Labour Relations Board
Saskatchewan

SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant v. WINNERS MERCHANTS INTERNATIONAL L.P., Respondent

LRB File No. 071-05; August 31, 2005
Chairperson, James Seibel; Members: Marshall Hamilton and John McCormick

For the Applicant: Larry Kowalchuk
For the Respondent: Susan Barber

Unfair labour practice – Unilateral change – Wage increase – Board reviews case law relating to wage increases and s. 11(1)(m) of *The Trade Union Act* – Where no first collective agreement in force and employer unilaterally changed existing, clearly articulated and consistent company-wide policy of awarding wage increases at same time each year based on uniform performance review, Board concludes that employer violated s. 11(1)(m) of *The Trade Union Act*.

***The Trade Union Act*, s. 11(1)(m).**

REASONS FOR DECISION

Background:

[1] By Order of the Board dated October 27, 2004, Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union") was designated as the certified bargaining agent for an all-employee unit of employees employed by Winners Merchants International L.P. in or in connection with Winners at the Golden Mile Shopping Centre, Regina, Saskatchewan (the "Employer"). The parties commenced collective bargaining for a first agreement in March, 2005 and agreed to deal with operational non-monetary issues first. They have met some ten times with more dates for negotiations scheduled in the near future. No collective bargaining agreement is in force.

[2] The Union filed the present application with the Board on April 27, 2005 alleging that the Employer committed an unfair labour practice in violation of s. 11(1)(m) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), which provides 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:*
>
> > *(m) where no collective bargaining agreement is in force, to unilaterally change rates of pay, hours of work or other conditions of employment of employees in an appropriate unit without bargaining collectively respecting the change with the trade union representing the majority of employees in the appropriate unit;*

[3] The Union alleges that the Employer unilaterally changed the employees' conditions of employment without bargaining collectively with the Union respecting the change. The Union alleges that prior to certification the Employer's policy and practice had been to conduct annual individual employee performance reviews and provide a performance-based wage increase according to a grid corresponding to each employee's point score on the review.

[4] In its reply to the application, the Employer asserts that wage rates are to be dealt with during collective bargaining and cannot be unilaterally implemented by it prior to making a collective agreement.

[5] The Employer operates an apparel, accessories and giftware retail store in the Golden Mile Shopping Centre in Regina. The store opened in November 2002. There are approximately 31 employees in-scope of the bargaining unit including five merchandise coordinators, four full-time associates and the balance being part-time associates.

[6] The Board heard the application on August 3, 2005.

Evidence:

[7] Anne Davidson was called to testify on behalf of the Union. She has been employed by the Employer since October, 2002, that is, approximately one month before the store opened for business. She started as a part-time associate, then became a full-time associate and was subsequently promoted to the position of merchandise coordinator. She is a member of the Union's committee in bargaining with the Employer for a first collective agreement.

[8] Ms. Davidson referred to a portion of an "associate handbook" provided to her by the Employer when she was hired with respect to annual employee performance reviews that provides in part as follows:

> *New Associates will receive a written performance review within 60 days of their start date. Following the 60 day review, performance reviews will be conducted annually around April 1st each year. [The Employer] compensates on a "pay for performance" system, meaning that increases or performances awards are based on performance.*

Ms. Davidson testified that she received a review around the beginning of April in each of 2003 and 2004 followed by a wage increase of three percent each year based upon the results of the reviews. In March, 2005 she inquired of the store manager, Sandra Knoll (phon.), about a performance review for 2005 and was told that because of the Union's certification all wage increases had to be negotiated through collective bargaining. By the time the present application was filed on April 27, 2005 Ms. Davidson had not yet received a review. She did receive a review in late April or early May, but she has not received a wage increase, despite a respectable score, nor to her knowledge has any other in-scope employee at the Golden Mile store.

[9] While Ms. Davidson said that her understanding was that past wage increases were in the discretion of the store manager, the increases are set according to a corporation-wide system.

[10] Diane Eyles-Turner was called to testify on behalf of the Union. She started her employment with the Employer as a full-time associate at the Golden Mile store in October, 2002. She was promoted to a full-time merchandise coordinator in March, 2005. She is a member of the Union's bargaining committee.

[11] Ms. Eyles-Turner testified that she received a performance review and a wage increase around the beginning of April in each of 2003 and 2004. She could not recall the rate of her increase in 2003, but stated that it was four percent in 2004 following a good review.

[12] Ms. Eyles-Turner referred to a letter sent by the Union to the Employer dated April 12, 2005 as follows:

> *Our members at the Golden Mile store in Regina have been told that their annual performance review and wage increase are on hold because of the Union. It is illegal for you to change conditions of employment without bargaining collectively and to blame the Union for this change.*
>
> *I expect annual performance reviews and wage increases to continue as usual, otherwise we will take the matter up with the Saskatchewan Labour Relations Board.*

The Employer conducted performance reviews of all employees at the Golden Mile store in 2005 after the Union filed the present application. While no subsequent pay raises have been given to any of the in-scope employees, out-of-scope district coordinator, Jan Lockhart, was reviewed and has received a raise. Ms. Eyles-Lockhart has not received a copy of her review as she has in past years.

[13] While it was Ms. Eyles-Turner's understanding that not every employee has historically received a pay increase following performance review, she did not think that the store manager could refuse on his or her own to give one to an employee with a good score.

[14] Ms. Eyles-Turner confirmed that, while the Union has made a wage proposal in bargaining, the Employer has not yet done so and the parties had agreed to negotiate operational items first.

[15] Leslie Lawson testified on behalf of the Employer. She has been the Employer's vice-president of human resources administration in Toronto since March, 2005 with responsibility for recruitment, associate relations, labour relations, compensation and benefits, human resources information systems and corporate communications. Prior to assuming the position, she was assistant vice-president of store operations. She said that she has some 15 years' collective bargaining experience.

[16] Ms. Lawson testified that annual performance reviews are the only basis upon which wage increases are provided to non-unionized employees – the Employer has no bonus system, for example. She confirmed that associates and merchandise coordinators would expect to have an annual performance review and merit increases would be made based upon individual performance. In 2005, the reviews were required to be completed by May 17.

[17] Referring to a blank "Field Associate Performance Review" form, Ms. Lawson explained the point rating system in 11 categories for a possible maximum score of 55. The Employer's head office provides store managers with guidelines for certain percentage wage increases for particular review point score levels. The guidelines are company and nation-wide. While increases could be withheld if the company's overall performance was poor, it has had a very successful past ten years. The increases are not dependent upon individual store performance or the cost of individual store operations. Store managers have what she described as a "discretion" to award a percentage increase greater than the head office guidelines, but it must be supported by an appropriate "business case" approved by regional management. Employee salary adjustments are made effective April 1st each year after the meeting of the company's board of directors. In 2005, the directors' meeting was April 8. Ms. Lawson confirmed that all of the company's non-unionized employees have received their increases for 2005 (if any) based upon their individual performance evaluations for the 2004 calendar year as follows:

Points	Evaluation Description	Increase Guideline
11-21	Unsatisfactory	0 %
22-29	Clear Development Needs	0%
30-40	Meets Expectations	3-5%
41-50	Exceeds Expectations	5-6%
51-55	Outstanding	7%

[18] Ms. Lawson testified that Golden Mile store management was uncertain about how to proceed with the 2005 reviews. She advised them to complete the reviews in the ordinary course, but explained that merit increases were an issue for collective bargaining. She replied to the Union's letter of April 12, 2005, by correspondence dated April 22, 2005, which provides in part as follows:

> *Your letter addresses the issue of the Associates annual performance review and wage increases being put on hold by the Company "because of the Union". It is important to clarify that the Company is not withholding these increased (sic.) because of the certification of this store to be represented by the RWDSU. These wage increases are not an automatic cost of living wage scale adjustment. The Company provides an annual merit process for associates whereby their performance is evaluated and based on the performance evaluation an increase may be awarded. This is a performance-based merit system.*
>
> *Our relationship now with the RWDSU requires these items now be bargained. The wage increases you have identified are not based on how long an associate has been with the Company, if that had been the case, we would have ensured all associates received the wage scale adjustments.*

[19] Ms. Lawson stated that, while the Union has provided its proposal on monetary issues, the Employer has not and the parties have agreed to bargain with respect to operational issues first. Depending upon the outcome of collective bargaining, the increases may be made retroactively to the employees at the Golden Mile store. The employees continue to receive the benefit package referred to in the associate handbook including prescription drugs, routine dental care and life insurance benefits, under a mandatory participation plan.

Arguments:

[20] Mr. Kowalchuk, counsel on behalf of the Union, argued that, according to the principles described in the Board's jurisprudence on the issue, the Employer has committed an unfair labour practice in violation of s. 11(1)(m) of the *Act* by unilaterally changing conditions of employment without bargaining collectively respecting the change. Counsel submitted that the Employer had not even attempted to put forward an economic or operational justification for not continuing to apply the wage increase system to the Golden Mile employees but rather refused to do so offering the specious excuse that wage issues were an item for collective bargaining. Accordingly, there is no justification for the Employer to deviate from conducting its business as usual and in accordance with the reasonable expectations of employees while collective bargaining continues. Pointing out that the parties have not yet begun to negotiate with respect to

wages, counsel asserted that the Employer was attempting to punish the employees for organizing and joining a union.

[21] In support of his arguments, counsel referred to the following Board decisions: *Construction and General Workers' Union, Local 890 v. Brekmar Industries Ltd.*, [1993] 1st Quarter Sask. Labour Rep. 126, LRB File No. 113-92; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Off the Wall Productions Ltd.*, [2000] Sask. L.R.B.R. 156, LRB File Nos. 192-98, 193-98 & 194-98; *Saskatchewan Joint Board, Retail Wholesale and Department Store Union v. Temple Gardens Mineral Spa Inc.*, [2001] Sask. L.R.B.R. 320, LRB File Nos. 032-00 & 033-00; *Newspaper Guild Canada/Communications Workers of America v. Sterling Newspapers Group, a division of Hollinger Inc. o/a The Leader-Post/Leader Star News Services*, [2000] Sask. L.R.B.R. 558, LRB File Nos. 272-98 & 003-00; *Canadian Union of Public Employees v. Canora Ambulance Care (1996) Ltd.*, [2000] Sask. L.R.B.R. 414, LRB File Nos. 105-99 & 106-99.

[22] Ms. Barber, counsel on behalf of the Employer, agreed with the characterization of the "business as usual" principle in the context of the "reasonable expectations of the employees" in reference to s. 11(1)(m) of the *Act*, but argued that the Employer had not committed the alleged unfair labour practice. The main factual element upon which counsel based her argument was the assertion that the wage increases at issue in the present case are discretionary, which makes it distinguishable from the situations in other cases considered by the Board, such as *Sterling Newspapers Group*, *supra*, and *United Steelworkers of America v. Brandt Industries Ltd.*, [1991] 4th Quarter Sask. Labour Rep. 81, set aside on review [1992] 3rd Quarter Sask. Labour Rep. 55 (Sask. Q.B.), restored on appeal [1994] 3rd Quarter Sask. Labour Rep. 84 (Sask. C.A.), LRB File Nos. 193-91 & 194-91. That is, counsel submitted, that, while there may have been a set pattern of annual performance reviews and employees may have had a reasonable expectation of same, there was no pre-determined or set pattern of wage increases: the associate handbook refers to an annual performance review but makes no mention of an annual wage increase.

[23] Counsel also argued that both *Off the Wall Productions*, *supra*, and *Brekmar Industries*, *supra*, were distinguishable from the present situation in that, in the

former case, a wage increase automatically followed if an employee met with expectations on performance review and, in the latter case, the employees had a reasonable expectation of receiving an increase regardless of performance.

[24] Counsel submitted that the Board in this case should follow its decision in *United Steelworkers of America v. Crestline Coach Ltd.*, [1987] November Sask. Labour Rep. 53, LRB File No. 132-87. In that case, the union alleged the employer had committed an unfair labour practice by failing to give employees raises as it had in the past. The Board stated, at 53, that the evidence indicated that prior to the union's certification the employer had periodically evaluated the work performance of each employee and had unilaterally decided whether and by how much employee wages would increase. In finding that the employer had not committed an unfair labour practice the Board stated as follows at 53-54:

> *Section 11(1)(m) precludes that very type of unilateral employer action. Once it was certified, the union became the exclusive bargaining representative of all employees in the appropriate unit, and it was no longer open to the employer to unilaterally grant discretionary wage increases or to change other terms and conditions of employment by dealing directly with individual employees.*

[25] In reply, Mr. Kowalchuk sought to distinguish *Crestline Coach*, *supra*. Counsel argued that it is only within the store manager's discretion to seek the approval of regional management in the event the store manager desires to grant an increase in excess of the centrally mandated guidelines – that is, there is no discretion to grant an increase less than the guidelines for the point bracket within which an individual's evaluation falls. In the present case, the Employer knew what the increases would be prior to performing the evaluations and, presumably, there is no discretion to perform other than an honest evaluation; accordingly, once a good-faith evaluation is performed an employee automatically receives a minimum pay increase set within the mandated guidelines.

Analysis and Decision:

[26] In *Canadian Union of Public Employees, Local 4152 v. Canadian Deafblind and Rubella Association*, [1999] Sask. L.R.B.R. 138. LRB File No. 095-98, the

Board undertook a detailed historical review of its approach to the interpretation of s. 11(1)(m) of the *Act*, and clarified the principles involved. At 151, the Board referred to the purpose of what is often called the "statutory freeze" provision:

> *[54] The purpose of the statutory freeze provision is to maintain the prior pattern and structure of the employment relationship while collective bargaining takes place. It provides a solid foundation and point of departure from which to begin negotiations towards a first agreement, preventing unilateral changes to the status quo which might allow an unfair advantage to one party in the bargaining process.*

[27] However, the application of the provision is often not easy. In *United Steelworkers of America v. Conservation Energy Systems Inc.*, [1993] 1st Quarter Sask. Labour Rep. 75, LRB File Nos. 215-92, 216-92 & 217-92, the Board observed as follows, at 78-79:

> *Attempts to determine the extent to which terms and conditions of employment should be seen as "frozen" during a period when there is no collective agreement in force, and what may be the practical significance of such a freeze, have given rise to a number of complications and uncertainties in the interpretation of the jurisprudence of this and other labour relations boards. The complexity of this picture is compounded when the parties have not yet reached a first collective agreement.*
>
> *The critical question then becomes what represents the status quo in the employment relationship which is to be preserved pending the conclusion of a collective agreement through bargaining between the employer and the union.*
>
> *It is relatively easy to state a rationale for the preservation of the status quo between the parties under these circumstances. During the period which follows certification, the union is in a vulnerable position. It has yet to demonstrate that it can use the status it has gained through employee support to obtain improvements in the position of those employees. The employer cannot be allowed to use advantages accrued from the lopsided balance of power which previously existed to punish employees for making the choice to support certification or to confer benefits on them in an attempt to show how little they need the union.*
>
> *It is more difficult to decide how this rationale applies to any given set of circumstances. An example of the complications which may arise is provided by the struggles which this Board has had with the question of whether an employer is entitled to give or withhold wage increases in the period before a collective agreement is concluded.*

[28] The Board then cited *Crestline Coach*, *supra*, as an example of the complications in application of the provision. And, at 79, the Board described what it perceived as the difference in the factual findings in *Crestline Coach* and *Brandt Industries*, *supra*, that led to the respective decision in each case:

> *More recently, in its decision in United Steelworkers of America v. Brandt Industries, LRB File Nos. 193-92 and 194-92, the Board drew a distinction between a wage increase, like that in the Crestline Coach case, which was arrived at on the basis of a unilateral and discretionary assessment related to each employee, and one which was made in accordance with well-established criteria and past practice. This latter finding of the Board is currently the subject of judicial discussion, but the point may be taken from these examples that the delineation of what constitutes the status quo may be a matter of some difficulty.*

[29] In *Canadian Deafblind*, *supra*, the Board described the standard applied by labour boards to better define the limits of the otherwise unrestricted management rights of employers prior to certification. Referring to what is commonly called the "business as before" standard, the Board stated, at 151:

> *[55] The "business as before" standard allows for sensitivity to the exigencies of carrying on the employer's business while preserving the stability necessary to ensure good faith bargaining. An employer must operate the business in accordance with the pattern established before the freeze. The right to manage the business is maintained, circumscribed only by the condition that it be managed as before the freeze.*

In that case, the Board also described, the modern application of this standard within the context of the "reasonable expectations of employees" test developed to clarify the "business as before" standard and accommodate those employee "privileges" enjoyed prior to certification and an employer's ability to react to first time or unexpected events following certification and before a collective agreement is achieved.

[30] *Canadian Deafblind, supra,* followed upon the analysis made by the Board in its earlier decision in *Brekmar Industries*, *supra*, where the Board described in detail the jurisprudential development of the "reasonable expectations of employees," and, at 129, explained the result of this interpretation as follows:

> *The result of this interpretation is that Section 11(1)(m) preserves not merely the terms and conditions of employment in effect at the moment of certification, but also the practices, policies and processes by which the employer operates. The employer's right to manage is maintained, qualified only by the condition that the business be managed as before. Generally, a departure from the pre-certification pattern is a prohibited change whereas a change consistent with these policies represents maintenance of the status quo as required by Section 11(1)(m).*

[31] In *Brekmar Industries*, *supra*, at 132, the Board commented on this interpretation in the specific context of wage increases as follows with reference to the following comment of the Ontario Labour Relations Board in *Queen's Way General Hospital and Ontario Nurses Association* (1992), 12 C.L.R.B.R. (2d) 80, at 86-87:

> *The Board has consistently found that the failure of an employer to pay a wage increase or otherwise continue with or institute an improved working condition during the statutory freeze, in accordance with a pre-existing pattern or a promise to do so, constitutes a breach of the freeze provisions. Collective bargaining does not occur in a vacuum. In our view, it is both contemplated by the legislation and appropriate that the basis for collective bargaining be the pattern of the employment relationship, and the resulting reasonable expectations of employees, including any pattern or expectation of wage increases.*

The Board then stated that, before the statutory freeze will apply, there must be a factual foundation that the policy or practice is sufficiently established to become part of the framework of terms and conditions of employment:

> *The "business as usual" or "reasonable expectation" interpretation of Section 11(1)(m) leads to the factual sub-issue of whether the policy or practice regarding wage increases was sufficiently established to become part of the framework of terms and conditions of employment preserved by Section 11(1)(m).*

[32] In *Brekmar Industries*, *supra*, the Board commented that some of its earlier decisions regarding the interpretation of s. 11(1)(m), including *Crestline Coach*, *supra*, were not as clear as they might have been – in part, at least in the case of *Crestline Coach*, because of the uncertainty created by the brevity of the Reasons for Decision. The Board commented as follows at 132:

> *This Board has previously accepted the "business as usual" interpretation of Section 11(1)(m), although some of its earlier decisions, such as the ones relied upon by the employer (see: Fort Garry Industries Ltd.; Crestline Coach Ltd., supra), are not as clear as they could be. In Fort Garry Industries Ltd., the Board simply found that the past practice or policy on wage increments was not sufficiently established. The Board's reasoning in Crestline Coach Ltd. is very brief and admittedly susceptible to two interpretations. The Board may have simply found, as it did in Fort Garry Industries Ltd., that the pattern or policy on wage increases was not sufficiently established. If, however, the Board found that such policies, even when well-established, are not preserved as part of the status quo, then it is not consistent with subsequent decisions.*
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> *In Ne-Ho Enterprises Ltd., (1989) Winter, Sask. Lab. Rep., p. 78, the Board held that the freeze provisions were not intended to place employers in a strait-jacket during certain periods. The decision is very brief, but the Board expressly accepted that Section 11(1)(m) preserves the employer's "ability to carry on business as usual." Subsequent to Ne-Ho Enterprises Ltd., the Board again adopted the "business as usual" interpretation in Brandt Industries Ltd., supra.*

[33] In *Brekmar Industries*, *supra*, the evidence established that for approximately twelve years most of the employees received an annual increase at approximately the same time every year based on a formula that took into account three factors: merit, years of service and the employer's ability to pay. The Reasons for Decision, at 127, established that how each factor was weighted, how each employee was evaluated and how the actual amount of the increase was arrived at were entirely within the discretion of the employer. In all but two of the years, the employees were placed in categories and the salary increase varied with each category. In two of the years the same increase was awarded to all employees across the board. The evidence of the employer's principal as to why the increase was withheld following certification was quite similar to that offered by Ms. Lawson in this case. At 127, the Board noted as follows:

> *Mr. Markusa is the President of the company and has held that position since the company was founded. He admits that the company did not follow its pre-certification policy on wage increases after the union was certified. He did not claim that the employees' performance did not warrant an increase or that the company lacked the ability to pay, although there was evidence that profits were down. Instead, he testified that the company*

> *withheld the wage increases because it believed that the effect of certification was to freeze wages at existing levels subject only to changes negotiated with the union. Accordingly, the company threw the subject of wages on to the bargaining table along with everything else.*

[34] In finding that the employer had committed a violation of s. 11(1)(m) of the *Act*, the Board observed as follows, at 132 and 133:

> *In this case, the evidence reveals that the employer had an articulated and thought-out formula, which it applied to determine all wage increases. This policy was long-standing, and followed consistently year after year. In the Board's opinion, this policy was a real, well-known and well-defined part of the labour relations fabric before certification, and therefore part of the employment relationship preserved by Section 11(1)(m).*

[35] In the present case, the Board must make four findings of fact in order to determine whether the Employer has violated s. 11(1)(m) of the *Act*: (1) whether a collective bargaining agreement is in force; (2) whether the alleged wage increase system is a term and condition of employment preserved by s. 11(1)(m); (3) if so, whether the Employer has changed the term and condition; and, (4) whether the Employer bargained collectively with the Union prior to making the change.

[36] It is common ground that there is no first collective bargaining agreement in place between the parties.

[37] We are satisfied that the evidence establishes that the employees received a detailed uniform annual performance review in accordance with the employee handbook and a wage increase based upon that review at the same time each year since the store opened until the Union was certified. The increases were part of a national policy made consistently in accordance with “guidelines” mandated nationally for each region. It is clear that the store manager had the discretion to seek approval to award an increase in excess of the guidelines for any particular employee, but it is not clear that the store manager had any discretion to seek to award less than the increase mandated by the guidelines. While the Employer is not necessarily obliged to grant an increase every year, given its positive profit history there is no reason to assume that it will not continue to do so. Section 11(1)(m) of the *Act* preserves the practices, policies and processes by which the Employer operates. As in *Brekmar Industries*, *supra*, we

are satisfied that in the present case the evidence discloses a clearly articulated and consistent company-wide policy of awarding wage increases at the same time each year based upon a uniform performance review. We find that this policy and process is preserved pursuant to s. 11(1)(m) of the *Act* in accordance with the criteria and standards described earlier in these Reasons for Decision. Therefore, a change consistent with this policy represents maintenance of the status quo as required by s. 11(1)(m).

[38] The Employer acted unilaterally in failing or refusing maintain the status quo with respect to wage adjustments and did not bargain collectively with the Union regarding the proposed change prior to implementing it.

[39] We are therefore satisfied that the Employer unilaterally changed the existing practice and policy which was in force prior to certification contrary to s. 11(1)(m) of the *Act*.

[40] An order will issue directing the Employer to refrain from engaging in the unfair labour practice and further directing it to make the wage adjustments in accordance with the policy within 14 days of the Order and directing the Employer to post copies of these Reasons and the Order in the workplace. We remain seized with respect to any issues that may arise with respect to the implementation of the Order.

DATED at Regina, Saskatchewan, this **31st** day of **August, 2005**.

LABOUR RELATIONS BOARD

James Seibel,
Chairperson