The Labour Relations Board
Saskatchewan

PAULETTE LISOWAY et al, Applicants v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 3078 and BOARD OF EDUCATION OF THE LAKEVIEW SCHOOL DIVISION NO. 142 OF SASKATCHEWAN, Respondents

LRB File No. 047-04; April 22, 2005
Vice-Chairperson, Wally Matkowski; Members: Gerry Caudle and Marshall Hamilton

For the Applicant: Larry Seiferling, Q.C.
For the Respondent Union: Peter Barnacle

Practice and procedure – Preliminary objection – Mootness – Applicants challenge legality of motion passed and subsequently rescinded by union - Board concludes that issue of legality of motion moot and declines to exercise discretion to deal with moot point.

REASONS FOR DECISION

Background:

[1] Canadian Union of Public Employees, Local 3078, (the "Union") is the certified bargaining agent for the employees of the Board of Education of the Lakeview School Division No. 142 of Saskatchewan (the "Employer"). Paulette Lisoway, Edd Feairs, John Babiuk, Lenora Hordos, Beverly Urbanoski, Sherry Romanus, Sandra Ewen, Lois McDonald, Garry Lisoway, Sheila Anderson, Donnella Rachkewich, Ivy Rachkewich and Rick Malinski (the "Applicants") were all employed by the Employer and were presumably members of the Union, though counsel for the Applicants did not concede this point at the hearing. Three other employees, Robert Taylor, Connie Prouse and Bernie Jansen, withdrew their support for the application.

[2] Following a successful strike vote held by the Union in April 2003, the Union implemented a rotating walk-out until the end of June, 2003. On August 25, 2003, the walk-out continued. At various times in September 2003, the Applicants crossed the picket line established by the Union and returned to work for the Employer, contrary to the wishes of the majority of the members of the Union.

[3] In October 2003, the Union notified the Applicants that it would be holding trials to determine whether the Applicants had committed an offence, pursuant to terms contained in the

Union's national constitution, by working for the Employer during the strike. The Applicants were convicted and ordered/penalized by a trial committee as follows:

1) The Applicants were ordered to immediately stop crossing the picket line and cease working for the Employer until the strike ended;

2) The Applicants were expelled from the Union;

3) The Applicants were fined an equivalent of all net money earned while working for the Employer during the strike.

[4] On November 3, 2003 the Union's membership upheld the trial committee's decision.

[5] The Union brought an unfair labour practice application against the Employer that resulted in an Order of the Board dated December 19, 2003 and Reasons for Decision dated July 23, 2004 (*Canadian Union of Public Employees, Local 3078 v. Board of Education of the Wadena School Division No. 46 of Saskatchewan*, [2004] Sask. L.R.B.R. 199, LRB File No. 188-03). The Board's December 19, 2003 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;*
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> *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;*
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> *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;*
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> *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. (the "December Order")*

[6] The Union and the Employer were able to successfully negotiate a new collective agreement, with the Union's striking members returning to work in January 2004. The issue of

the rectification plan, required by the Board's Order of December 19, 2003, remained unresolved.

[7] At a general meeting held by the Union on January 21, 2004, the following motion was unanimously passed by the Union's membership:

> *That CUPE Local #3078 make the following changes to the Union dues deductions assessed on all members total wages and retroactive wage payments, effective immediately:*
>
> 1. *The total regular monthly dues deduction shall be fifteen percent (15%) on all members wages, including retroactive wage payments. This shall be divided into the amounts of 2% and 13%. This shall be remitted to the Secretary-Treasurer of CUPE Local #3078.*
>
> 2. *CUPE Local #3078 shall reserve two percent (2%) of the regular monthly dues for the purpose of normal business of the Local*
>
> 3. *CUPE Local #3078 shall use the balance, thirteen percent (13%) of the regular monthly dues for the following purposes:*
>   a) *To pay one hundred percent (100%) of the Employer contributions owed to Municipal Employees Pension Plan for striking members for the period from April 9th, 2003 to January 5th, 2004.*
>   b) *To pay all lost wages to striking members of CUPE Local #3078 for the period from April 9th, 2003 to January 5th, 2004.*
>   c) *No CUPE Local #3078 striking member, who lost pension contributions or wages during the above period, because of the strike, shall subsidize the payments in a) and b) above. Striking members of CUPE Local #3078 shall be paid a strike honorarium each month of 13% of their own wages. The Local Union will make the appropriate statutory deductions from such honorariums. The honorariums shall continue in effect for the same duration as the fifteen percent (15%) dues deduction.*
>   d) *A striking member shall mean a member of CUPE Local #3078 who participated in the picketing or a member who respected the CUPE Local #3078 picket line for the entire duration of the strike activity. A striking member does not include any member who worked for the Employer during any period of the strike. All members of CUPE Local #308 shall be considered striking members unless they have been found guilty by the Trial Committee of violating the Constitution during the strike.*

> *The fifteen percent (15%) regular monthly dues deduction shall remain in effect until all striking members have been compensated for all above pension contributions and lost wages for the period of April 9th, 2003 to January 5th, 2004, or as otherwise directed by the membership. In the month following complete restitution above the regular monthly dues deduction rate shall revert to two percent (2%) of total wages.*
>
> *All necessary costs to administrate and process the regular monthly dues distribution as required by this motion shall be paid for out of the thirteen percent (13%) portion of the dues assessment.*

[8] By letter dated January 22, 2004, the Union instructed the Employer to increase the union dues deduction rate to 15% of total gross wages, including retroactive wage rates, for all employees within the jurisdiction of the Union. The Employer sent its employees a memorandum outlining the Union's instructions.

[9] Counsel for the Applicants sent a letter to counsel for the Employer dated January 23, 2004 that provided in part:

> *We now have instructions that these people have not given you authority to deduct any monies from their paycheques other than the dues that were required prior to the commencement of the labour dispute. It is the position of our clients that the increase in dues has been initiated in order to do indirectly what cannot be done directly i.e. fine and collect fines from the individuals who chose not to be actively involved in the labour dispute. However, our clients have not been given copies of the resolutions or other documents relating to the increase in dues. Obviously a 15 percent union due is outrageous. We would presume therefore that there are people who are going to be treated differently than our clients with regard to the monies that are collected from these dues and that some people are going to get back these dues immediately after they are collected. If this is not the case, why does the Union need 15 percent of employees' wages for its fees?*
>
> *We therefore will not authorize any deduction that is greater than the amount of deduction that was in place prior to the commencement of the strike and direct the employer not to make the deduction. If the deduction is made from our clients' paycheques for anything more, we will file unfair labour practices against both the Union and the employer with regard to these deductions, and ask that they be repaid to our clients by both the employer and the Union, because the deduction is unauthorized and therefore not allowed to be made under Section 32 of The Trade Union Act, or because it is the Union attempting to penalize our clients in a way that is not authorized by Section 36 of The Trade Union Act. We also reserve the right to argue any and all violations of The Trade Union Act that affect our client's rights.*

> *If you wish, you may provide the Union with a copy of this letter when you advise them of your position on the payment of monies. We would require that you provide us with your position prior to the payment of any monies greater than the dues required prior to the strike.*

[10] The Employer provided correspondence to the Applicants dated February 17, 2004, that provided:

> *I am writing to advise you that as per instructions given to me by my solicitor, Jim McLellan and your solicitor, Mr. Seiferling, I have deducted the additional 13% union dues from your payroll. I will be holding the 13% deduction in trust at the Lakeview School Division Office until further notice is given. I trust this is satisfactory.*

[11] The Union filed an unfair labour practice application against the Employer as a result of the Employer's decision not to remit the additional 13% union dues deducted from the Applicants to the Union.

[12] The Applicants filed this application with the Board on March 10, 2004. In it, the Applicants allege that the Union and the Employer are guilty of an unfair labour practice by authorizing and/or withholding from their pay the additional 13% union dues assessment. The Applicants allege that the dues deduction is nothing more than a fine against the Applicants and is made in violation of ss. 11(2)(a), 32, 36.1, 36(4) and 36(5) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") and that the Union's constitution does not allow for fines to be imposed on the Applicants by the Union.

[13] The Applicants also complain in their application that the Union failed to provide them with a copy of the Union's constitution and with notice of the meeting held on January 21, 2004 and that they were misinformed and misled by the Union (the application does not outline how the Applicants were misinformed or misled).

[14] The Applicants sought repayment of the monies held in trust by the Employer, together with interest, legal costs and damages for loss of the use of the monies.

[15] The Board issued its Reasons for Decision in LRB File No. 188-03, *supra*, on July 23, 2004, together with the following Order:

> ***THE LABOUR RELATIONS BOARD****, pursuant to Sections 5(d), 5(e), 5(g) and 5.1 of The Trade Union Act,* ***HEREBY****:*
>
> *1.* ***ORDERS*** *the Respondent to reimburse the Applicant for strike pay paid by the Applicant to its striking members for the period from September 25, 2003 to December 21, 2003;*
>
> *2.* ***ORDERS*** *the Respondent to pay the Applicant retroactive salary and benefits, minus any amounts paid pursuant to paragraph 1 above, for striking employees for the period from September 25, 2003 to December 21, 2003; and*
>
> *3.* ***RESERVES*** *jurisdiction to quantify the payments ordered in paragraphs 1 and 2 above in the event the parties are unable to agree on the amounts payable.*

[16] As a result of the July 23, 2004 Order, the Union rescinded the January 21, 2004 motion and provided correspondence to the Employer dated August 27, 2004, informing the Employer that it could release all funds that it held in trust to the Applicants. The Union also withdrew its unfair labour practice application made against the Employer as a result of the Employer's failure to remit to the Union the additional 13% union dues withheld from the Applicants' pay.

[17] The Union asked the Applicants to withdraw this application given its decision to rescind the January 21, 2004 motion and given the fact that the Employer had returned the union dues to the Applicants. Counsel for the Union took the position that any issues flowing from the January 21, 2004 motion are now moot.

[18] The Union advised the Board that it has not given up its right to collect the fines, assessed against the Applicants, as determined by the Union's trial committee and as upheld by the Union's membership.

[19] Counsel for the Applicants advised counsel for the Union that his clients would not withdraw the application unless the Union considered paying a portion of the Applicants' legal fees. The Union rejected this request. As such, this matter was argued before the Board in Saskatoon on April 14, 2005. The parties agreed that the Board would deal with the preliminary matter as to whether or not the application is moot.

Relevant statutory provisions:

[20] Relevant statutory provisions are as follows:

> *11(2) It shall be an unfair labour practice for any employee, trade union or any other person:*
>
> > *(a) to interfere with, restrain, intimidate, threaten or coerce an employee with a view to encouraging or discouraging membership in or activity in or for a labour organization, but nothing in this Act precludes a person acting on behalf of a trade union from attempting to persuade an employer to make an agreement with that trade union to require as a condition of employment membership 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 such trade union has been designated or selected by a majority of employees in an appropriate unit as their representative for the purpose of bargaining collectively;*
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> . . .
>
> *32(1) Upon the request in writing of an employee, and upon request of a trade union representing the majority of employees in any bargaining unit of his employees, the employer shall deduct and pay in periodic payments out of the wages due to the employee, to the person designated by the trade union to receive the same, the union dues, assessments and initiation fees of the employee, and the employer shall furnish to that trade union the names of the employees who have given such authority.*
>
> *(2) Failure to make payments and furnish information required by subsection (1) is an unfair labour practice.*
>
> . . .
>
> *36.1(1) Every employee has a right to the application of the principles of natural justice in respect of all disputes between the employee and the trade union certified to represent his bargaining unit relating to matters in the constitution of the trade union and the employee's membership therein or discipline thereunder.*
>
> *(2) Every employee shall be given reasonable notice of union meetings at which he is entitled to attend.*
>
> *(3) No employee shall unreasonably be denied membership in a trade union.*
>
> . . .

> *(4) Notwithstanding subsection (3), a trade union may assess or fine any of its members who has worked for the struck employer during a strike held in compliance with this Act a sum of not more than the net earnings that employee earned during the strike.*
>
> *(5) No trade union shall require any member to pay an assessment or fine pursuant to subsection (4) unless the constitution of the trade union provides for the assessment or fine prior to the commencement of the strike.*

Union's arguments:

[21] Counsel for the Union argued that any issues flowing from the January 21, 2004 motion are moot because the Union rescinded the motion and the monies that the Employer had held in trust were returned to the Applicants. Counsel relied on the Supreme Court of Canada's decision in *Borowski v. A.G. Canada*, [1989] 1 S.C.R. 342 (S.C.C.) to support his argument that the matter is moot.

[22] Counsel conceded that the Applicants may have a number of arguments that could be advanced pursuant to s. 36 of the *Act*, and agreed that the Board should follow the logic set out in the recent decision *McNairn v. United Association of Journeyman and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 179* (2004), 240 D.L.R. (4th) 358 (Sask. C.A.).

Applicants' arguments:

[23] Counsel for the Applicants argued that the matter is not moot, and that his clients were entitled to know whether or not the January 21, 2004 motion was legal, in the sense that the motion was meant to be a fine against his clients, rather than dues. Counsel for the Applicants conceded that the damages issue, for the most part, was resolved but argued that his clients were entitled to know whether their rights had been violated under the *Act*.

Analysis:

[24] As both counsel agreed, it can be difficult for employers, unions and employees to move forward from a strike situation and its aftermath. Given the fact pattern of this case, the Board sees itself as having a dual role, in that it must interpret the provisions of the *Act* and attempt to assist the parties in their efforts to regain a functional work environment.

[25] In *Borowski*, *supra*, the Supreme Court of Canada stated at paragraph 15:

> *The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision.*

[26] In the case at hand, because the January 21, 2004 motion was rescinded and the Employer returned the union dues to the Applicants, the issue of the motion's legality is not a live one. While counsel for the Applicants conceded that the damages issue was for the most part resolved, some analysis by the Board is still required. As set out earlier herein, counsel for the Applicants and counsel for the Employer arrived at an agreement whereby the Union would not receive the increased union dues. Given this agreement, there can be no possible claim for interest against the Union or damages for loss of use of money in that the Union never received the money. In addition, given this agreement, together with the fact that the Union rescinded the January 21, 2004 motion, there can be no claim for legal fees or costs against the Union. (In any event, it is an extremely rare occurrence for the Board to order one party to pay the other party's costs: see: *Rattray v. Saskatchewan Government and General Employees' Union*, [2003] Sask. L.R.B.R. 528, LRB File No. 011-03).

[27] Even though the Board has found that there is not a live issue in relation to the January 21, 2004 motion, according to the court in *Borowski, supra*, a discretion still exists for the Board to determine whether or not the January 21, 2004 motion was illegal. In exercising this discretion, the Board must consider three factors, namely, whether or not there still exists an adversarial context, the concept of judicial economy and finally, the need for the Board to demonstrate a measure of awareness of its proper law-making function. In addition to these three factors, the Board considered its role in assisting the parties to regain a functional workplace, after a lengthy and, at times bitter, labour dispute.

[28] Based on these four factors, the Board declines to exercise its discretion to deal with the legality of the January 21, 2004 motion where the January 21, 2004 motion has been rescinded and the withheld union dues have been returned to the Applicants. As stated earlier, it is incumbent upon the Board to assist the parties in rebuilding a harmonious workplace and not

to have the parties arguing over a moot point. Therefore, the Board will not deal with any arguments in relation to the January 21, 2004 motion.

Sections 36 and 36.1 of the *Act:*

[29] As set out earlier, the Court of Appeal in *McNairn, supra*, examined the applicability of s. 36 of the *Act* in great detail, and stated at paragraphs 37 and 38:

> *[37] …the purpose of this section lies in protecting a member of a union from abuse in the exercise of the power conferred on unions by the proceeding section - section 36 - and in particular subsections (4) and (5) thereof. These subsections empower a union to fine any of its members who has worked for a struck employer during a strike, provided the constitution of the union made allowance for this before the strike occurred. The purpose also lies in protecting an employee, employed in a unionized shop and required to maintain union membership as a condition of employment, not to be deprived of membership by the union except, according to subsection (3), for failure to pay the dues, assessments, and initiation fees uniformly required of all members.*
>
> *[38] Thus subsection 36.1(1) imposes a duty upon a union (again correlative to the right thereby conferred upon an employee), to abide by the principles of natural justice in disputes between the union and the employee involving the constitution of the trade union and the employee's membership therein or discipline thereunder. As such, the subsection embraces what may be characterized as "internal disputes" between a union and an employee belonging to the union,….the dispute must encompass the constitution of the union and employee's membership therein or discipline thereunder. And when it does apply, it requires that the principles of natural justice be brought to bear in the resolution of the dispute.*

[30] The Applicants allege that the Union has no authority, pursuant to the terms of its constitution, to impose any fines on the Applicants. The Applicants complain that the Union failed to provide copies of the Union's constitution to them and misinformed and misled them (although the application does not say how this was done). In any event, these are all live issues, pursuant to ss. 36 and 36.1 of the *Act*, especially given the Union's position at the hearing that it is not abandoning the prospect of collecting the fines that were imposed on the Applicants by the Union.

[31] Since the January 21, 2004 motion was rescinded, there is no necessity for the Board to consider whether or not the Union followed the principles of natural justice in relation to the process followed by the Union in dealing with the January 21, 2004 motion.

Subpoenas Issued by the Board:

[32] The Board issued two subpoenas prior to the hearing, requiring representatives of the Union to produce a number of documents requested by the Applicants. These documents were provided to the Board by counsel for the Union. Counsel for the Union and counsel for the Employer agreed that the Board should follow the procedure for production of documents set out in the recent Saskatchewan Court of Appeal decision *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp., et al*., [2004] Sask. L.R.B.R. c-66, LRB File No. 069-04.

[33] In *Wal-Mart, supra*, the Court provided that the documents under subpoena should be produced to the Board and examined by the Board to determine their relevancy. Given that all or part of the application could be dismissed depending on the Board's preliminary ruling, counsel agreed that, following the Board's preliminary ruling, a conference call should be held to determine which documents the Union is alleging are irrelevant. The Board Registrar will arrange a conference call as soon as possible, so that the Board and the parties can deal with this issue.

DATED at Regina, Saskatchewan, this **22nd** day of **April, 2005**.

LABOUR RELATIONS BOARD

Wally Matkowski,
Vice-Chairperson