Labour Relations Board
Saskatchewan

ADMINISTRATIVE AND SUPERVISORY PERSONNEL ASSOCIATION, Applicant v. UNIVERSITY OF SASKATCHEWAN, Respondent

LRB File No. 070-05; November 16, 2005
Vice-Chairperson, Angela Zborosky; Members: Gerry Caudle and Clare Gitzel

For the Applicant: Gary Bainbridge
For the Respondent: Neil Gabrielson, Q.C.

Arbitration - Deferral to – Board reviews circumstances under which appropriate to defer to grievance arbitration process - Where essence of dispute same whether before Board or arbitrator, arbitrator empowered to deal with dispute and remedies in arbitration process suitable alternative to those parties could obtain from Board, Board defers to grievance arbitration process.

***The Trade Union Act*, ss. 5(d), 5(e), 11(1)(a), 11(1)(c), 25(1), 25(1.1) and 25(1.2).**

REASONS FOR DECISION

Background:

[1] The Administrative and Supervisory Personnel Association (the "Union") filed an unfair labour practice application against the University of Saskatchewan (the "Employer") in which the Union alleges that the Employer unilaterally changed provisions in the collective agreement, specifically a procedures document (the "PD"), without bargaining the same with the Union. The Union maintains that the PD, which was developed by the parties pursuant to a memorandum of agreement (the "MOA") concerning job evaluation and a new compensation system, forms part of the collective agreement, having been incorporated by reference into the collective agreement. The Union asserts that this conduct constitutes a failure by the Employer to bargain in good faith with the Union and is an attempt by the Employer to undermine the role of the Union as the exclusive representative of employees, contrary to ss. 11(1)(a) and (c) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"). In its application, the Union seeks various orders including an order finding an unfair labour practice, a cease and desist order and an order that the Employer bargain collectively with the Union in relation to the PD.

[2] The Employer filed a reply to the application indicating that the dispute between the parties concerns the interpretation of the collective agreement. While the Employer denies that the PD forms part of the collective agreement, it asserts that grievance arbitration is the appropriate forum for a determination as to what constitutes the collective agreement and whether it has been breached. The Employer seeks to have the application dismissed on that basis or, in the alternative, asks the Board to defer jurisdiction to an arbitrator under the collective agreement. At the time of the hearing, no grievance had been filed by the Union in relation to this issue between the parties.

[3] A hearing was held in Saskatoon on November 2, 2005. At the outset of the hearing the Employer indicated that it wished to raise a preliminary objection that the Board should defer to arbitration. Prior to argument on the preliminary objection, the Union advised the Board that it objected to the Board considering the preliminary objection without the benefit of receiving all evidence in relation to the application. The Board indicated that it would first hear the arguments concerning the preliminary objection at which time it would determine whether further evidence was required. Following arguments on the preliminary objection, the Board ruled that it did not require further evidence given that it had sufficient information before it to show that there was an arguable issue in relation to the objection that the Board should defer to arbitration. Also, given the Board's preference to use arbitration as a method of resolving disputes between the parties to a collective agreement, the Board determined that it would be more efficient and practical for the Board to make a decision on deferral to arbitration prior to hearing evidence and argument on the substance of the application that would only be repeated at an arbitration hearing should the Board decide to defer to arbitration. The Board then reserved its decision on whether to defer to arbitration and adjourned the hearing to consider this preliminary objection and provide written reasons. These are those written reasons.

Facts:

[4] At the hearing the parties agreed that certain documents should be provided to the Board including the collective agreement, the MOA and three versions of the PD. During the course of argument on the preliminary objection, Mr. Bainbridge, counsel for the Union, raised concerns that, without hearing the *viva voce* evidence of the witnesses in support of the Union's application, the Board would be improperly receiving evidence

through counsel. While the Board agrees that in many situations that would be inappropriate, in assessing this preliminary objection the Board is not required to make a final determination concerning the unfair labour practice application but rather is called upon to determine and assess the nature of the dispute between the parties. This assessment can be made on the basis of the information contained in the pleadings and the documents referenced in those pleadings which were provided to the Board by agreement of the parties.

[5] The Union was certified to represent a group of employees of the Employer on October 31, 1978. The parties have successfully negotiated collective agreements since that time and are currently bargaining a renewal of the latest collective agreement which has a term of operation of May 1, 2002 to April 30, 2005. During the last round of bargaining, the parties agreed to make a significant change to job classifications and the wage schedule and agreed that negotiations concerning this new compensation scheme would be conducted separately from main bargaining.

[6] Throughout 2003 and 2004, the parties negotiated a detailed job classification and wage payment scheme or "job evaluation system" which classified employees into one of five "job families" with three "phases" for each family and placed employees on a corresponding negotiated wage grid according to a number of factors including the employee's level of experience and duties. The concepts of the job families, phases and wage grid were incorporated into the MOA, which had the effect of amending certain provisions of the collective agreement.

[7] Following the negotiation of the MOA, the parties jointly developed the PD, which sets out the details for the implementation and maintenance of the new compensation model, and the criteria matrix ("CM"), which provides for the determination of the job duties or qualifications. A dispute arose between the parties when the Employer implemented changes to the PD, in approximately May 2005, without first obtaining the agreement of the Union to the changes. The primary changes related to the appeal mechanism for challenging an employee's placement on the wage grid.

[8] Another area of disagreement between the parties concerns the responsibility under the CM for determining job duties and qualifications and the

employees' level of experience and qualifications, with the Employer taking the position that this process remained internal to the human resources division of the Employer, a provision for joint determination with the Union not being contained in the collective agreement or the MOA. The Union maintains that this process for determination was also bargained between the parties.

[9] The Union takes the position that the details of the job evaluation and compensation scheme in the PD and CM referred to above were bargained between the parties and reduced to the MOA which was executed March 25, 2004. The Union maintains that the MOA is incorporated by reference into the collective agreement and various revisions to the collective agreement were made to include the substantive and procedural provisions of the MOA. The Union also states that its members ratified the MOA on April 20, 2004 and had with them at that time a copy of the PD setting out how reconsiderations of employees' placement on the grid would be considered, the deadline for submitting applications for reconsideration and the timeline by which the Employer would respond. The Union also states that the Employer, having attended the Union's informational meetings on the subject earlier in April 2004 and having been advised of the ratification by the Union's members following the April 20, 2004 meeting, would have been aware that the MOA was ratified by the Union's members.

[10] The Employer takes the position that, while the MOA references certain provisions of the PD, the PD and CM are not part of the MOA. While they were jointly developed by the parties, the PD having been prepared by the Employer after consultation with the Union, neither was negotiated and neither formed part of the MOA. The Employer takes the position that the parties agreed the PD was internal to the human resources department of the Employer and contained the procedures for the implementation and maintenance of the new compensation model provided for in the MOA. The Employer also states that it was recognized that the PD would need to be changed over time, with the Employer seeking input from the Union prior to making any changes. In their pleadings and in argument the parties indicated the specific provisions of the MOA and collective agreement that they relied upon in support of their positions on these issues.

[11] The new compensation scheme became effective May 1, 2004 and remained effective through to the expiry of the collective agreement on April 30, 2005. In late 2004 and early 2005, the administrative employees consultative committee ("AECC"), a standing committee composed of representatives of the Employer and employees who are members of the Union, met and created a process committee (a subcommittee of the AECC) to consider the salary review process and the guidelines contained in the PD. The process committee thereafter met to discuss changes to the PD and the Employer states that these changes were ultimately agreed to by members of that committee. The changes were then discussed at a number of AECC meetings. At one of the later AECC meetings the Union took the position that the PD formed part of the collective agreement and could not be changed without bargaining the same with the Union, that the AECC had no ability to change the collective agreement and that, in any event, the Union was opposed to the changes suggested.

[12] In early April 2005, the Employer proceeded with the changes to the PD, which primarily included a change to the deadline for employees to file for reconsideration of their placement on the grid and the timeframe in which the Employer would respond. The Union takes issue with the changes because they were not negotiated and because the Union only learned about the changes through the Employer's website, where the revised PD was posted. The Employer takes the position that it was not required to negotiate the changes, that the changes were made for business needs, that representatives of the Union had input into the changes as a result of their participation on the process committee and that the Union was first notified of the changes through a meeting involving the Employer and one of the Union's representatives prior to the revised PD being posted on the Employer's website.

[13] In its unfair labour practice application, the Union takes the position that the Employer improperly made unilateral changes to the collective agreement (i.e. the PD), without negotiating the same with the Union and that this is a direct affront to the Union's status as the exclusive bargaining agent of its members and it will undermine the role of the Union in the eyes of its membership. The Employer responds that it does not deny the exclusive bargaining status of the Union and that it negotiated the MOA with the Union in good faith, although the Employer maintains that the PD was not to form part of the collective agreement and thus there was no requirement that it negotiate unilateral

changes to the PD. The Employer states that the changes to the PD were made for valid business and operational needs and only after attempted consultation with the Union. The Employer also takes the position that the dispute between the parties requires a determination of whether the PD or CM is part of the collective agreement or MOA and, if so, whether the collective agreement was violated, thereby making it necessary to interpret the collective agreement. As such, the Employer maintains that the appropriate method of resolving the dispute is through the grievance and arbitration provisions of the collective agreement.

Arguments:

[14] Mr. Gabrielson, on behalf of the Employer, filed a written brief which we have reviewed. He argued that the essence of the dispute between the parties relates to the construction of the collective agreement between the parties and, as such, the dispute should be determined pursuant to the grievance and arbitration provisions and not by the Board. The Employer asks that the Union's application be dismissed or, in the alternative, that it be deferred to the grievance and arbitration procedure contained in the collective agreement should the Union file a grievance.

[15] The Employer maintains that it has been a longstanding policy of the Board to dismiss or defer a dispute to the grievance and arbitration process when the dispute involves the interpretation and alleged breach of a collective bargaining agreement. The Employer maintains that such a scheme is mandated by s. 25(1) of the *Act* and relies on *Retail, Wholesale and Department Store Union, Local 995 et al. v. Saskatchewan Labour Relations Board and Morris Rod Weeder Company Limited* (1977), 78 CLLC 14,140; and *Canadian Union of Public Employees, Local 59 v. City of Saskatoon*, [1990] Fall Sask. Labour Rep. 77, LRB File Nos. 155-89, 026-90, 043-90, 044-90 & 045-90. The Employer points out that the parties have included a grievance and arbitration provision in their collective agreement which contains a clause defining a grievance as follows:

> *Should a difference arise between the University and the Association concerning the interpretation, application or alleged violation of any of the terms of this Agreement that cannot be resolved as outlined above, the Association may choose to file a grievance.*

> *The Association is entitled to initiate a grievance in its own right and on behalf of a member.*

[16] The Employer also relies on *International Brotherhood of Electrical Workers, Local 2067 v. Saskatchewan Power Corporation*, [2000] Sask. L.R.B.R. 17, LRB File No. 162-99 in support of its argument that the Board should defer on a complaint under ss. 11(1)(a) and (c) where the bargaining obligation sought to be enforced arises solely from the collective agreement and depends upon the Board finding a breach of the collective agreement. In such circumstances, even where the union has not filed a grievance, it is appropriate for the Board to defer to the arbitration process on the basis that the arbitration board is better equipped to hear and determine the dispute. The Employer also relies on *Greater Vancouver Regional Health District (Re)*, [2002] B.C.L.R.D. No. 142 (British Columbia Labour Relations Board); and *Canadian Union of Public Employees v. University of Saskatchewan and University of Regina,* [2004] Sask. L.R.B.R. 45, LRB File Nos. 246-03 & 247-03.

[17] The Employer argues that it can only be guilty of an unfair labour practice if the collective agreement imposes an obligation to bargain changes to the PD. The Employer maintains that the management rights clause of the collective agreement allows it to manage its affairs as it wishes, subject only to the provisions of the collective agreement saying otherwise. Article 2 of the collective agreement between the parties states as follows:

> ***MANAGEMENT OF THE UNIVERSITY***
>
> *The Association recognizes that the Management of the University and direction of employees are vested exclusively with the University. The University agrees that the exercise of its management and directory functions will be consistent with the terms of the Collective Agreement.*

[18] Counsel for the Employer argued that, to make a finding of an unfair labour practice against the Employer, the Board would need to determine whether there is an obligation on the Employer to bargain with the Union concerning changes to the PD. The Employer submits that there is no such obligation upon it if, as it asserts, the terms of the PD are not part of the collective agreement or the MOA amending the collective

agreement and the Employer is exercising its management rights. The Employer suggests that, in order to answer these questions, the Board would have to interpret and apply the collective agreement, the MOA and the PD and says that this is not the function of the Board but rather of an arbitrator under the collective agreement.

[19] Mr. Bainbridge, on behalf of the Union, also filed a brief which we have reviewed. The Union argues that the three criteria in the leading case of *United Food and Commercial Workers Union v. Westfair Foods Ltd., et al.* (1992), 95 D.L.R. (4th) 541 (Sask. C.A.) have not been met and therefore the Board should decline to defer the dispute between the parties to the grievance arbitration process.

[20] In relation to the first of those criteria, the Union argues that the dispute between the parties is not the same. The Union acknowledges that the fact that the Union has not filed a grievance under the collective agreement is not determinative of this factor. The Union takes the position that its unfair labour practice complaint is not merely that the Employer violated the collective agreement by making a unilateral change to the PD but rather that the Employer has repudiated the collective agreement by completely failing to recognize a jointly bargained document (the PD) as a collective agreement. The Union argues that, in so doing, the Employer has undermined the Union's role as exclusive bargaining agent. The Union alleges a statutory wrong and seeks a disciplinary sanction under the *Act* rather than a determination of whether the collective agreement has been breached by the Employer. The Union disagrees that the Board is required to interpret the collective agreement to resolve this dispute, but says rather that the Board need only determine whether the PD meets the criteria of a collective agreement under the *Act*.

[21] Secondly, on the question of whether an arbitrator is empowered to deal with the dispute, the Union, while acknowledging the expanded jurisdiction of arbitrators over the last ten years, argues that the collective agreement, as evidenced by its preamble, does not have as its object the discipline of the Employer. On the contrary, the *Act* has a disciplinary and regulatory flavour designed to deal with the wrongs alleged by the Union in this case. Further, the Union argued that, because the Employer is denying that the PD forms part of the collective agreement, there cannot be said to be a grievance within the meaning of the collective agreement, that is, there is no term or provision whose

interpretation, application, operation or violation is brought into focus through the complaint or dispute.

[22] In relation to the third criteria, the Union argues that there is no suitable or equivalent remedy available through the arbitration process because an arbitrator cannot make a finding that the *Act* has been violated, nor can an arbitrator make a cease and desist order. Further, an arbitrator cannot enforce the certification order by compelling the Employer to bargain collectively with the Union. The remedies available under the collective agreement do not sanction the Employer and they fail to address the undermining of the Union's role as exclusive bargaining representative.

[23] The Union relies on the following decisions: *Energy and Chemical Workers Union, Local 649 v. Saskatchewan Power Corporation*, [1988] Winter Sask. Labour Rep. 64, LRB File No. 022-88; *Saskatoon City Police Association v. Saskatoon Board of Police Commissioners*, [1993] 4th Quarter Sask. Labour Rep. 158, LRB File No. 240-93; *Canadian Union of Public Employees, Local 1975 v. Saskatchewan Indian Federated College* [2003] Sask. L.R.B.R. 217, LRB File No. 245-02; *Prince Albert Police Association* v. *Prince Albert Board of Police Commissioners*, [1998] Sask. L.R.B.R. 296, LRB File No. 005-97; and *Canadian Union of Public Employees v. Saskatchewan Association of Health Organizations*, [2002] Sask. L.R.B.R. 624, LRB File No. 057-02.

[24] In answer to a question posed by the Board concerning the jurisdiction of an arbitrator, the Union acknowledged that an arbitrator also has jurisdiction to determine what documents form part of a collective agreement, that is, an arbitrator has authority to determine its own jurisdiction. The Union, however, stated that its primary concern was over the lack of jurisdiction for an arbitrator to right a statutory wrong. The Union also stated that this application is properly before the Board because the Employer is denying that the PD is part of the collective agreement and that, had the Employer accepted that the PD was part of the collective agreement, the question of whether it had been breached would be properly within the jurisdiction of the an arbitrator.

Statutory Provisions:

[25] Relevant provisions of the *Act* include the following:

> *5 The board may make orders:*
>
> *(d) determining whether an unfair labour practice or a violation of this Act is being or has been engaged in;*
>
> *(e) requiring any person to do any of the following:*
>
> *(i) to refrain from violations of this Act or from engaging in any unfair labour practice;*
>
> *(ii) subject to section 5.1, to do any thing for the purpose of rectifying a violation of this Act, the regulations or a decision of the board;*
>
> *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) in any manner, including by communication, to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any right conferred by this Act;*
>
> *. . .*
>
> *(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;*
>
> *25(1) All differences between the parties to a collective bargaining agreement or persons bound by the collective bargaining agreement or on whose behalf the collective bargaining agreement was entered into respecting its meaning, application or alleged violation, including a questions as to whether a matter is arbitrable, are to be settled by arbitration after exhausting any grievance procedure established by the collective bargaining agreement.*

> *(1.1) Subsections (1.2) to (4) apply to all arbitrations pursuant to this Act or any collective bargaining agreement.*
>
> *(1.2) The finding of an arbitrator or arbitration board is:*
>
> *(a) final and conclusive;*
>
> *(b) binding on the parties with respect to all matters within the legislative jurisdiction of the Government of Saskatchewan; and*
>
> *(c) enforceable in the same manner as an order of the board made pursuant to this Act.*

Analysis:

Preliminary Objection

[26] The Board has followed a longstanding policy of deferring to the grievance and arbitration process contained in a collective agreement where the issues raised involve the interpretation or application of the terms of the collective agreement and where complete relief can be obtained through the arbitration process. The Union urges the Board not to defer and asks the Board to exercise its jurisdiction to determine what documents form part of the collective agreement and to hold the Employer responsible for failing to bargain in good faith.

[27] Several of the case authorities on the issue of deferral refer to the following three-part test enunciated by the Saskatchewan Court of Appeal in *Westfair Foods Ltd., supra*:

> *(i) the dispute put before the Board in an application for an unfair labour practice order and the dispute intended to be resolved by the grievance-arbitration procedure provided for in the collective agreement must be the same dispute;*
>
> *(ii) the collective agreement must make possible (i.e. empower) the resolution of the dispute by means of the grievance arbitration procedure; and*
>
> *(iii) the remedy sought under the collective agreement must be a suitable alternative to the remedy sought in the application before the Board.*

[28] The rationale for deferring to the grievance and arbitration procedure was described in *United Food and Commercial Workers v. Western Grocers, a division of Westfair Foods Ltd.*, [1993] 1st Quarter Sask. Labour Rep. 195, LRB File No. 010-93 at 196 and 197:

> *In Canadian Union of Public Employees v. City of Saskatoon, LRB File Nos. 155-89, 026-90, 043-90, 044-90 and 045-90, the Board laid out a number of principles which might help to determine whether deference to arbitration would be appropriate. The Board considered what would justify deference to a private decision-making tribunal by a labour relations board deriving its mandate from statute. It found the answer in the nature and objectives of The Trade Union Act itself. Since the primary purpose of the statue is to foster and promote sound collective bargaining, the fruit of that bargaining – a collective agreement in which the parties have set out their respective rights and obligations – should be given a full and expansive role in relation to whatever disputes arise between an employer and a trade union. If the parties have decided in the course of collective bargaining to submit disputes concerning certain aspects of their relationship to a forum of their own creation, it is appropriate that a labour relations board allow the tribunal an opportunity to adjudicate the dispute. Support for this view was found by the Board in United Food and Commercial Workers v. Valdi Inc. (1980) 11 CLLC 729 (Ont. LRB) and St. Anne Nackawic Pulp & Paper Ltd. v. Canadian Paperworkers Union (1986) 86 CLLC 12, 184 (S.C.C.)*

[29] Also in the *City of Saskatoon* decision*, supra*, the Board stated its view that deferral to the grievance and arbitration process "does not do violence to that scheme but, rather, enhances it" and provided a practical justification for exercising the discretion to defer at 82 and 83:

> *This is particularly emphasized by the reality that, in the absence of a deferral scheme, the parties would face the prospect of doubly incurring the expenditure of time, money and emotional strain litigating essentially the same issue before two tribunals with the unacceptable prospect of inconsistent determinations. The deferral scheme discourages undue litigation and forum shopping. More importantly, it avoids the prospect of equally enforceable yet inconsistent determinations.*
>
> *Finally, it has the compelling positive effect of enhancing and encouraging the collective bargaining process by forcing the*

> *parties to utilize the procedures, processes and remedies by which they have agreed to govern themselves through the collective bargaining agreement.*

[30] In the *Saskatchewan Power Corporation* decision (LRB File No. 162-99), *supra,* the Board considered the issue of deferral to grievance arbitration in the context of an unfair labour practice filed by the union alleging a violation of ss. 11(1)(a) and (c) in that the employer breached the collective agreement by hiring individuals as "project employees" and by not abiding by the collective agreement in relation to those employees. The union argued that the employer was failing to bargain in good faith and was undermining the role of the union as the exclusive bargaining representative of employees. In determining that it was appropriate to defer to arbitration, the Board stated at 20 and 21:

> *Before the Board could find that the Employer was subject to the contractual obligation to bargain collectively with the trade union, it would first need to find that Article 3.04 had been violated by the Employer. In our view, this is a matter required to be determined by the grievance and arbitration provisions set out in the collective agreement or by arbitration which is mandated by s. 25(1) of the Act which requires "[a]ll differences between the parties to a collective agreement …to be settled by arbitration".*
>
> *There is no allegation contained in the materials that the Employer has failed with respect to its duty to negotiate with respect to the settlement of a grievance, as no grievance has been filed by the Union. The bargaining obligation which the Union asks the Board in this instance to enforce arises solely from the agreement itself and depends on a finding by the Board of a breach of a provision contained in the collective agreement.*
>
> *An arbitration board appointed by the parties is better equipped than the Board to hear and determine the dispute in question, being comprised of a chairperson agreed to by the parties, along with two nominees each familiar with the collective agreement between the parties. In addition, it can provide full relief to the Union should its grievance be upheld.*

[31] A similar situation had previously arisen between those same parties in *International Brotherhood of Electrical Workers, Local 2067 v. SaskPower*, [1998] Sask. L.R.B.R. 95, LRB File No. 312-97. In that case the union filed an unfair labour practice application alleging that the employer violated ss. 11(1)(a) and (c) by unilaterally altering the terms of a negotiated medical services plan. A medical services plan had been

incorporated by reference into the parties' collective agreement and a letter of agreement was negotiated with respect to the essential features of the medical services plan, which the union alleged included a term that the employer would pay the full cost of the plan. Following the implementation of the plan, the insurer increased the premium payments and, when the employer failed to negotiate a resolution with the union on the issue of payment of the increased premiums, the employer advised the union that it would only be covering a portion of the premium payments. In addition to filing the unfair labour practice application the union filed a grievance. The Board determined that it should defer to the jurisdiction of a board of arbitration on the basis of the following reasoning at 97:

> *The Board is of the view that it should defer its jurisdiction to the Board of Arbitration. The Union's complaint centres on SaskPower's conduct in altering the terms of a negotiated provision contained in its last collective agreement. It would seem to this Board to be impossible to determine the unfair labour practice allegations without deciding if SaskPower has breached the medical services plan provisions contained in the agreement or letter of agreement. The issue is precisely the issue that the Board of Arbitration has been asked to determine. In our view, it is appropriate to avoid duplication of decision-making on the same issue and to defer to the grievance and arbitration system when the essence of the Union's complaint concerns a possible breach of the agreement. The Board of Arbitration is in a position to provide an effective remedy to the alleged breach and can do so in an expeditious manner.*

[32] The Board considered a fact situation similar to that before us in *University of Saskatchewan and University of Regina* (LRB File Nos. 246-03 & 247-03)*, supra*. The unfair labour practice application filed by the union involved an allegation under ss. 11(1)(a) and (c) that the employers failed to bargain in good faith by refusing to continue to bargain in relation to a job evaluation/pay equity committee. The union had also filed a policy grievance to which the employer raised issues of timeliness and the arbitrability of the grievance. The Board determined that the matter should be deferred to the grievance and arbitration process by utilizing the three part test in *Westfair Foods Ltd., supra*, and stated at 54 and 55:

> *The Union has filed a grievance relating to the failure of the U of S to continue with the job evaluation process as set out in the Terms of Reference, which form part of the collective agreement between the parties. The grievance will require an arbitrator to interpret the Terms of Reference and advise the parties how to proceed.*

> *From a practical perspective, if the arbitrator determines that the process is flawed (i.e. the terms of reference do not provide for a mechanism to deal with the dual JEC results) the parties could then attempt to salvage almost six years of work by revising the process. If the process is not flawed, the parties will be advised by the arbitrator how to proceed to achieve their joint goal of achieving pay equity.*
>
> *The Board has no desire to interpret the Terms of Reference when it is possible that an arbitration board could come to a different conclusion on the meaning of the Terms of Reference than this Board arrives at.*
>
> *As set out by the Board in International Brotherhood of Electrical Workers, Local 2067 v. Saskatchewan Power Corporation, [2002] Sask. L.R.B.R. 268, LRB File No. 010-02, legislative policy supports the use of arbitration as the method of resolving disputes relating to the interpretation of the Terms of Reference, which form part of the collective agreement. Likewise, the Board also accepts the proposition that the nature of the complaints that may be referred to the grievance and arbitration process and the remedies that may be granted by an arbitration board have been significantly expanded. An arbitration board will have the jurisdiction to deal with the meaning of the Terms of Reference and will be able to provide the Union with the necessary remedies in the event the Union's policy grievance is successful.*

[33] The Union urges the Board to accept the proposition found in the *Westfair Foods Ltd.* case, *supra*, that the statutory wrongs the Union alleges invite a remedy that has a disciplinary or regulatory flavour and should therefore be determined by the Board. It is difficult for the Board to assess this argument given the results of the *Westfair Foods Ltd.* decision, *supra*. In that case, the Court of Appeal remitted the matter back to the Board for a determination of the unfair labour practices with direction regarding the appropriate test to be used for the issue of deferral, however, the Board, in finding the employer guilty of one of the unfair labour practices, declined to provide written reasons for its decision. The allegations by the union included that the employer undermined the union's right to represent employees and the right of an employee to have a grievance settled without interference or coercion. Essentially, a supervisor repeatedly threatened an employee who had filed a grievance and the employer engaged in a continuing course of conduct of reducing the hours of work of that employee, which had the effect of being coercive or intimidating in nature, all of which it was alleged would have continued if the employer were not ordered to cease. Based on a letter sent to the parties with the

Board's Order, it appears that the finding of the unfair labour practice was in relation to threatening conduct toward a grievor exercising rights under the grievance procedure itself. This view appears to be supported by the Court of Appeal's reasons where the Court characterized the dispute as follows at 549:

> *The essence of the complaint is the alleged commission by the Employer of a series of wrongs, the central focus of each being the undermining of the Union's right to represent the Employer's employees in labour matters and in particular, Mr. Mondor and the interference by the Employer of the employees right to be represented by the Union or alternatively of his right to have his grievances settled in the absence of any interference, coercion, threat or intimidation by the Employer.*

[34] It seems to the Board that it would be inappropriate to defer to the grievance arbitration process if the essence of the dispute was the employer's improper conduct in relation to that grievance procedure. Here, however, we are not dealing with allegations of interference in the grievance procedure itself, particularly because no grievance has been filed by the Union. Questioning the arbitrability of a grievance on the basis that the alleged violation is not in relation to a term of the collective agreement does not amount to interference by the Employer in the grievance procedure.

[35] The Union also relies on the *Saskatchewan Power Corporation* decision (LRB File No. 022-88), *supra*, stating that the Board, in that case, ruled that whether or not a bonus payment to employees violated the collective agreement was irrelevant, as the question before the Board was whether the bonus payment amounted to a violation of the *Act*. The situation in that case is clearly distinguishable from the situation before us. In that case the employer and the union were in the process of bargaining the renewal of a collective agreement when the employer, while pleading poverty at the bargaining table, delivered a $1000 cash bonus to its employees. The Board characterized the payment as one for services, not a gift. The Board, in assuming jurisdiction over the dispute, characterized the dispute as one where the employer's conduct amounted to a refusal to recognize the union as the exclusive bargaining representative of the employees and a failure to make every reasonable effort to reach a collective bargaining agreement with the union, thereby amounting to a failure to negotiate in good faith. It is apparent that one of the factors the Board considered in characterizing the dispute in this fashion was the fact

that the parties were currently negotiating a renewal of the collective agreement. The Board concluded at 69:

> *In this case, for over 13 months SPC resolutely refused to agree to any wage increase and then, suddenly and without consultation, paid every employee $1000 (or a pro-rated amount) for a job well done. By doing so SPC repudiated the union as exclusive bargaining representative of all employees in the bargaining unit and at the same time demonstrated in the clearest way that it had not been making every reasonable effort to reach a collective bargaining agreement at the negotiating table. If there was bonus money available to be paid directly to the employees, then there was bonus money available to be placed on the bargaining table and it was SPC's duty to do so.*

[36] The Union relies on the *Saskatoon Board of Police Commissioners* decision, *supra*, to support the proposition that an arbitrator's jurisdiction to rule on an allegation that the employer bargained directly with employees in relation to the offering of an early retirement package is limited by the terms of the collective agreement. In that case the Board recognized that the parties intended the early retirement plan to be a term or condition within the scope of what was to be bargained by them based on a reference in their collective agreement that the parties agreed to negotiate in relation to "pension and related matters." The Board went on to observe that it was not clear from the collective agreement what sanctions would ensue upon a finding of a violation of that provision but that its existence reinforced the obligation on the employer to negotiate with respect to that issue. The Board concluded that the employer was in breach of s. 11(1)(c) by offering the early retirement plan to the employees without first bargaining the same with the union. The Board ordered the employer to cease implementation of the program and to stop discussing it with the employees, subject to the outcome of negotiations with the union. It is not clear in the case before us that the procedures for the new compensation scheme are a term and condition of employment required to be bargained. That is part of the issue in dispute between the parties. A reading of the many decisions of the Board concerning the issue of deferral to arbitration makes it clear that the decisions are fact driven and we find that the *Saskatoon Board of Police Commissioners* decision is not on all fours with the case before us. In fact, the issue of deferral was not before the Board in the *Saskatoon Board of Police Commissioners* decision, *supra*, as it was not argued by the parties. As such, it is our view that the comments made by the Board and referred to by the Union at the hearing were not made in the context of the

issue of deferral. Furthermore, the Board, in that case, expressed the view that it could not see how an arbitrator could provide an appropriate sanction for the breach of a provision in the agreement to negotiate "pension and related matters" and that only the Board could order the parties to bargain. Finally, it has been recognized by the Board in previous decisions and by the parties to this application that an arbitrator's jurisdiction has expanded significantly in the last ten years making new remedies possible.

[37] The Union also cited the decision of *Saskatchewan Indian Federated College, supra*, where the Board deferred to arbitration that portion of the dispute that dealt with the interpretation of a letter of understanding but made a finding of an unfair labour practice in relation to the employer's conduct in repudiating part of the letter of understanding. The Union argues that the claim in that case is comparable – that the employer negotiated the collective agreement and then denied its status as a collective agreement. This *Saskatchewan Indian Federated College* case is clearly distinguishable on the basis that the Board's decision to exercise its jurisdiction under the *Act* in that case rested on the finding that the employer refused to implement the terms of a letter of understanding which were not in dispute between the parties. The Board stated at 224:

> *In the Board's view, the Employer's conduct in not making any retroactive payments at the time provided for in the Letter of Understanding amounted to a repudiation of the collective bargaining process. The Employer negotiated the Letter of Understanding with the Union; it acknowledged that retroactive pay was owing to employees even on its interpretation of the collective agreement; it was asked by the Union to make such payment to employees in accordance with the terms of the Letter of Understanding; and it refused to do so without explanation.*
>
> *The Board finds that the Employer failed to bargain in good faith and repudiated the Letter of Understanding by failing to carry out that part of the Letter of Understanding that is not in dispute between the parties – i.e. the retroactive pay that the Employer agrees is owing to the employees. This aspect of the Employer's conduct clearly falls within the Board's jurisdiction as the guardian of the process of collective bargaining under the unfair labour practice provisions contained in s. 11 of the Act. The grievance and arbitration process cannot directly remedy this aspect of the application.*

[38] In the present case there is no suggestion that the Employer has failed to honour any term of the job evaluation system or compensation scheme which it agrees continues to govern the parties, such that it has repudiated the agreement. There are no allegations that the Employer has failed to continue with the scheme such that it is ignoring those parts of the scheme with which it agrees.

[39] In the case before us it appears that the Employer intends to proceed to implement the changes it made to the PD. Whether the Employer is obliged to negotiate those changes to the PD depends on a determination of whether the collective agreement has been violated, which in this case initially depends on a finding by an arbitrator that the PD forms part of the MOA or the collective agreement. In our view, it is only in the event that it is determined that the collective agreement has been violated that the obligation to bargain changes to the PD arises. Until such time, there is no duty on the Employer to bargain with the Union and no apparent breach of the *Act*. The Board finds that the fact situations in the two *Saskatchewan Power Corporation* decisions, *supra*, (LRB File Nos. 312-97 & 162-99) as well as in the *University of Saskatchewan and University of Regina* decision, *supra*, (LRB File Nos. 246 & 247-03) are very similar to the case before us and we have decided to defer this matter to the parties' grievance arbitration process.

[40] Utilizing the three part test in the *Westfair Foods Ltd.* decision, *supra*, the Board has decided to defer to the grievance arbitration process for the following reasons:

(1) The Board finds that the essence of the dispute between the Union and the Employer is: (i) whether the PD forms part of the collective agreement between the parties; and (ii) whether the Employer is in violation of the collective agreement for failing to bargain the changes to the PD that it unilaterally implemented. The bargaining obligation which the Union asks the Board to enforce arises not from the certification Order *per se* but rather from the collective agreement itself and it clearly depends on the finding of a breach of a term in the collective agreement (whether through the PD, MOA or the collective agreement). As such, it is more appropriately a dispute for an arbitrator under the parties' collective agreement to hear and determine according to the agreed upon process.

The Union cannot change the essence of the dispute by saying that it is not seeking a finding that there was a breach of the collective agreement but rather that it is seeking a disciplinary sanction against the Employer for the Employer's failure to recognize the PD as part of the collective agreement (i.e. "repudiate") and that this conduct undermines the Union. It is clear by the wording in the Union's application that it is seeking a finding of a failure to bargain in good faith because of the Employer's unilateral change to the PD, however, in argument; the Union suggested the change to the PD was irrelevant to its application. We find this argument unmeritorious in that there would be no possible failure to bargain in good faith if the Employer had not made a change to the PD in violation of the collective agreement.

The dispute between the parties is therefore the same whether it is before the Board or an arbitrator under the parties' collective agreement.

(2) In the Board's view, an arbitrator under the collective agreement is empowered to deal with the dispute between the parties. Although a grievance may be defined under the collective agreement as an alleged violation of a term of the collective agreement, it is open to a party to take the position that the term allegedly violated is not a term of the collective agreement. An arbitrator has jurisdiction to determine what documents form part of the collective agreement and the Union accepted that the arbitrator had such jurisdiction. While the Board may also have jurisdiction to determine whether a document meets the definition of a collective agreement under the *Act*, that does not provide a reason for not deferring to grievance arbitration where the essence of the dispute before the Board and what would be the dispute before an arbitrator are the same.

(3) The Union states that there is no suitable alternative remedy available through the grievance arbitration process and the Board should therefore not defer. In our view, the remedies available need not be the same in both forums but the remedies available through the grievance and arbitration process must be a suitable alternative to those the Union could obtain before the Board. The alternate remedy to a finding of bargaining in bad

faith by the Board is a finding by an arbitrator that the PD forms part of the MOA or the collective agreement and that the Employer breached the agreement by making the changes it did. The practical result of such a positive finding by an arbitrator would be that the Employer would need to follow the terms of the PD or bargain any new terms with the Union. In the Board's view, this remedy is a suitable alternative to a finding by the Board of a failure to bargain in good faith, a cease and desist order and an order to bargain future changes to the PD – if there is a finding of a violation of the collective agreement, there is effectively a cease and desist order because making such a change again would be in violation of the collective agreement and because the result of the arbitrator's order is the need for the Employer to bargain any future changes to the PD with the Union.

In addition, it is not at all clear that the conduct of the Employer in this case, even if the allegations of the Union are true, requires a disciplinary sanction in order to be effective. The dispute is a straightforward one where there is a difference of interpretation between the parties as to what constitutes the collective agreement. It is not a situation where the Employer is refusing to follow terms which it agrees form part of the agreement between the parties, nor is it one where the Employer is interfering with the grievance procedure itself. Finally, there is no allegation that the Employer is engaging in a continuing course of conduct designed to interfere with the exclusive bargaining status of the Union, all of which could provide good reason for the Board to exercise jurisdiction over the dispute to allow for a possible disciplinary remedy. It is also possible that a declaration that the Employer has breached the collective agreement can be characterized as a sanction in itself. In any event, while we believe that this matter can be fully and adequately dealt with pursuant to the grievance and arbitration process, should that process not completely dispose of the issues in dispute between the parties, it is open to the Union to return to the Board.

[41] The Union argued that, if the Board makes an order of deferral to the grievance and arbitration process, it is essentially making a final order the result of which is to deprive the Union of a statutory right.

[42] The Board disagrees. In determining that the Board will defer to the jurisdiction of an arbitrator under the collective agreement, the Board is not making a final determination that it has no jurisdiction over the matters in dispute between the parties. In *Canadian Union of Public Employees, Local 3736 v. North Saskatchewan Laundry and Support Services Ltd.*, [1996] Sask. L.R.B.R. 54, LRB File Nos. 289-95 & 290-95, the Board, after determining that it would not be possible to evaluate the allegations which were made in the application without having to interpret the collective agreement, a task which the parties had clearly agreed to place in the hands of an arbitration board, stated at 64:

> *In our view, nearly all of the specific issues which are raised in the application are based on allegations of breaches of the collective agreement, and could be dealt with fully and adequately by the grievance procedure to which the parties have signified their agreement. If we are wrong about this – if an arbitration board declines jurisdiction concerning any of these allegations, or if the grievance procedure cannot provide an adequate remedy – it would be open to the Union, as always, to return to the Board for determination of any issue. It would also be open to the Union at some future time to point to a pattern of breaches of the collective agreement as posing a more generalized threat to the Union as the bargaining agent for these employees.*

[43] Also, in *Saskatchewan Union of Nurses v. South Central District Health Board,* [1995] 2nd Quarter Sask. Labour Rep. 281, LRB File No. 016-95, the Board deferred to the grievance procedure and acknowledged that it was possible that an arbitrator might find itself without jurisdiction to decide the dispute in question. The Board stated at 284:

> *Another feature of the approach followed by the Board which should be noted is the acknowledgment by the Board that an arbitrator may ultimately decline jurisdiction or decide that remedial power under the collective agreement is inadequate to address all of the issues in dispute between the parties. In the Western Grocers decision, supra, the Board made this comment:*
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> > *…If the Board finds, as we do here, that the arbitration tribunal appears to be endowed with the power to decide all disputes which arise from the events on which the allegations are based, it is still open to the board of arbitration to decline jurisdiction on any particular question. Following a finding that any*

> *specific issue does not lie within the scope of the grievance and arbitration procedure, the parties can lay before this Board any questions addressed exclusively by The Trade Union Act.*
>
> *. . .*
>
> *…As we see it, this rationale applies not only to questions which are clearly within the jurisdiction of the arbitrator to decide – the possibility of concurrent jurisdiction derived from the collective agreement and The Trade Union Act means that jurisdiction itself will in many cases be in dispute. In our view we should also defer to an arbitrator when the arbitrator has been called upon to decide whether the dispute lies within the scope of the grievance procedure as defined in the collective agreement. As we have pointed out, in cases where an arbitrator decides that the grievance does not raise a matter which can be dealt with in terms of the collective agreement, it is still open to consider whether that aspect of the dispute which involves the provisions of The Trade Union Act should be addressed.*

[44] On occasion, the Board has issued an order adjourning a party's application *sine die* to be brought back to the Board at the conclusion of the grievance and arbitration process by either party on notice to the other party if there are any issues remaining that were not dealt with by the arbitration board which heard and decided the grievance. However, in this case for the administrative convenience of the Board we are dismissing the application with the understanding that the Union can re-file the application if the grievance and arbitration process does not completely resolve the matter. The Union has not yet filed a grievance and it could take some time before the parties need to return to the Board, if they need to return to the Board at all. In addition, should the parties return to the Board, the unfair labour practice application and the reply would likely require amendments in any event.

[45] The Union's application is therefore dismissed, the Board having determined that it is appropriate to defer the dispute to the grievance arbitration process provided for in the parties' collective agreement.

DATED at Regina, Saskatchewan, this **16th** day of **November, 2005.**

LABOUR RELATIONS BOARD

Angela Zborosky,
Vice-Chairperson