The Labour Relations Board
Saskatchewan

CANADIAN UNION OF PUBLIC EMPLOYEES. LOCAL 1975, Applicant v. UNIVERSITY OF SASKATCHEWAN, Respondent

LRB File No. 274-04; December 8, 2004
Vice-Chairperson, Wally Matkowski; Members: Brenda Cuthbert and Bruce McDonald

For the Applicant: Peter Barnacle
For the Respondent: Neil Gabrielson, Q.C.

Remedy – Interim order – Criteria – Balance of labour relations harm – Union alleges that employer bargained directly with employees - Union not in formative stage at workplace and has achieved mature collective agreement – No realistic threat exists to union's integrity requiring issuance of interim order – Potential labour relations harm to employer if interim order issued outweighs any labour relations harm union would encounter if interim order not issued – Board dismisses interim application.

***The Trade Union Act*, ss. 5.3, 11(1)(a), 11(1)(b) and 11(1)(c).**

REASONS FOR DECISION

Background:

[1] Canadian Union of Public Employees, Local 1985 (the "Union") filed an unfair labour practice application alleging that the University of Saskatchewan (the "Employer") committed an unfair labour practice within the meaning of ss. 11(1)(a), (b) and (c) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"). In its unfair labour practice application, which was filed with the Board on November 10, 2004, the Union alleges that the Employer violated the *Act* by "introducing a market supplement of $4.65 per hour to Shift Engineers without the agreement of the certified bargaining agent, CUPE Local 1975." The Union also filed an application for interim relief in which it sought an interim order pursuant to s. 5.3 of the *Act* ordering that the "Employer rescind the market supplement and refrain from such further violations."

[2] The Board heard the application for interim relief in Saskatoon on November 24, 2004.

Facts:

[3] The Employer has six boilers in its central heating and cooling plant (the "plant") that provide heating and cooling for the buildings on campus as well as steam for Royal University Hospital. These boilers run continuously and are operated by a chief engineer, six shift engineers and five boiler operators. The plant and the employees are subject to *The Boiler and Pressure Vessel Act*, R.S.S. 1978, c. B-5 (the "*Boiler Act*"). Pursuant to the *Boiler Act*, either a chief engineer or a shift engineer must be present and in immediate charge at all times at the plant. The chief engineer and the shift engineer must obtain certification pursuant to the *Boiler Act*.

[4] The Employer had been receiving special boiler operator permits pursuant to the *Boiler Act* that allowed boiler operators (who hold 3rd or 4th class certificates under the *Boiler Act*) to perform the work of 2nd class shift engineers. The Employer was informed by the appropriate authorities that these special temporary permits would no longer be issued after September 30, 2004.

[5] In August, 2004, a shift engineer employed by the Employer retired. Prior to his retirement, the Employer unsuccessfully attempted to fill a posting for a shift engineer, 2nd class position. The Employer discovered that the applicants for the position were not prepared to accept the position because the wage paid by the Employer to shift engineers was not competitive.

[6] The Employer conducted a survey of wages being paid to 2nd class engineers in the Saskatoon market area that confirmed the shift engineers employed by the Employer were being underpaid.

[7] In August 2004, the Employer contacted the Union and attempted to enter into a memorandum of agreement that would see the shift engineers receive a market supplement of $4.65/hour.

[8] The Employer also became aware that the Union and the University of Regina (the "U of R") had entered into a memorandum of agreement in May, 2004, which paid the shift engineers at the U of R a monthly market supplement of $670. The U of R and the Employer are parties to the same collective agreement with the Union.

[9] The current collective agreement between the parties expired on December 31, 2003, but remains in force pursuant to the provisions of the *Act*. The parties have been negotiating since the beginning of 2004 in an attempt to arrive at a new collective agreement.

[10] The Employer and the Union were unable to agree on a memorandum of agreement dealing with a market supplement for the shift engineers. While the parties could agree on a market supplement for the shift engineers, the Union also asked for a market supplement for the boiler operators at the plant. The Employer rejected a market supplement for the boiler operators as it had not experienced any difficulty in filling boiler operator positions.

[11] The Employer unilaterally implemented the market supplement for the shift engineers effective November 1, 2004. The Employer claims that it did so for "critical operational needs" and only after it had failed to achieve an agreement with the Union. The Employer claims that it has "not bargained individually with any union member but only with the Union," that it has no desire to undermine the Union and that it will continue to bargain collectively with the Union in an attempt to arrive at a new collective agreement, which would include bargaining new wage rates for both the shift engineers and the boiler operators.

[12] The Union's affidavits state that the market supplement issue has become a "divisive issue within the plant," that the issue "has the potential of creating a breakdown in communication and becoming a safety issue in the environment" and that "the Employer has bargained individually with union member(s)."

[13] The Union's affidavits also indicate that the effect of the unilaterally implemented market supplement has been to "undermine the bargaining agent status of the union" and to "split the membership and this local and weaken the union."

Arguments:

[14] It was conceded by counsel for the Employer that the Union had put forward an arguable case as required in the Board's test for interim relief.

[15] 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 favours the granting of an interim order. Counsel took the position that the Union is the exclusive bargaining agent for the

employees and that the Employer's actions in unilaterally changing the rates of pay for the shift engineers and negotiating directly with members of the Union threatens the integrity of the Union. Counsel argued the Employer's actions amounted to a fundamental violation of the *Act* and had to be rectified by the Board in an interim order. Counsel argued the Employer created or manufactured an operational needs crisis and that there existed a number of options the Employer could have utilized rather than unilaterally changing the rates of pay for the shift engineers. Counsel for the Union asked the Board to order that the wages revert to those set out in the collective agreement.

[16] Counsel for the Employer argued the Employer had not bargained directly with members of the Union but had always bargained with the Union and would continue to do so. Counsel advised the Board that, in the event the Employer was unsuccessful on the final application, the Employer would not be asking the shift engineers to reimburse it for the market supplement payments.

[17] Counsel for the Employer advised the Board that, at the hearing of the final application, the Employer would be arguing that the matter should more properly go before an arbitrator to interpret the provisions of the collective agreement between the parties. Counsel for the Employer indicated the Employer would be filing its own unfair labour practice application against the Union as a result of the Union's actions in relation to the memorandum of agreement, which the Employer argued amounted to "extortion."

[18] Counsel for the Employer argued that there was no irreparable harm being suffered by the Union as a result of the Employer implementing the market supplement given the fact that the Union had agreed to the market supplement with the U of R. Counsel argued the Employer had not manufactured a crisis and it was necessary for the Employer to take the steps that it did.

[19] Counsel for the Employer argued that an interim application is meant to deal with an urgent situation and the facts at hand did not disclose an urgent situation. In addition, counsel argued an interim order is extraordinary relief, which should be granted cautiously by the Board. Counsel pointed to the Board's Practice Note No. 1 which states there must be "some compelling reasons to grant a remedy without a full hearing of the case."

Relevant statutory provisions:

[20] The Board considered ss. 11(1)(a),(b), (c) and 5.3 of the *Act* which provide 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;*
> >
> > . . .
>
> *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.*

Test for Interim Relief:

[21] The parties agreed that the test for determining if an interim order should be granted is as 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:

[22] After having considered both the materials filed by the parties on this interim application as well as the arguments of counsel, the Board must dismiss the Union's interim application.

[23] On an assessment of the applicable test with respect to labour relations harm, it is our view that the Union will face little if any labour relations harm if the interim order is not granted. The Employer is prepared to continue to bargain with the Union in an attempt to arrive at a new collective agreement. The Employer will not seek a return of the market supplement from the shift engineers if the Board finds that the Employer committed an unfair labour practice on the main application.

[24] In the case at hand, the reputation of the Union "is not so fragile that it must be protected from a possible breach by the employer" by having the Board issue an interim order. (See: *Retail, Wholesale and Department Store Union, Local 455 v. Tai Wan Pork Inc*. [2000] Sask. L.R.B.R. 219 at 222). The Union is not in its formative stage at the workplace and has

achieved a mature collective agreement with the Employer. There exists no realistic threat to the Union's integrity that would require the Board to issue an interim order.

[25] The labour relations harm that the Employer will face if an interim order is granted is that the Employer would again find itself in a critical operational needs situation at the plant. This harm outweighs any labour relations harm that the Union would encounter if an interim order is not granted. In addition, if the interim order is granted, one option available to the Employer to eliminate the critical operational needs situation at the plant would be to accept the Union's proposal to increase the wages for both the shift engineers and the boiler operators, which could have the effect of resolving the final application. This would be an inequitable result for the Employer and would take away the Employer's ability to argue the final application before the Board.

[26] In *Tai Wan Pork, supra,* the Board rejected this course of action and stated at 222:

> *If an interim Order was granted by the Board, the remedial consequences of the main application would be complete…This result dissuades the Board from proceeding solely on the basis of affidavit material and brief oral arguments.*

[27] In all of the circumstances the bases for the exercise of the Board's discretion to grant an interim order have not been established. The Board therefore dismisses the application for interim relief and directs the Board Registrar to schedule a hearing of the final application.

DATED at Saskatoon, Saskatchewan, this **8th** day of **December, 2004.**

LABOUR RELATIONS BOARD

Wally Matkowski,
Vice-Chairperson