The Labour Relations Board
Saskatchewan

SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant v. LORAAS DISPOSAL SERVICES LTD., Respondent

LRB File No. 183-04; December 22, 2004
Vice-Chairperson, Wally Matkowski; Members: Donna Ottenson and Clare Gitzel

For the Applicant: Larry Kowalchuk
For the Respondent: Gary Semenchuck, Q. C.

> **Remedy – Interim order – Criteria – Balance of labour relations harm – Union seeks interim order imposing terms of collective agreement on employer – Potential labour relations harm to union can be addressed in monetary award subsequent to hearing of final application – Potential labour relations harm to employer is loss of right to negotiate or attempt to negotiate collective agreement – Balance of labour relations harm favours employer – Board dismisses interim application.**
>
> ***The Trade Union Act*, s. 5.3.**

REASONS FOR DECISION

Background:

[1] Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union") filed an unfair labour practice application on April 23, 2004 (LRB File No. 077-04) alleging that Loraas Disposal Services Ltd. (the "Employer") committed an unfair labour practice within the meaning of ss. 3, 11(1)(a), (b), (e), (f), (g) and 12 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"). In its unfair labour practice application in LRB File No. 077-04, the Union alleged that the Employer violated the *Act* by continually harassing and belittling two known supporters of the Union, Henry Franke and Kevin Wood, and by creating a poisoned, anti-union environment in an attempt "to rid the workplace of the union."

[2] The Union stated in its application in LRB File No. 077-04 that "the employees who led each of the last six rescission applications are in control of the bargaining committee" and that:

> *the majority of the members of the bargaining committee who led the rescissions have previously indicated their opposition to those clauses*

> *(that protect Mr. Franke and Mr. Wood) and the Board orders protecting Mr. Wood and Mr. Franke.*

[3] The Union filed a second unfair labour practice application on June 30, 2004 (LRB File No. 183-04) alleging that the Employer committed an unfair labour practice within the meaning of ss. 3, 11(1)(a), (b), (c), (e), (f) and 12 of the *Act*. In its unfair labour practice application in LRB File No. 183-04, the Union alleged that the Employer violated the *Act* by tabling a wage proposal that would see a wage decrease for Mr. Wood and Mr. Franke and a proposal that requests that the Union withdraw any unfair labour practice applications and remedies relating to Mr. Wood and Mr. Franke.

[4] In LRB File No. 183-04, the Union also sought an interim order pursuant to ss. 5, 5.3 and 42 of the *Act* requiring the Employer to remove from its bargaining proposals "any conditions which reduce the minimum hourly guarantee for drivers" and the request that the Union withdraw "any matters presently before the Board." The Union also sought an interim order that the Employer continue to bargain only with Brian Haughey, a representative of the Union. The Union sought an order requiring the Employer to offer the Union a new collective agreement on the terms last agreed to between Mr. Haughey and the Employer on June 16, 2004 and that the Employer provide leaves of absence with full pay to Mr. Wood and Mr. Franke.

[5] The Board heard the application for interim relief in Saskatoon on July 13, 2004. On July 20 2004, the Board dismissed the interim application and advised the parties that it would issue written reasons in due course. The Board delayed issuing its written reasons as Vice-Chairperson Matkowski attempted to assist the parties in resolving a number of their disputes through a pre-hearing process. The pre-hearing process concluded unsuccessfully in September, 2004.

Facts:

[6] In support of its interim application, the Union filed affidavits from Mr. Haughey, the Union's staff representative responsible for collective bargaining with the Employer, and three employees of the Employer, Collette Smith, Mr. Franke and Mr. Wood. The Union's affidavit evidence established that, since the Union was certified in 1997, it has attended before the Board in relation to numerous disputes that involved the Employer either directly or indirectly. The Board record indicates that the Union has been successful in having countless

decertification applications rejected on the basis of employer interference. The Board record indicates that the Employer has, in the past, taken steps to ensure that the Union's key supporters were discriminated against and treated differently than other employees. The Board record indicates that the actions of the principal of the Employer, Carman Loraas, have created such a poisoned work environment that it has been difficult for the Board to obtain a clear picture as to what the true wishes of the employees of the Employer are.

[7] Two individuals who have been instrumental in either bringing forward or testifying in a number of the decertification applications, Sydney Glas and Ben Schaffer, are now on the Union's bargaining committee. During bargaining, the Employer advanced bargaining proposals that Mr. Haughey, on behalf of the Union, claims discriminate against Mr. Franke and Mr. Wood. In addition, the Employer advanced the proposal that any outstanding applications to the Board advanced by the Union be withdrawn, which would include an application dealing with Mr. Franke and Mr. Wood.

[8] Mr. Haughey refused to participate in bargaining with the Employer so long as these two proposals were on the table. After Mr. Haughey left the bargaining table, the Employer's chief spokesperson at the bargaining table took the position that he could not bargain with the Union's bargaining committee without Mr. Haughey's presence. The two bargaining unit representatives on the Union's bargaining committee were prepared to take the Employer's last proposals to the membership.

[9] The remainder of Mr. Haughey's affidavit attempted to demonstrate to the Board the enormous pressure that Mr. Franke and Mr. Wood were experiencing at the workplace.

[10] Mr. Franke's affidavit states that, as a result of the continual harassment and intimidation he has experienced from the Employer, he was advised by his doctor to go on stress leave effective June 9, 2004. Mr. Wood's affidavit states that the Employer continues to ridicule him in front of co-workers and harass him by assigning him the least productive and economical work routes.

[11] Mr. Loraas, the general manager of the Employer, filed an affidavit on behalf of the Employer confirming that the only two outstanding issues preventing a new collective agreement from being achieved are a new minimum guaranteed hourly rate for all of the

Employer's drivers and the withdrawal by the Union of any and all applications or actions before the Board with respect to rectification or other claims for compensation and, in particular, pursuant to the Board's Order in LRB File No. 143-00.

[12] Mr. Loraas' affidavit states that the Employer has been involved in bargaining with the Union in an attempt to achieve a new collective agreement and that the Employer, prior to each bargaining session, confirmed that the proper representatives of the Union were present for the bargaining sessions.

[13] At the last bargaining session held on June 16, 2004, the Union's bargaining committee members agreed to the Employer's proposals in relation to the two outstanding issues and advised Mr. Loraas that they would take the two proposals to the membership. At that stage, Mr. Haughey refused to bargain any further and left the bargaining meeting. The Employer then adopted the position that it would not bargain with the Union's bargaining committee without Mr. Haughey's presence.

[14] Mr. Loraas denies knowledge of any discrimination by the Employer against Mr. Franke and/or Mr. Wood as a result of their support for the Union. Mr. Loraas deposes that the new minimum guaranteed hourly rate for drivers applies to all employees, not just Mr. Wood and Mr. Franke, and that Mr. Wood and Mr. Franke, for a majority of the 2003 and 2004 pay periods utilized the "piece rate of pay" and not the "guaranteed hourly rate of pay."

[15] Mr. Loraas states in his affidavit that counsel for the Employer has requested particulars from the Union as to whether there are any outstanding issues in relation to LRB File No. 143-00 and that Mr. Haughey has not responded to this Employer request. Mr. Loraas is of the belief that there are no outstanding issues remaining relating to the Order issued on LRB File No. 143-00.

Argument:

[16] Counsel for the Union put forward the view that the Union had made an arguable case under ss. 11(1)(a), (b), (c) and (e) of the *Act*. The Union's main application raised a concern over the safety of Mr. Franke, a long time employee of the Employer and a known supporter of the Union. Counsel for the Applicant argued that, if the Board did not grant the interim relief, the workplace pressure that Mr. Franke would experience would be immense. In

addition, the Union sought relief from the Board relating to the bargaining process, including who the Employer must bargain with, what the terms of the collective agreement should be and whether the Union's bargaining committee has any authority to agree to have the Union withdraw any applications before the Board.

[17] On the second part of the Board's test for obtaining interim relief, counsel for the Union argued that the balance of labour relations harm test favoured the granting of an interim order. An interim order would ensure that a collective agreement was obtained and that Mr. Franke would be safe at the workplace.

[18] Counsel for the Union blamed Mr. Loraas for a pattern of conduct that the Union said had been undertaken to defeat the Union by intimidating union members. The Union blamed the Board for not protecting the Union and its members from an employer who the Union describes as anti-union. The Union argued that an interim order was necessary in part because the Board had not crafted more appropriate remedies so as to ensure the Employer ended its pattern of anti-union conduct.

[19] Counsel for the Employer argued that the Union was bringing the interim application because of the internal problems that the Union was experiencing. The Employer stated that it was bargaining in an attempt to obtain a collective agreement with the proper bargaining committee members and that there was no need for the Board to interfere with that process. Counsel for the Employer pointed to the Board's decision in *Grain Services Union, Local 1450 v. Bear Hills Pork Producers Ltd. Partnership*, [2000] Sask. L.R.B.R. 223, LRB File No. 079-00, to support his argument that the Board does not normally throw itself into a bargaining dispute through the mechanism of an interim order.

[20] Counsel for the Employer argued that an interim order is meant to preserve the *status quo* and is not meant to be remedial in that the Union's allegations should not be determined by the Board. If the Board granted the Union's interim application and imposed a collective agreement on the Employer, counsel argued that the Union's unfair labour practice application would, in large part, be dealt with. Counsel for the Employer cited as authority for this argument the Board's recent decision *Grain Services Union (ILWU – Canada) v. Startek Canada Services Ltd.*, [2004] Sask. L.R.B.R. 128, LRB File Nos. 115-04 to 117-04.

[21] Counsel also argued that interim orders are "exceptional orders" and to grant an order would be prejudicial to the Employer and the vast majority of the Union's members.

[22] Counsel for the Employer argued that the Board would be going against all previous precedent if it granted the interim order requested by the Union and imposed a collective agreement on the parties.

Relevant statutory provisions:

[23] The Board considered ss. 3, 5.3, 11(1)(a), (b), (c), (e), (f), (g) and 12 of the *Act* which provide as follows:

> *3 Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively.*
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> *. . .*
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> *5.3 With respect to an application or complaint made pursuant to any provision of this Act or the regulations, the board may, after giving each party to the matter an opportunity to be heard, make an interim order pending the making of a final order or decision.*
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> *. . .*
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> *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;*
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> *. . .*
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> *(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;*
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> *(f) to require as a condition of employment that any person shall abstain from joining or assisting or being active in any trade union or from exercising any right provided by this Act, except as permitted by this Act;*
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> *(g) to interfere in the selection of a trade union as a representative employees for the purpose of bargaining collectively;*
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> *. . .*
>
> *12 No person shall take part in, aid, abet, counsel or procure any unfair labour practice or any violation of this Act.*

Test for Interim Relief:

[24] The test for determining if an interim order should be granted was set out by the Board in *Hotel Employees and Restaurant Employees Union, Local 206 v. Canadian Hotels*

Income Properties Real Estate Investment Trust #19 Operations Ltd. o/a Regina Inn Hotel and Convention Centre, [1999] Sask. L. R. B. R. 190, LRB File No. 131-99 at 194:

> *The Board is empowered under ss. 5.3 and 42 of the Act to issue interim orders. The general rules relating to the granting of interim relief have been set down in the cases cited above. Generally, we are concerned with determining (1) whether the main application reflects an arguable case under the Act, and (2) what labour relations harm will result if the interim order is not granted compared to the harm that will result if it is granted. (see Tropical Inn, supra, at 229). This test restates the test set out by the Courts in decisions such as Potash Corporation of Saskatchewan v. Todd et al., [1987] 2 W.W.R. 481 (Sask. C.A.) and by the Board in its subsequent decisions. In our view, the modified test, which we are adopting from the Ontario Labour Relations Board's decision in Loeb Highland, supra, focuses the Board's attention on the labour relations impact of granting or not granting an interim order. The Board's power to grant interim relief is discretionary and interim relief can be refused for other practical considerations.*

Analysis:

[25] In *Schaeffer v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Loraas Disposal Services Ltd.,* [2002] Sask. L.R.B.R. 657, LRB File No. 196-02, the Board reviewed the numerous applications to and decisions from the Board involving the Union and the Employer up to December, 2002. In *Schaeffer, supra*, the Board made the comment that "Mr. Franke must have a constitution of steel." The Union suggested that a pattern of continual "employer bullying" had caused Mr. Franke to go on stress leave and that an interim order should be granted, in large part, to assist Mr. Franke. At the hearing the parties agreed that Mr. Franke had returned to "light duty work" pursuant to the terms of the applicable collective agreement.

[26] The Union presented an arguable case before the Board, as required by part one of the Board's test for granting interim relief. With respect to the second part of the test, the labour relations harm that the Union would suffer if the interim order was not granted was that Mr. Franke and Mr. Wood would still be required to work at the workplace. They would still be supported by the Union and would be governed by the terms of the applicable collective agreement. In Mr. Franke's case, his physician would have to authorize his availability and the extent of the work that he was able to perform. If the interim order was not granted, the Union would have to deal with its membership and bargaining committee in an attempt to resolve the two outstanding bargaining issues.

[27] The labour relations harm that would have resulted if the interim order was granted would be that the Board would have determined the terms of the collective agreement between the parties. The Board was not prepared to take this extraordinary step. Under most circumstances, on an interim application, the Board will not determine the terms of a collective agreement nor will it determine the composition of the union's bargaining committee. As such, the alleged harm to the Union if an interim order was not granted is far less than the harm to the Employer if the interim order had been granted, in that the Board would be taking away the Employer's right to negotiate, or attempt to negotiate, a collective agreement.

[28] In *Bear Hills Pork*, *supra,* the Board stated at 229:

> *The Board is reluctant to throw itself into a bargaining dispute of this nature through the mechanism of an interim Order . . . .The Union's concern with the lawfulness of the Employer's bargaining position could be brought to the Board in the form of an unfair labour practice . . . .*
>
> *If it is found on a final hearing, that the Employer's offer was unlawful and that it caused an unnecessary delay in achieving a collective agreement or unnecessarily prolonged the labour dispute, the Board can address the resulting harm in a monetary award.*

[29] Likewise, in the case at hand, the Union is challenging the lawfulness of the Employer's bargaining position. If the Union's challenge is successful at the main hearing, the Employer's breach can be addressed in a monetary award.

[30] The Union's criticism that the Board has not protected supporters of the Union at the workplace is simply not correct. In *Schaeffer, supra*, the Board reviewed its previous decisions where employees such as Mr. Wood and Mr. Franke were reinstated. The Board granted remedial Orders in order to rectify any wrongs that had occurred.

[31] While it may be true that, in spite of the Board's remedial Orders, there exists a poor relationship between the Union and the Employer, that, in and of itself, is not enough to warrant the granting of an interim order. If, after hearing all the evidence at the hearing of the final application, the Board determines that the Employer has committed an unfair labour practice, the Board will grant the remedial relief that it considers appropriate.

[32] In all of the circumstances, the bases for the exercise of the Board's discretion to grant an interim order were not established. As such, the Board dismissed the interim application.

DATED at Saskatoon, Saskatchewan, this 22nd day of **December, 2004.**

LABOUR RELATIONS BOARD

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Wally Matkowski,
Vice-Chairperson