided to the Union. Mr. Logan had no first hand knowledge relating to the composition of that grid and his members did not provide him with any information that was contained in the "under glass" wage grid. As such, there was insufficient evidence to substantiate the Union's claim that the Employer was exhibiting a pattern of conduct which was designed to thwart the bargaining process.

[49] The Board also rejects the Union's argument that the Employer's actions interfered with the administration of the Union. There was insufficient evidence presented which could substantiate this allegation.

Conclusion:

[52] For all of the foregoing reasons, the Union's application is dismissed.

DATED at Regina, Saskatchewan, this **10th** day of **November, 2004.**

LABOUR RELATIONS BOARD

Wally Matkowski,
Vice-Chairperson