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 No. 188-03; July 23, 2004
Vice-Chairperson, Wally Matkowski; Members: Clare Gitzel and Duane Siemens

For the Applicant: Peter Barnacle
For the Respondent: Jim McLellan

Duty to bargain in good faith – Refusal to bargain - Employer bargained amnesty clause to impasse, thereby prolonging strike – Board finds unfair labour practice pursuant to s. 11(1)(c) of *The Trade Union Act*.

Duty to bargain in good faith – Refusal to bargain – In previous case involving parties, Board ordered employer to reinstate certain employees – Employer then raised issue of reinstatement in bargaining and pressed issue to impasse – Once union advised employer that union relying on Board's order and issue of reinstatement not open for negotiation, employer required to move off issue - Board finds unfair labour practice pursuant to s. 11(1)(c) of *The Trade Union Act*.

Duty to bargain in good faith – Refusal to bargain – Employer refused to bargain at all with union for period pending amalgamation of employer with another school division – Employer then returned to table, pressed amnesty clause and implementation of Board order to impasse and failed to disclose relevant bargaining information to union – Board finds subjective unwillingness to conclude collective agreement on part of employer.

Remedy – Unfair labour practice – Monetary loss – Striking employees – Where employer failed to bargain in good faith during strike, thereby prolonging strike, Board orders employer to pay back wages and reimburse union for strike pay for period from time application filed until employer resumed bargaining in good faith.

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

REASONS FOR DECISION

Background:

[1] Canadian Union of Public Employees, Local 3078 (the "Union") filed two unfair labour practice applications on September 25, 2003 against the Board of Education of the

Wadena School Division No. 46 of Saskatchewan (the ”Employer”). At the request of the Union, the Board only dealt with the first application, LRB File No. 188-03. The second application, LRB File No. 198-03, will be scheduled for hearing on a later date, if necessary.

[2] The Union is the certified bargaining agent for the employees of the Employer (with a number of exceptions). The collective agreement between the Union and the Employer expired on December 31, 2000. The Union served a notice to bargain in November, 2000 and the parties have held approximately thirty bargaining meetings since service of the notice to bargain.

[3] In LRB File No. 188-03, the Union alleged that the Employer had committed an unfair labour practice in violation of s. 11(1)(c) of *The Trade Union Act*, R.S.S.1978, c. T-17 (the ”*Act*”). Following a pre-hearing which was held on December 11, 2003, the Union submitted correspondence to the Board dated December 11, 2003, which provided particulars of its complaint against the Employer and requested leave to amend the application to include an allegation that the Employer had also committed an unfair labour practice in violation of s. 11(1)(b) of the *Act*.

[4] At the hearing, which was held on December 15 and 16, 2003, the Union asked if it could limit its evidence to the time period subsequent to August 25, 2003, the date the Union commenced its full blown strike with the Employer. Counsel for the Union indicated that, if this request was not granted, the case would not be completed in the two hearing days allotted. Given that the Employer was only able to enter into a contract with the Union up until December 31, 2003 (effective January 1, 2004, the Employer amalgamated with the Board of Education of the Shamrock School Division No. 38), a timely Board decision was required so that productive collective bargaining could resume. In the event a Board decision was not received in a timely fashion, collective bargaining would not resume with the amalgamated employer until late January or early February, 2004.

[5] The Union argued that the evidence would demonstrate that the parties are at a bargaining impasse and that the Board’s ruling could assist the parties to resume productive collective bargaining. The Employer consented to the Union’s proposed amendment to include s. 11(1)(b) of the *Act* but argued that the Board should not bifurcate the hearing by only dealing with incidents that occurred after August 25, 2003.

[6] The Board agreed to bifurcate the hearing and to only consider incidents that arose after August 25, 2003 to determine whether or not the Employer had committed an unfair labour practice pursuant to s. 11(1)(b) and/or s. 11(1)(c) of the *Act*. The primary reason for the Board taking this course of action was that the Board's ruling could potentially assist the parties in arriving at a negotiated collective agreement prior to the January 1, 2004 amalgamation which, as agreed by the parties, was their ultimate goal.

Facts:

[7] The Union called one witness, Jim Holmes, the Union's regional director for Saskatchewan. Prior to becoming regional director, Mr. Holmes had been a national representative with the Union and, in that capacity, had negotiated countless collective agreements. Mr. Holmes became involved in contract negotiations with the Employer in May, 2003 as a result of the Union taking rotating strike action.

[8] The Union went on a full-scale strike on August 25, 2003, the first day back for the office staff following the summer break. During the strike, striking members of the Union, so long as they met certain conditions, were paid strike pay and benefits from the Canadian Union of Public Employees ("CUPE") national strike fund. At this time, the parties were utilizing a conciliator to assist them in arriving at a new collective agreement and were exchanging proposals. Following this exchange, the parties were still no closer to arriving at a collective agreement.

[9] The Employer placed an article in the *Wadena News* dated September 17, 2003, which provided in part:

> *Board of Education elections take place October 22, 2003, and the new Board of Education comes into being January 1, 2004. In these circumstances this Board of Education has made the decision that they cannot bargain during elections. Further, because the new Lakeview Board will have to pay the cost of any agreement, further negotiations after the elections must be left until the Lakeview Board takes office in January.*
>
> *The Board has a signed agreement available for CUPE to accept at any time. Copies of the offer are available at the Wadena School Division Board office.*

[10] Mr. Holmes obtained a copy of the collective agreement which included a letter of understanding which stated:

> *The parties agree that there shall be no retaliations, reprisals, disciplinary measures and suits against each other, their affiliated organizations, officers, representatives, employees, members, teachers, community members or students in respect of any withdrawal of services, job action, communication campaign, publication, strike activity, or use of any replacement workers by the Board between the expiry of the current Collective Agreement and the signing and ratification of the replacement Collective Agreement.*
>
> *The Union agrees that there shall be no retaliation, reprisals, disciplinary measures, fines or increases in dues levied against any specific union members between the expiry of the current Collective Agreement and the signing and ratification of the replacement Collective Agreement. Dues increases or rebates may apply only to the union membership as a whole. The Union further agrees that it will pay the applicable group benefit premiums equally for all employees. The Union further agrees that it will pay the applicable group benefit premiums for all employees who are members of the bargaining unit during the strike period.*
>
> *(the "amnesty plus clause")*

[11] Mr. Holmes made inquiries with regard to the Employer's ability to carry out its normal responsibilities, including collective bargaining, up until December 31, 2003, prior to the planned amalgamation with the Shamrock school division. Mr. Holmes received correspondence from the Minister of Learning that confirmed that the Employer retained the ability to carry out all of its normal responsibilities, including entering into collective agreements, until December 31, 2003.

[12] The amnesty plus clause caused Mr. Holmes a great deal of concern. He believed that the amnesty plus clause was either illegal, or, if not illegal, could not be used to bring bargaining to a halt. He testified that, because the CUPE national strike fund pays not only strike pay but benefits for striking members, the amnesty plus clause would require the Union to pay funds toward benefits of members who crossed the picket line. Mr. Holmes indicated that this was objectionable and unworkable for the Union. The Employer proposed the amnesty plus clause after the strike commenced. Mr. Holmes conceded that a different CUPE local had agreed to an amnesty clause with the Biggar school board on a previous occasion. This amnesty clause, which was included in a back to work agreement and entered as an exhibit

before the Board, did not contain the provision that the Union pay group benefit premiums for all employees.

[13] Approximately eighteen Union members crossed the picket line and worked for the Employer during the strike. Mr. Holmes testified that the Union was advising its members that there existed an internal procedure that could be utilized to deal with members who crossed the picket line. This procedure is set out in the CUPE constitution, a copy of which was filed as an exhibit before the Board. The internal procedure, which can be initiated by any member in good standing, provides for both a trial and an appeal process. Mr. Holmes was of the belief that the Union could not negotiate away its members' rights as set out in the CUPE constitution and he did not want to tell his striking members that there were no rules, which could cause significant problems at the workplace.

[14] On September 25, 2003 the Union filed LRB File No. 188-03, which alleged, *inter alia*, that the Employer's insistence on the amnesty plus clause and the Employer's refusal to bargain because of the impending amalgamation amounted to a refusal to bargain in good faith, contrary to the provisions of the *Act*.

[15] The Board released Reasons for Decision and issued an Order dated October 7, 2003 in LRB File Nos. 101-03 & 130-03, (different applications involving these parties) wherein the Board found that the Employer had committed unfair labour practices pursuant to ss. 11(1)(a), 11(1)(c) and 11(1)(e) of the *Act* and reinstated seven employees who had been permanently laid off during the Union's rotating strikes. By letter dated October 20, 2003, the Employer advised the seven employees, who had been employees at Quill Lake School prior to the Employer's conduct, which was found by the Board to amount to an unfair labour practice, that they should report to the Employer's Wadena division office because:

> *The programming requirements of the Quill Lake School are such that there is no work available for you at the school.*

[16] The evidence indicated that Wadena is approximately thirty miles from Quill Lake School.

[17] Mr. Holmes testified that, from the Union's perspective, the work requirements at Quill Lake School had remained the same.

[18] On October 21, 2003 the parties met separately with the conciliator and then ultimately held a face-to-face bargaining session that lasted approximately two hours. Present at this meeting were the Union's negotiating committee, including Mr. Holmes, as well as the Employer's negotiating committee, including Rose Olson.

[19] Mr. Holmes advised the Employer that, from the Union's perspective, negotiations had come to a grinding halt as a result of four issues. Mr. Holmes then discussed the four issues and provided options that would ensure that the bargaining impasse was broken.

[20] The first issue discussed was the amnesty plus clause. As set out in the Union's application, after the strike commenced, the Employer brought forward a new letter of understanding that sought to protect workers who crossed the picket line by ensuring that these workers received the same benefits as other workers. Mr. Holmes advised the Employer that dealing with union members who crossed the picket line was an internal union matter, which could be dealt with through the Union's constitution and s. 36.1 of the *Act*. In an attempt to move forward in achieving a collective agreement, the Union proposed that the amnesty plus clause issue could be referred to the Board as a reference of dispute. The Union suggested that, if the Employer wanted peace at the workplace, it would be inequitable for all union members to benefit equally when they did not sacrifice equally. The Union suggested that, if the Employer wanted equality for all employees following the strike -- in that the Employer was asking the Union to pay benefits to all employees, including those who crossed the picket line -- all employees could be treated equally by the Employer paying the striking employees the difference between their strike pay and what their wages would have been. The Employer would not move on this issue and provided no counter-proposals.

[21] The second issue discussed dealt with the seven teacher assistants who were reinstated by the Board's Order of October 7, 2003. The Union wanted the Employer to

implement the Board's Order and reinstate the teacher assistants at Quill Lake School. The Union also proposed that the issue of where the teacher assistants should be reinstated could be referred back to the Board. Finally, the Union suggested that the Employer compensate the seven teacher assistants and pay them a sum of money to have them, in effect, leave Quill Lake School. Mr. Holmes was of the belief that, at some point, the Employer would be entitled to make a legitimate decision as to its staffing, free of the taint which the Board had found in its October 7, 2003 Reasons for Decision and Order. The Employer would not agree to any union proposals and, when asked by the Union for any proposals, the Employer gave none. The Union was advised by the Employer that all issues had to be resolved together.

[22] Following a pre-hearing with the Board's Investigating Officer on December 11, 2003, counsel for the Union provided the following amendment to the schedule attached to the Union's application in LRB File No. 188-03:

> *The Employer has tabled on October 21st, 2003 a condition that the Union agrees to the layoff of the seven (7) Teacher Associates at Quill Lake School who had been reinstated by Board Order dated October 7th, 2003 (Board File #101-03 & 130-03). As with the "amnesty" provision, the Employer insists that the Union agree to the layoff as a condition of achieving a collective agreement, and has thus similarly put the matter to impasse.*

[23] The third issue revolved around what the Employer had proposed in terms of wages. The Employer was offering a wage package of 10% and Mr. Holmes asked why it was not 11%, which had been offered earlier. The Employer responded that the 11% had been offered previously but that its wage offer was now 10%. The Union wanted to know what had changed to cause the Employer to move from a wage offer of 11% to a wage offer of 10%.

[24] The fourth issue revolved around benefits. Pursuant to the provisions of the existing collective agreement, the Employer paid the premiums for a number of insurance plans while the Union paid the premiums for the long-term disability plan. The Union asked for the necessary information so that it could cost the applicable plans. The Employer had not given this information to the Union.

[25] Bargaining broke off after the October 21, 2003 session and the parties had not resumed face-to-face bargaining. At the hearing, the parties were discussing meeting again on December 22 and 23, 2003.

[26] Mr. Holmes testified that the Union ran into a complete brick wall in regard to the four issues. The Employer would not deal with the four issues separately and wanted the issues resolved as a total package. The Union acknowledged that there were other matters/issues in dispute between the parties, but advised that these matters had not been taken to impasse or had not been identified as blockages to reaching a collective agreement because the parties cannot get past the four issues. The Union believed that the first two issues were illegal/improper to take to impasse and that the last two issues simply required some information to be provided by the Employer.

[27] Following the unsuccessful bargaining session on October 21, 2003, the Employer sent out a news release dated October 22, 2003 which provided, in part:

> *. . . the Union is requesting the right to discipline the employees who have returned to work; the Board is asked to sign an agreement where retaliations, reprisals, disciplinary measures and/or lawsuits can occur among employees; the Union is asking that striking employees be paid full salary while on strike (the Union request is for the Board to top up the strike pay in order for the striking employees to receive full pay while on strike); the Union is requesting 10 months of salary for the 6 Teacher Associates at Quill Lake School rather than reinstating them to work.*
>
> *The Board of Education believes that these demands are unreasonable. The Board is prepared to meet when the Union has a realistic proposal for the Board to consider…*

[28] The *Regina Leader Post*, in an article dated December 10, 2003, quotes an Employer spokesperson as stating:

> *Probably the stickiest point is that these people crossed the picket line and the union wants to discipline these people and we want everyone to go back peacefully with no reprisals.*

[29] Three witnesses testified on behalf of the Employer. Erin Weigel, who has two children receiving instruction from special education teachers at Quill Lake School, testified that her children are having a great deal of success this year as compared to previous years.

[30] Bev Closson, the vice-principal at Quill Lake School testified that the Employer hired special education teachers to fill 2.5 positions at Quill Lake School. These positions were in addition to two existing special education teachers. The new special education teachers did not have the special education designation but were working toward it and had received an interim designation. The results that the special education teachers have encountered have surpassed the Employer's expectations. Ms. Closson testified that, given the large number of special need students at Quill Lake School, specialized teachers are required. Ms. Closson also testified that, as far as she was aware, the Employer did not review or do an assessment on the teacher assistant duties at Quill Lake School in October following the Board's October 7, 2003 Reasons for Decision and Order.

[31] Rose Olson, the Employer's chairperson testified before the Board. She confirmed that negotiations had been difficult and lengthy, and that the parties had utilized two conciliators. She confirmed that the Employer had initially refused to bargain with the Union as set out in the September 17, 2003 Wadena newspaper article. Ms. Olson testified that she believed that it would have been ethically and morally irresponsible for the Employer to negotiate with the Union given the upcoming elections and Board amalgamation. She indicated that the Employer changed its position on bargaining and that the Employer met with the Union on October 21, 2003. Ms. Olson is on the Employer's bargaining committee and attended the October 21, 2003 meeting.

[32] At the October 21, 2003 meeting, the Employer took the position that all issues had to be discussed and resolved as part of a package and that issues could not be severed. Ms. Olson confirmed Mr. Holmes' testimony relating to the discussion which occurred about the four issues which the Union viewed as stumbling blocks and she confirmed that the Employer did not make any counter-proposals in relation to the four issues. Ms. Olson testified that the Employer did not view the Union's proposals as reasonable and that the Union did not address Employer concerns at the October 21, 2003 meeting.

[33] Ms. Olson confirmed that, with respect to the amnesty plus clause, the Employer viewed this as important in that it wanted peaceful conditions at the workplace following the resolution of the strike. Under cross-examination on this issue, she reluctantly indicated that the Employer would probably not sign a collective agreement without the amnesty plus clause.

[34] In relation to the Quill Lake teacher assistant reinstatement issue, Ms. Olson testified that the Employer is not an employment agency and that there was no work for the teacher assistants at Quill Lake School because special education teachers were already there. She also testified that the Employer had received a number of letters from parents expressing their satisfaction with the staffing arrangement as it existed at Quill Lake School.

[35] Ms. Olson conceded that a comment was made at the October 21, 2003 meeting that the Employer had made a wage offer of 11%, but that the offer had been time sensitive. With respect to benefits, Ms. Olson testified that the parties have not dealt with a number of issues that will be necessary to finally resolve the benefits issue.

[36] During the second day of the hearing, counsel for the Employer advised the Union that his client was prepared to meet on December 22 and 23, 2003, and that he was prepared to personally assist the Union in attempting to obtain the necessary information in regard to the benefits costing issue.

Relevant statutory provisions:

[37] Sections 11(1)(b) and (c) of the *Act* 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:*
>
> > *(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:

[38] Counsel for the Employer argued that the Employer had not brought bargaining to an impasse and that bargaining had taken place on October 21, 2003. Counsel argued that the Union had put forward a number of proposals to the Employer to deal with the four issues which the Union called "blockers," and that this was all part of the bargaining process.

Union's arguments:

[39] Counsel for the Union argued that the Employer breached s. 11(1)(c) of the *Act* when it brought the amnesty plus clause and the Quill Lake teacher assistant issues to impasse. Counsel also argued that the Employer committed an unfair labour practice by failing to give the Union the necessary information relating to the costing of benefits and by failing to advise the Union why it was offering a wage package of 10% when it had previously offered 11%. Counsel argued that this failure to provide information had the procedural effect of bringing bargaining to a halt, given the Employer's position that all issues had to be settled together.

[40] Counsel argued that the Employer's September 17, 2003 newspaper article indicated that the Employer was no longer prepared to bargain and that the signed copy of a collective agreement was for the Union to "take it or leave it." The October 21, 2003 meeting confirmed that the Employer had not deviated from this position.

[41] Finally, counsel argued that the Employer breached s. 11(1)(b) of the *Act* when it brought the amnesty plus clause issue to an impasse.

Analysis:

The Amnesty Plus Clause

[42] This Board finds as a fact that the Employer bargained the amnesty plus clause issue to impasse. The evidence of Mr. Holmes in that regard was confirmed by Ms. Olson when she testified that the amnesty plus clause was important to the Employer and that the Employer would probably not sign a collective agreement without such a clause. This is consistent with both the Employer's October 22, 2003 news release which described the Union's request to discipline its members as unreasonable (though this is a mis-statement by the Employer as the

Union had made it clear to the Employer that, under its constitution, individual union members had the right to file charges against fellow members) and the December 10, 2003 newspaper article wherein the Employer describes the Union's request to discipline its members as the "stickiest point." This is also consistent with the fact that the Employer did sign a collective agreement which contained the amnesty plus clause and that the Employer, as set out in its September 17, 2003 newspaper article, provided the signed collective agreement to the Union on a take it or leave it basis.

[43] By bargaining the amnesty plus clause to impasse and by taking the position that all items had to be resolved as a package, the Employer prolonged the strike on the basis of this issue. This issue was a "blocker," which prevented meaningful bargaining from taking place.

[44] In the decision *General Teamsters, Local Union 979 v. Brinks Canada Limited* [2002] CIRB No. 175, the Canada Industrial Relations Board dealt with a situation which was identical to the case at hand and held, at 26:

> *…that, while the tabling of a "no reprisal clause" is not in and of itself illegal or improper, however, if and when an employer negotiates this issue until it reaches an impasse and prolongs the strike on the basis of this issue, then such conduct does become improper and constitutes bargaining in bad faith, contrary to section 50(a) of the Code.*

[45] In *Brinks Canada, supra*, the Canada Board reviewed the jurisprudence in other jurisdictions in relation to reaching an impasse on an amnesty clause or a no reprisal clause. The Canada Board referenced decisions of the Canada, British Columbia, Alberta, Saskatchewan and Ontario labour relations boards which all held that bargaining an amnesty clause to impasse was improper, illegal or inconsistent with the scheme of labour relations.

[46] The Canada Board, in *Brinks Canada, supra*, referred to this Board's decision in *R.W.D.S.U., Local 955 v. Morris Rod Weeder Co. Ltd.*, [1977] Sept. Sask. Labour Rep. 32, LRB File Nos. 375-77, 451-77, 452-77 & 462-77, which provides at 4:

> *The Board therefore finds that the matter of discipline of Union members is an internal Union matter and therefore not a proper subject for collective bargaining. The Company in insisting on the condition set out in the letter above brought negotiations to an impasse by insisting on a condition which was not a proper subject of collective bargaining and the*

> *Board therefore finds that it was guilty of an unfair labour practice as defined by Section 11(1)(a), (b) and (c) of the Trade Union Act*
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> *. . .*
>
> *With respect to Section 11(1)(b), the action of the Company interfered with the administration of the Union in attempting to impose conditions upon the relationship between the Union and the six members in question. With respect to Section 11(1)(c), the action of the Company constituted a failure to bargain collectively by insisting, as a condition precedent to any collective agreement, on a matter which is not the proper subject of collective bargaining.*

[47] The Canada Board in *Brinks Canada, supra*, provided further analysis in relation to a no reprisal clause at 25:

> *The CLRB had reviewed this issue in Eastern Provincial Airways Ltd. (1983), 51 di 209; and 3 CLRBR (NS) 75 (CLRB no.419)….this particular decision addressed the issue of the "no reprisal" clause in the context of bad faith bargaining and pushing that issue to an impasse. The Board essentially maintained the same position as the one outlined by the Alberta Labour Relations Board. The CLRB found that such a clause constitutes an interference with internal union affairs and, thus, becomes illegal and tantamount to bad faith bargaining if pushed to an impasse.*

[48] The Board accepts its jurisprudence and the jurisprudence in other jurisdictions to the effect that, by bargaining the amnesty plus clause issue to impasse and by taking the position that all items had to be resolved as a package, the Employer committed an unfair labour practice pursuant to s. 11(1)(b) and (c) of the *Act*. As in *Morris Rod Weeder*, *supra*, the Employer's actions attempted to interfere with the Union's members' right to utilize provisions of the Union's constitution.

[49] In *Morris Rod Weeder Co. Ltd., supra*, the Board states that the business of disciplining union members is an internal union matter and that, by insisting on interfering with union affairs and thereby bringing bargaining to an impasse, an employer is guilty of an unfair labour practice. The Board accepts that a union must be able to say to its members "there are rules which govern member conduct during a labour dispute." To hold otherwise could lead to the dangerous situation where individual union members, because they cannot rely on their own union constitution, take matters into their own hands, which is in no one's best interest.

[50] For all these reasons, the Board found that the Employer's insistence on the amnesty plus clause, as part of a total package, amounted to a refusal to bargain in good faith.

[51] On October 7, 2003, the Board found that the Employer had committed unfair labour practices within the meaning of ss. 11(1)(a), (c) and (e) of the *Act* by permanently laying off seven teacher assistants from Quill Lake School and ordered their reinstatement (see *Canadian Union of Public Employees, Local 3078 v. Board of Education of the Wadena School Division No. 46*, [2003] Sask. L.R.B.R. 443, LRB File Nos. 101-03 & 130-03). By letter dated October 20, 2003 the Employer advised the seven Quill Lake teacher assistants to report to the Wadena division office rather than Quill Lake School as there was no work available for them.

[52] The Union asked the Board to order the Employer to withdraw its bargaining demand that the Union agree to the lay-off of the seven Quill Lake teacher assistants, which the Board did.

[53] The Union was entitled to rely on the October 7, 2003 Order reinstating the Quill Lake teacher assistants. The Employer was entitled to raise the issue of lay-off rather than reinstatement of the Quill Lake teacher assistants during bargaining, but once the Union advised the Employer that it would not move on this issue and that it was relying on the terms of the October 7, 2003 Order, the Employer was required to move off this issue.

[54] This set of factual circumstances has some similarities to the situation in *SEIU v. Town of Shaunavon*, [1987] Dec, Sask. Labour Rep., 37, where the Board states, at 40:

> *The Board is therefore of the view that if the employer had pressed its demand in this case for an alteration in the scope of the bargaining unit to the point of impasse, its conduct would have amounted to a refusal to accept the Board's determination of the appropriate bargaining unit and constitute an unfair labour practice within the meaning of Section 11(1)(c) of the Act.*

[55] In the case at hand, the Employer did press its demand relating to the Quill Lake teacher assistants to impasse and therefore its conduct amounted to a refusal to accept the Board's determination on this issue and constituted an unfair labour practice within the meaning of s.11(1)(c) of the *Act*.

Costing of Benefits and Movement in Employer's Wage Package

[56] The Board set out the general principles regarding the Employer's obligation to disclose information during collective bargaining in *Saskatchewan Government Employees' Union v. Government of Saskatchewan*, [1989] Winter Sask. Labour Rep. 52, LRB File Nos. 245-87 & 246-87 as follows, at 58:

> *That duty is imposed by Section 11(1)(c) of The Trade Union Act and its legislative counterpart in every other jurisdiction. It requires the union and the employer to make every reasonable effort to conclude a collective bargaining agreement, and to that end to engage in rational, informed discussion, to answer honestly, and to avoid misrepresentation. More specifically, it is generally accepted that when asked an employer is obligated:*
>
> *(a) to disclose information with respect to existing terms and conditions of employment, particularly during negotiations for a first collective bargaining agreement;*
>
> *(b) to disclose pertinent information needed by a union to adequately comprehend a proposal or employer response at the bargaining table;*
>
> *(c) to inform the union during negotiations of decisions already made which will be implemented during the term of a proposed agreement and which may have a significant impact on the bargaining unit; and*
>
> *(d) to answer honestly whether it will probably implement changes during the term of a proposed agreement that may significantly impact on the bargaining unit. This obligation is limited to plans likely to be implemented so that the employer maintains a degree of confidentiality in planning, and because premature disclosure of plans that may not materialize could have an adverse effect on the employer, the union and the employees.*

[57] Counsel for the Employer recognized the Employer's obligation to provide costing of benefits information to the Union and advised the Board during the hearing that he was prepared to make inquiries to obtain the necessary information relating to the costing of benefits. The Board thanks counsel for his assistance in this matter as the Union, as set out in *SGEU, supra*, is entitled to this information.

[58] In regard to the decrease in the Employer's wage offer, the Union was entitled to know the circumstances that had changed for the Employer to cause the Employer to retreat from its earlier wage proposal.

The Employer's Refusal To Bargain At All

[59] The Employer's September 17, 2003 newspaper article confirmed that the Employer was no longer prepared to bargain with the Union until the amalgamated employer took office in January, 2004. Ms. Olson confirmed this position during her testimony. In the circumstances of this case, the Employer's refusal to bargain with the Union until after the amalgamation amounted to bad faith bargaining and a breach of s. 11(1)(c) of the *Act*.

Subjective Unwillingness by the Employer to Conclude a Collective Agreement

[60] The evidence confirmed that the Employer did not want to bargain with the Union so as to achieve a collective agreement from and after September 17, 2003. At some point (no direct evidence was presented by the Employer as to when) the Employer changed its position and met with the Union on October 21, 2003. Even though back at the bargaining table, the evidence indicated that the Employer was still not attempting to conclude a collective agreement with the Union.

[61] In *Saskatchewan Government Employees' Union v. Government of Saskatchewan, Saskatchewan Association of Health Organizations, Mamawetan Churchill River District Health Board, Keewatin Yathé District Health Board and North East District Health Board*, [1999] Sask. L.R.B.R. 307, LRB File No. 109-98 the Board states, at 341:

> *…the cases demonstrate that while Boards generally will not delve into the reasonableness of the bargaining positions taken by either party during collective bargaining, Boards may find that a specific proposal does constitute bad faith bargaining if: (1) the proposal contains some illegality: (2) the proposal in itself or in conjunction with other conduct indicates a subjective unwillingness to conclude a collective agreement; and (3) the proposal is or should be known to go against bargaining standards in the industry and to be generally unacceptable to either include or refuse to include in a collective agreement, i.e. it has the effect of blocking the negotiations of a collective agreement.*

[62] Ms. Olson testified that the Employer was of the belief that it would have been "ethically and morally irresponsible" for the Employer to negotiate with the Union given the upcoming elections and amalgamation. Counsel for the Union argued that this same attitude existed at the October 21, 2003 bargaining session. The evidence supports counsel's assertion. The Employer's only witness on this point, Ms. Olson, did not dispute Mr. Holmes' testimony that the Employer did not submit any counter-proposals to the Union. The Employer did not respond to the Union's attempts to break the impasse that existed. The Employer portrayed negatively the Union's attempt to break the impasse relating to the amnesty plus clause issue by releasing the October 22, 2003 news release which could have no other purpose than to make the Union look bad before the public and its members.

[63] Applying the second test set out in *SGEU, supra*, the Employer's insistence on the amnesty plus clause together with the Employer's refusal to bargain as set out in the September 17, 2003 newspaper article, the Employer's refusal to provide relevant bargaining information to the Union and the Employer's refusal to accept the Board's Order relating to the Quill Lake teacher assistants, indicate a subjective unwillingness to conclude a collective agreement on the part of the Employer. The Union informed the Employer that the amnesty plus proposal was unacceptable to include in a collective agreement and had the effect of blocking negotiations of a collective agreement. The Union advised the Employer that the amnesty plus clause was unacceptable as it would directly interfere with the Union's constitution and the Union's members' ability to utilize provisions of the constitution. The Union advised the Employer that the amnesty plus clause was unacceptable in that it would have the Union pay benefits to individuals who crossed the Union's picket lines. These same individuals were undermining the Union's attempt to exert economic pressure on the Employer so that the Union could achieve the most desirable collective agreement as possible for its members.

[64] When the Board considers the Employer's other conduct in conjunction with the Union's conduct, the unwillingness to conclude a collective agreement on the part of the Employer is evident.

Order Issued by Board

[65] Accordingly, the Board found that the Employer committed an unfair labour practice in violation of ss. 11(1)(b) and (c) of the *Act* and issued an Order dated December 19, 2003. The Order provided as follows:

> ***THE LABOUR RELATIONS BOARD**, pursuant to Sections 5(d), 5(e) and 5.1 of The Trade Union Act, **HEREBY**:*
>
> *1. **FINDS** that the Respondent has violated ss. 11(1)(b) and 11(1)(c) of The Trade Union Act by interfering in the administration of the Applicant and by failing to bargain in good faith;*
>
> *2. **ORDERS** the Respondent to cease and desist from further violations of The Trade Union Act, and, in particular, **ORDERS** the Respondent to refrain from interfering in the administration of the Applicant and **ORDERS** the Respondent to bargain in good faith;*
>
> *3. **ORDERS** the Respondent to withdraw its demand that the Applicant agree to an "amnesty-dues restriction-benefit payment to strikebreakers" as a condition of achieving a collective bargaining agreement;*
>
> *4. **ORDERS** the Respondent to withdraw its demand that the Applicant agree to the lay-off of the seven (7) Quill Lake Teacher Assistants despite their reinstatement pursuant to the Board's Order in LRB File Nos. 101-03 & 130-03;*
>
> *5. **ORDERS** the Respondent to provide the Applicant with the rationale for the reduction of the Respondent's wage proposal from eleven percent (11%) to (10%) no later than Monday, December 22, 2003 at 9:00 a.m.;*
>
> *6. **ORDERS** the Respondent to provide the Applicant with the costing of the following items no later than Monday, December 22, 2003 at 9:00 a.m.:*
>
> *(a) Existing employee benefit plans pursuant to Article 17.06 of the collective agreement:*
> *(i) group life insurance;*
> *(ii) accidental death and dismemberment;*
> *(iii) employee and family assistance plan;*
> *(iv) long term disability;*
>
> *(b) The premiums paid by the Respondent on each of the above plans;*
>
> *(c) The premiums paid by the employees on each of the above plans;*

> *(d) The premium cost of the Extended Health Plan and the Vision Care Plan as proposed by the Applicant, both total cost and as a percentage of total annual wages.*
>
> *7. **ORDERS** the Applicant and the Respondent to meet and commence collective bargaining no later than Monday, December 22, 2003 and continue to meet on Tuesday, December 23, 2003 and thereafter as may be necessary for the purpose of bargaining in good faith to reach a collective agreement;*
>
> *8. **ORDERS** the Respondent to submit a rectification plan, addressing the Applicant's request for compensation for lost wages, within 30 days of the date of this Order, to the Applicant and to the Board; and*
>
> *9. **RESERVES** jurisdiction to deal with any issues arising from the implementation of this Order or from the Respondent's rectification plan ordered herein.*

[66] The purpose of issuing the Order, with written Reasons for Decision to follow, was to permit the parties to resume meaningful bargaining prior to the January 1, 2004 amalgamation. After the Order was issued, the parties were able to arrive at a negotiated collective agreement.

[67] In response to the Board's Order calling for a rectification plan, counsel for the Employer submitted correspondence to the Board dated January 16, 2004, which provided:

> *The Board of Education for the Wadena School Division No. 46 sincerely regrets the unfair labour practices that affected collective bargaining between it and the Canadian Union of Public Employees Local No. 3078. The plan to rectify such unfair labour practices, adopted by the Board of Education for the Wadena School Division No. 46, was to bargain collectively with the Union and achieve a collective bargaining agreement. This in fact occurred on December 24, 2003, when the parties successfully bargained a collective bargaining agreement covering all matters properly in dispute between them. This collective bargaining agreement was subsequently ratified by the parties.*

[68] By letter dated February 24, 2004, counsel for the Union advised the Board as follows:

> *This is further to the Order issued by the Labour Relations Board dated 19th December 2003 (copy attached for convenience).*
>
> *As set out in paragraph eight of the Order, the Respondent, Wadena School Division No. 46 was ordered to submit a rectification plan*

> *addressing our request for compensation for lost wages within thirty days of the date of the Order. The Respondent submitted a letter to the Board, copied to CUPE dated January 16th, 2004 in which it advised that it treated the collective bargaining agreement reached between the parties on December 24th, 2003 as covering all matters in dispute (copy attached for reference).*
>
> *We wrote the Respondent on January 23rd, 2004 advising that CUPE did not accept the January 16th letter as meeting the requirements of the rectification plan as ordered by the Board. We further requested that the Respondent respond to our letter no later than the end of January. A copy of that letter is also attached and in the absence of a reply from the employer, we therefore request that the Board convene a hearing to address the failure of the employer to comply with paragraph eight and, further, to set out the specifics of a rectification plan, given the failure of the employer to do so.*
>
> *Thank you for your attention in this matter and please note that we are prepared to expedite the hearing.*

April 13, 2004 Hearing

[69] The parties appeared before the Board on April 13, 2004 to address the Employer's rectification plan and the "compensation for lost wages issue" arising from the Board's December 19, 2003 Order (the "Order"). The Board had hoped that the Employer would recognize some element of wrongdoing and attempt to arrive at a negotiated settlement with the Union relating to the compensation issue. Unfortunately, a negotiated settlement was not achieved.

[70] The Employer took the position before the Board that its rectification plan was "to bargain collectively with the Union and achieve a collective bargaining agreement." Since this did, in fact, occur -- the Union conceded as a fact that a collective agreement was achieved and subsequently ratified by the parties, following two days of bargaining which occurred on December 22 and 23, 2003 -- the Employer's position was that there should be no monies awarded to the Union or its members pursuant to the Order.

[71] Counsel for the Employer argued that it would be a dramatic step for the Board to compensate union members while they were on strike. Counsel argued that the Employer was winning the strike and that, if the parties were at an impasse on October 21, 2003, it could have been for a different reason. Counsel took the position that the parties may not have achieved a collective agreement at the October 21, 2003 meeting even if the Employer had bargained

differently. Counsel argued that the Union's answer of "no" to the amnesty plus clause at the October 21, 2003 meeting could have meant "maybe."

[72] Counsel for the Employer conceded that the Employer made a mistake when it released its September 17, 2003 newspaper article in that "ineloquent language" was used. Counsel suggested that the Board could infer that the Employer had recognized its error from the fact that collective bargaining resumed on October 21, 2003.

[73] Finally, counsel for the Employer argued that various CUPE locals gained from the ultimate contract obtained by the Union and that the Board should take that factor into account in determining what monies the Employer should pay, pursuant to the Order, if any.

[74] Counsel for the Union argued that the actions of the Employer prolonged the strike and could be divided into two stages. The first stage ran from September 17, 2003 to October 21, 2003, the day the parties again met to bargain. During this period of time the Employer refused to bargain at all, thereby prolonging the strike. The second stage ran from October 22 to December 21, 2003 and saw the Employer prolong the strike by bargaining the amnesty plus clause to impasse and tying the amnesty plus clause to the settlement of the collective agreement as a whole. Counsel also argued that, once the Employer returned to the bargaining table on October 21, 2003, its position, in reality, had not changed and that the Employer had no intention of negotiating and achieving a collective agreement with the Union unless improper provisions were contained therein.

[75] Counsel argued that the Union was entitled to be compensated for the strike pay it paid its members and that its members were entitled to the difference between what they normally would have received had they been employed less what they received in strike pay, which would include both wages and benefits. Counsel for the Union argued that to do otherwise would penalize the Union for the wrongful actions of the Employer. Put another way, the Employer would benefit from the assistance that CUPE National provided to the Union.

[76] Counsel for the Union therefore argued that the Board should order the Employer to compensate the Union from and after September 25, 2003, the date the unfair labour applications were filed, to and including December 21, 2003, the date the parties resumed collective bargaining that was not impeded by wrongful actions by the Employer.

[77] Counsel for the Union argued that the *Brink's Canada, supra,* decision was directly on point and that the Canada Board ordered the employer to pay the employees back wages and ordered reimbursement of strike pay to the union.

[78] The Board heard limited evidence from two witnesses on behalf of the Union, Sharon Lockwood and Sheila Bindig, relating to what monies should be payable to the Union and its members. During the evidence of these two witnesses, the parties agreed to the following:

1. The Union agreed to provide to the Employer documents similar to exhibit U-18 for every employee, or if no U-18 existed for certain employees, to provide whatever was available for these employees. These documents would go to a two-person committee (an employer official and a union official) for its review. The committee would attempt to agree on wages and vacation pay that employees would have received had they not been on strike for the applicable time period. If no agreement was reached, the matter would again come before the Board. The committee could submit to the Board what it had agreed upon, and the committee would meet as soon as possible and, in any event, within 30 days after April 13, 2004.

2. The Union agreed to make its best efforts to provide the Employer, within a two week period, the following:

    (a) CUPE's regulations listing who would be entitled to strike pay;
    (b) The entitlement of the Union to pay;
    (c) Daily and weekly reports prepared during the strike;
    (d) Statements from CUPE bank accounts showing what was paid by CUPE in regard to the strike.

[79] Ms. Lockwood testified that what was achieved by the Union in its collective bargaining agreement would be looked at by other CUPE locals and "taken into consideration" when these locals attempted to bargain new collective agreements.

[80] The issue before the Board at the April 13 2004 hearing was the determination of the extent of compensation available to the Union and its members pursuant to the Board's December 19, 2003 Order.

Analysis:

[81] A party must not maintain a position at the bargaining table that is "improper, illegal or inconsistent with the scheme of labour relations." Labour relations boards are extremely hesitant to interfere with the collective bargaining process unless this type of wrongful action occurs.

[82] The Board in *IBEW v. Sask Power*, [1993] 1st Quarter Sask. Labour Rep. 286, LRB File No. 256-92 confirms this approach, at 292-293:

> *It is our conclusion from reading the academic works referred to us by counsel for the Union that they do not support the conclusion that Canadian labour relations boards have intervened - or even that they should intervene - to influence the course of negotiations between two parties to collective bargaining, with the exception of circumstances where the position taken by one of the participants is illegal, stands in fundamental contravention of the objectives of collective bargaining legislation, or, arguably, precludes the attainment of essential procedural protection for employees or trade unions. They do not seem to us to invite an extension of labour relations board intervention to otherwise modify or manipulate the bargaining positions adopted by the parties.*
>
> (See also: *SGEU v. Government of Saskatchewan*, [1999] Sask. L.R.B.R 307 at 340-342)

[83] If an employer maintains a position at the bargaining table that is improper, illegal or inconsistent with the scheme of labour relations, tying this improper position with the settlement of the dispute during a strike situation, thereby prolonging the strike, it faces the prospect of being held responsible for lost wages and strike pay.

[84] In *Brink's Canada, supra*, the Canada Board states at 19:

> *The Board has carefully reviewed the foregoing and finds that, while the employer attempted to create an illusory sense of movement, in reality, there were neither movement nor any real intention to move from its position of obtaining some form of protection for the strike breakers.*

And further at 27:

> *The Board has considered the union's request and has determined that it is appropriate to order back wages and reimbursement of the strike pay. The Board, however, does not accept the union's submission that August 22, 2001, should serve as the operative date for the commencement of any payments….but the Board finds that the bad faith bargaining on the part of the employer did not occur until the "no reprisal" proposal, with respect to the return to work protocol, was pushed to an impasse on September 12, 2001.*

[85] In *Brinks Canada, supra,* there was only one outstanding issue preventing the parties from arriving at a collective agreement, while in our case there were a number of outstanding issues still unresolved between the parties. Does this change the proposition that the Employer should not maintain a position at the bargaining table which is improper, illegal, or inconsistent with the scheme of labour relations, during a strike situation, tying this improper issue with the settlement of the agreement, thereby prolonging the strike? With respect, we do not think so.

[86] In this case, as set out earlier in these Reasons for Decision, by insisting on the amnesty plus clause and by linking the amnesty plus clause to a total settlement, the Employer brought negotiations to an impasse.

[87] The Employer advanced a number of arguments that attempted to minimize the Employer's liability for its improper actions. The first argument was that the Employer was winning the strike. Counsel for the Employer argued that the Board should take this factor into account in assessing whether any back wages or strike pay should be paid by the Employer as a result of its breach of s. 11(1)(b) and (c) of the *Act*.

[88] On the face of it, counsel for the Employer may be correct in saying that the Employer was winning the strike. The Employer appeared to be in no hurry to arrive at a settlement and was continuing to function with volunteers and members of the Union who crossed the picket line. However, can this be a relevant factor for the Board to consider in light of the Employer's wrongful conduct? The Board does not think so. What is relevant is how the parties were conducting themselves during bargaining and whether one of the parties was bargaining in bad faith or carrying on in violation of the *Act*.

[89] The Board must ensure that parties do not think that they can maintain positions at the bargaining table that are improper, inconsistent with the scheme of labour relations or illegal, during a strike situation, thereby prolonging the strike. If the Board did not adopt this position, both unions and employers could see some lengthy, unwarranted work stoppages.

[90] As set out in *RWDSU v. Canada Safeway et al*., [1995] 3rd Quarter Sask. Labour Rep. 170, LRB File No. 093-95, the nature of collective bargaining is that either or both sides may make concessions, especially when the strategy being pursued by one side is not having the anticipated results. In this case, even if the Employer was "winning the strike," the Union was entitled to make a decision relating to any concessions that it would make or consider making in the context of legal or proper collective bargaining requests from the Employer.

[91] The Employer argued that, even if it had bargained appropriately, there may not have been a settlement reached at the October 21, 2003 meeting. Collective bargaining can be a difficult enough process, especially during a strike situation, without one party maintaining at the table an improper or illegal position. It is not appropriate for that party to now say that a collective agreement may not have been reached at that time even if it had not bargained in bad faith. As stated earlier, parties in the collective bargaining process are entitled to make decisions relating to any concessions that have to be made during bargaining in a setting that does not include improper demands. In this case, once the amnesty plus clause provision was removed, the parties achieved a collective agreement after two days of bargaining. It is therefore evident that a collective agreement would have been achieved earlier than it was had the Employer taken a position that was not illegal or improper at the bargaining table.

[92] The Board rejects the Employer argument that the Union's answer of "no" to the amnesty plus clause could have meant "maybe." All that the Employer is attempting to do by advancing this unique argument is to reargue the Board's earlier finding that the Employer had committed an unfair labor practice by bargaining the amnesty plus clause to impasse in the circumstances of this case.

[93] The Employer's argument that its liability in this case should be restricted because other locals of the Union could potentially benefit from the terms contained in the collective agreement entered into between the Employer and the Union is also rejected. This assertion is nothing more than speculation. As stated by Ms. Lockwood during her testimony, different employers have different ideas and, in effect, different agendas. Likewise, different union locals also have different priorities that are then advanced by each local's respective bargaining committee.

[94] In spite of counsel for the Employer's creative arguments attempting to lessen the Employer's liability, it must not be forgotten that the Employer is the author of its own misfortune in that it maintained a position at the bargaining table that attempted to interfere with the Union's constitution. This occurred after the Employer wrongfully refused to bargain with the Union at all, as set out in the Employer's September 17, 2003 newspaper article. The Employer did not provide any case law to support the proposition that it should not be held responsible for its improper actions.

[95] The Board also considered whether there were any policy reasons that would dictate that the Board should limit the Employer's liability in the case at hand. In *Brinks Canada*, *supra*, the Canada Board ordered the employer to pay back wages and reimbursement of strike pay in that the employer had bargaining in bad faith, during a strike situation, thereby prolonging the strike. This case is similar to *Brinks Canada*, *supra*. In a strike situation, where both parties (and for that matter third parties such as students, parents and other members of the community) are suffering some form of hardship, it is incumbent on the Board to send a clear message that a party, who fails to bargain in good faith during a strike situation, thereby prolonging the strike, must expect that it will be held accountable for its improper actions.

[96] The Board therefore has no hesitation in concluding that the Employer should pay back wages and strike pay from and after September 25, 2003 (the Union asked for relief from and after the date it filed its application with the Board) to and including December 21, 2003, the day prior to the resumption of bargaining.

[97] In arriving at a logical result as to what monies the Union and its members are entitled to from the Employer as a result of the Employer's improper actions, the Board considered the fact that the CUPE national strike fund paid striking members some monies. The Board is of the belief that to rule that the Employer was not required to pay the Union the strike pay would allow the Employer to benefit from the CUPE national strike fund and would, in effect, hold the Union partially responsible for the wrongful actions of the Employer. As such, a majority of the Board held that the Employer must reimburse the Union for the monies paid to its members during the strike.

Conclusion:

[98] The Board's Order dated December 19, 2003 achieved the desired result in that the parties were able to achieve a negotiated settlement. The Board further orders, as was ordered in *Brinks Canada, supra*, the Employer to pay the Union strike pay paid by the Union to its striking members for the period of September 25, 2003 to December 21, 2003. The Employer is also ordered to pay the Union retroactive salary and benefits, minus any amounts paid as strike pay as referenced herein, for all striking employees from September 25, 2003 to December 21, 2003. The Board reserves its jurisdiction with respect to the quantification of these amounts in the event the parties are unable to agree on the amounts payable.

[99] Board Member Gitzel dissents from the remedy portion of the Board's decision and would not have ordered the Employer to reimburse the Union for strike pay paid by the Union to its members.

DATED at Saskatoon, Saskatchewan, this **23rd** day of **July, 2004.**

LABOUR RELATIONS BOARD

Wally Matkowski,
Vice-Chairperson