Labour Relations Board
Saskatchewan

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

LRB File No. 150-05; September 15, 2005
Chairperson, James Seibel; Members: Gloria Cymbalisty and Leo Lancaster

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

> **Remedy – Interim order – Criteria – Board finds that main application raises arguable issue and serious case to be tried - Labour relations harm to union resulting from imposition of suspensions for employees wearing buttons exceeds harm that may result to employer by employees wearing buttons until final application heard and resolved – Board grants interim order.**
>
> ***The Trade Union Act*, s. 5.3.**

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 of Winners Merchants International L.P. operating as Winners at the Golden Mile Shopping Centre, Regina, Saskatchewan (the "Employer"), a retail clothing and accessories store. The parties commenced collective bargaining for a first agreement in March 2005. They have met to negotiate on more than ten occasions. While the Union has provided the Employer with its comprehensive proposals, including those regarding monetary issues, the Employer has not reciprocated. The parties had agreed to bargain non-monetary issues first.

[2] On April 27, 2005 the Union filed an application with the Board (LRB File No. 071-05) alleging that the Employer had 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*") by unilaterally changing terms and conditions of employment relating to performance

evaluation and concomitant wage changes without first negotiating the same with the Union. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Winners Merchants International L.P.*, [2005] Sask. L.R.B.R. ---, LRB File No. 071-05 (August 31, 2005 - not yet reported), the Board found that the Employer had committed the unfair labour practice. No collective bargaining agreement is in force. More bargaining sessions are planned.

[3] In the latter part of August, 2005 some of the affected employees began wearing buttons at work bearing the slogan "Workers Waiting For Winners To Negotiate." The Employer advised employees that they were not permitted to wear the buttons while on the premises and working. The Employer advised employees that they could choose to work or wear the buttons. Certain employees who refused to remove the buttons were escorted off the premises and lost a certain number of hours of work and wages.

[4] The Union filed the present application with the Board on August 26, 2005 alleging that the Employer committed unfair labour practices in violation of ss. 11(1)(a) and (e) of the *Act*, which provide as follows:

> *11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*
>
> > *(a) 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;*
> >
> > *. . .*
> >
> > *(e) to discriminate in regard to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including discharge or suspension or threat of discharge or suspension of an employee, with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in a proceeding under this Act, and if an employer or an employer's agent discharges or suspends an employee from his employment and it is shown to*

> *the satisfaction of the board that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right under this Act, there shall be a presumption in favour of the employee that he was discharged or suspended contrary to this Act, and the burden of proof that the employee was discharged or suspended for good and sufficient reason shall be upon the employer; but nothing in this Act precludes an employer from making an agreement with a trade union to require as a condition of employment membership in 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 the trade union has been designated or selected by a majority of employees in any such unit as their representative for the purpose of bargaining collectively;*

[5] The application seeks, *inter alia*, declaratory and injunctive relief, as well as compensation for monetary loss.

[6] Pursuant to s. 5.3 of the *Act*, the Union applied for an interim order restraining the Employer from taking any disciplinary action regarding the wearing of the buttons until the determination of the main application. Section 5.3 provides as follows:

> *With respect to an application or complaint made pursuant to any provision of this Act or the regulations, the board may, after giving each party to the matter an opportunity to be heard, make an interim order pending the making of a final order or decision.*

[7] The Board heard the application for interim relief on September 1, 2005.

Evidence:

[8] In support of the application for interim relief the Union filed the affidavits of Anne Davidson and Jacklyn Kaiser, both members of the bargaining unit, and an affidavit of union representative, Brian Haughey. In reply to the application, the Employer filed the affidavits of district manager, Shannon Pagan, Andrea Doka, the Employer's Victoria Avenue store assistant manager, and vice-president, human resources administration, Leslie Lawson.

[9] For the most part, the essential facts regarding the events concerning the wearing of the buttons and the Employer's response thereto are uncontroverted.

[10] On Wednesday, August 24, 2005, a number of employees in the bargaining unit attended to work at the Employer's Golden Mile store wearing yellow buttons approximately five centimetres in diameter bearing the slogan "Workers Waiting For Winners To Negotiate" in red lettering. The affidavit materials filed on behalf of the Union allege that some employees also wore buttons bearing the slogans "I'm Sticking With My Union" or "It's Difficult to Have a Nice Day … Without A New Contract," however, the materials filed in response by the Employer allege that, if that was the case, the Employer was not aware of it and its actions were not predicated upon the display of these latter slogans. A shop steward provided one of the impugned buttons to the district manager, Ms. Pagan and advised her that employees would be wearing the buttons.

[11] At the regular pre-work meeting with employees of the store on the morning of August 25, 2005, Ms. Pagan advised the employees that the buttons were not part of the dress code and that if they were wearing the buttons they could not be working. All of the employees refused to remove the buttons and left the store. That morning management personnel staffed the store. That afternoon, the employees returned to work without the buttons.

[12] On the next morning, Thursday, August 25, 2005, some employees, including Ms. Davidson and Ms. Kaiser, arrived for work wearing the impugned button. At the pre-work meeting Ms. Pagan advised the employees to remove the buttons and to be on the floor for the 9:30 a.m. store opening. All of the employees with the exception of Ms. Davidson and Ms. Kaiser removed the button and went to work. Ms. Pagan, accompanied by Ms. Doka, then met with Ms. Davidson and Ms. Kaiser in the social lounge. When Ms. Pagan was asked why employees could not wear the button, Ms. Pagan replied that it gave a negative message to customers. Reference was made to the Employer's "no-solicitation policy."

[13] The Employer's "no-solicitation policy" dated April, 2005 provides in part as follows:

> *POLICY*
> *In order to promote efficiency and productivity in the workplace, and to keep the work environment as clean and safe as possible, Associates are prohibited from soliciting for any cause or organization on Company premises.*
>
> *GUIDELINES*
> *This policy applies to soliciting, messaging, fundraising, collecting, selling for any purpose or distributing unauthorized literature of any kind. Examples of such activity include, but are not limited to:*
> *. . . .*
> - *Wearing messaging that has not been approved or provided by the Company.*
>
> *. . . .*
> *NON-COMPLIANCE*
> *Associates who fail to comply with this policy will be subject to corrective action, up to and including termination of employment.*

[14] Ms. Pagan advised Ms. Davidson and Ms. Kaiser that it was their choice whether or not to wear the button and deposed that they then elected to leave the store. However, about twenty minutes later, Ms. Pagan was advised that Ms. Davidson and Ms. Kaiser had returned to the store and were working while wearing the impugned buttons. Ms. Pagan asked Ms. Davidson and Ms. Kaiser to accompany her to the office, whereupon Ms. Davidson then indicated that she and Ms. Kaiser were not leaving and that the Employer would have to suspend them. Ms. Davidson also asked what would happen if she and Ms. Kaiser refused to leave and Ms. Pagan indicated that it could lead to disciplinary action up to and including termination. Ms. Pagan then met with Ms. Davidson and Ms. Kaiser in the lounge, along with Ms. Doka and loss prevention officer, Russell Parrott, where further discussion resulted in Ms. Pagan advising Ms. Davidson and Ms. Kaiser that, if they chose not to remove the buttons, Mr. Parrott would accompany them out of the store. Ms. Pagan also indicated that Ms. Davidson and Ms. Kaiser would not be paid for the remainder of the shift. Ms. Davidson and Ms. Kaiser were escorted off the property by Mr. Parrott.

[15] That same afternoon, four other employees arrived for their shift wearing the impugned button and they chose to leave.

[16] Since that time there have been no further instances of employees wearing the buttons at work, including Ms. Davidson and Ms. Kaiser.

[17] The store manager provided the employees with a memorandum, dated August 27, 2005, that provides as follows:

> *As you are aware, this week some of our fellow Associates at the Golden Mile Store chose to leave their scheduled shift to go home without pay rather than to comply with our request that they adhere to our customer relations practices and No solicitation Policy. I would like to take this opportunity to reiterate to all of our associates why these practices and policy are in place.*
>
> *Customer relations is crucial to our business. As part of our customer relations practices, we have a policy of not soliciting our customers for any issue, cause or purpose not authorized by WMI. This includes not soliciting customers through messaging on clothing on any issues that might exist between Associates and management, particularly those issues that are properly being dealt with at the bargaining table. Associates who choose not to comply with this policy, or do not arrive for regularly scheduled shifts will be subject to disciplinary action.*
>
> *It is important for our customers to enjoy a pleasant shopping experience in all of our stores, and our customer relations practices and No Solicitation Policy are key components to ensuring that experience. I appreciate your cooperation in achieving this goal.*

[18] The perception of the Union, as gleaned from the affidavit of Mr. Haughey, is that, although there have been many bargaining sessions, actual agreement on specific items has been slow and relatively unproductive. The perception of the Employer, as expressed in the affidavit of Ms. Lawson, is that the Employer has been co-operative and accommodating and bargaining is progressing at a not disappointingly slow pace.

Arguments:

[19] Mr. Kowalchuk, counsel on behalf of the Union, submitted that the test used by the Board as to whether to grant interim relief, as described and applied by the Board in *Hotel Employees and Restaurant Employees Union, Local 206 v. Canadian Hotels Income Properties Real Estate Investment Trust #19 Operations Inc., operating as Regina Inn Hotel and Convention Centre*, [1999] Sask. L.R.B.R. 190, LRB File No. 131-99 and *Canadian Union of Public Employees v. Del Enterprises Ltd.*, [2004] Sask.

L.R.B.R. 156, LRB File Nos. 087-04 to 092-04, requires that the applicant demonstrate, firstly, that the main application reflects an arguable case under the *Act*, and, secondly, that the labour relations harm that will result if the interim relief is not granted is likely greater than that which will result if it is granted.

[20] Counsel argued that, given that *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1 protects freedom of conscience, opinion and belief, employees have the right to express an opinion or belief regarding their labour relations with their employer through the wearing of a button. Counsel also submitted that, although the decision of the Supreme Court of Canada in *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156 (S.C.C.) was in relation to secondary picketing, it established that "free expression is particularly critical in the labour context" (see: case report at paragraphs 33 to 37) and that, while protection from economic harm is capable of justifying limitations on freedom of expression, "in the absence of independently tortuous activity, protection from economic harm resulting from peaceful persuasion, urging a lawful course of action, has not been accepted …as a protected legal right" (see: case report at paragraph 72).

[21] Counsel submitted that there were many cases in the arbitral, labour board and judicial jurisprudence regarding the wearing of buttons relating to aspects of labour relations by employees in the workplace. Counsel referred to the following decisions, mainly in the context of the historical treatment of the situation: *Quan v. Canada (Treasury Board)*, [1990] 2 F.C. 191 (Fed. C.A.); *Re National Steel Car Ltd*. (1998), 76 L.A.C. (4th) 176 (Craven); *Hamilton-Wentworth District School Board*, [2002] OLRB Rep. July/Aug 652 (Ont. L.R.B.); *Ontario Hospital Association*, [2003] OLRB Rep. July/Aug 622 (Ont. L.R.B.); *Re Health Employers' Association of British Columbia and Hospital Employees Union* (2004), 125 L.A.C. (4th) 145 (Sanderson).

[22] In *Regina Inn*, *supra*, the only Saskatchewan decision regarding the issue of buttons in the workplace, the Board allowed an application for interim relief that restrained the Employer from taking disciplinary action against employees wearing buttons during an organizing drive bearing the slogans "Yes for the Union – Hotel Employees and Restaurant Employees Union #767" or "H.E.R.E. Local #767 – Justice Dignity Respect."

[23] Ms. Barber, counsel on behalf of the Employer, filed a written brief, which we have reviewed.

[24] Counsel argued, as a preliminary issue, that the application for interim relief ought not to be heard or determined because a decision in favour of the application would, practically, provide the Union with all of the relief that it is seeking on the main application, but rather, the Board should hear the main application on an expedited basis. The *status quo* that should be preserved is that of the employees working without wearing the impugned buttons.

[25] Counsel submitted that the first part of the test that the Board should apply on an application for interim relief is whether there is a serious issue to be tried and conceded that, *prima facie*, the present case appears to raise the important issue of freedom of expression in the workplace. However, counsel asserted that the message communicated by the impugned buttons was misleading and essentially false, *i.e.,* that the Employer was refusing to negotiate with the Union, and that, therefore, there was no serious issue.

[26] Counsel submitted that the labour relations harm to the Employer if interim relief were granted outweighed any harm to the Union or employees if it was not granted. Counsel cited *Graphic Communications International Union, Local 75M v. Sterling Newspaper Company*, [1997} Sask. L.R.B.R. 742, LRB File No. 323-97, as authority that it was incumbent on the Union to demonstrate that irreparable harm would ensue if interim relief was not granted and that it had not done so.

[27] Counsel sought to distinguish certain of the decisions cited by counsel on behalf of the Union, including *Regina Inn*, *supra*, on the basis that the message on the buttons in question in those cases was a simple declaration of support for the union and did not express misleading or false statements. Counsel also referred to the arbitral decision in *Re Convention Centre Corp.* (1997), 63 L.A.C. (4th) 390 (Freedman), which dismissed a policy grievance regarding the employer's prohibition on employees wearing buttons at work with the slogan "No Contracting Out," an obvious reference to the employer's plan to contract out security services.

[28] In reply, Mr. Kowalchuk argued that *Convention Centre*, *supra*, was decided before the Supreme Court of Canada decision in *Pepsi*, *supra*, and contained no analysis in the context of rights protected by the *Charter of Rights and Freedoms*.

Analysis and Decision:

[29] The test applied by the Board in determining whether to grant interim relief was described by the Board, in *Regina Inn*, *supra*, as adopting the test enunciated by the Ontario Labour Relations Board in *United Food and Commercial Workers International Union, Local 175/633 v. Loeb Highland*, [1993] OLRB Rep. March 197. In *Regina Inn*, *supra*, the Board described the test at 190 as follows:

> *Generally, we are concerned with determining (1) whether the main application reflects an arguable case under the Act, and (2) what labour relations harm will result if the interim order is not granted compared to the harm that will result if it is granted. …In our view, the modified test, which we are adopting from the Ontario Labour Relations Board's decision in Loeb Highland, supra, focuses the Board's attention on the labour relations impact of granting or not granting an interim order. The Board's power to grant interim relief is discretionary and interim relief can be refused for other practical considerations.*

[30] At this stage of the application, the Board is not required to assess the evidence in detail, but assesses whether the applicant has requested relief which seems to lie within the Board's jurisdiction and whether the evidence raises an arguable and not frivolous case: see *Regina Inn*, *supra*, at 195 and *International Union of Bricklayers and Allied Craftsmen, Local #1 Sask. V. Regal Flooring Ltd.*, [1996] Sask. L.R.B.R. 694, LRB File No. 175-96 at 701.

[31] In *Regina Inn*, *supra*, the Board granted interim relief restraining the employer from taking disciplinary action against employees for wearing the buttons described in that case during an organizing drive. The arguments raised on behalf of the employer in that case, as in the present case, included that the maintenance of the *status quo* required that no buttons be worn at work and that the employer's prohibition on wearing the buttons was based on its business interests and concerns about discouraging customers or engaging them in debate. Nonetheless, the Board found that

the balance of labour relations harm favoured the union and the employees, predicating this finding in large part upon the broadly accepted fact that the employees and union are extremely vulnerable to the imposition of discipline during an organizing campaign. The Board observed as follows, at 198:

> *As suggested in the Courtyard Inn case, the imposition of discipline or dismissal on an employee during the organization of a trade union is an effective method of chilling employee support for the Union. The harm that may result to the Union is not easily remedied by the Board; in fact, it may not be possible for the Union to regain employee support or interest once the Employer has made its views known to employees through its conduct. Employees lose their confidence in then Union's ability to protect their jobs once discipline or suspensions are imposed on employees during an organizing drive. They also lose confidence in the statutory scheme that is established under the Act to ensure their right to organize into trade unions.*

[32] These sentiments are no less applicable to the period between certification and the achievement of a first collective bargaining agreement. It is equally broadly accepted that a nascent bargaining unit is vulnerable to the inappropriate imposition of discipline by the employer. The chilling effect of such action has the propensity to make the union look weak and ineffectual, and unable to protect the employees from unwarranted discipline. It is an assault upon the attempt by the union to garner the confidence of its members in collective bargaining. And, of course, as observed by the Board in *Regina Inn, supra*, it may cause employees to "lose confidence in the statutory scheme" established to ensure their right to organize into trade unions.

[33] Bargaining for a first collective agreement has been ongoing for some seven months. We note that the "open period" to apply for rescission of the certification Order is looming. It may not be surprising that the Union or the employees could form a perception that the Employer is not bargaining with the degree of vigour that they might wish. In our opinion, on the basis of the evidence before us, which certainly does not bind the panel that hears the final application, the buttons are at most ambiguous in that they express a perception that the Employer is not bargaining as quickly or as wholeheartedly as the Union might prefer.

[34] The Employer asserts that it has not taken any disciplinary action – that the missed work hours were by the decision of individual employees. This is a classic distinction without a difference. A "rose by any other name" is a "suspension." We are of the opinion that the application raises not only an arguable issue, but also a serious case to be tried.

[35] While the slogan on the buttons in the present case is not the same as that in *Regina Inn*, *supra*, similar to the view of the Board in that case, we find that the labour relations harm to the Union resulting from the imposition of the suspensions for wearing the buttons exceeds the harm that may result to the Employer by the wearing of the buttons until such time as the application is heard and finally resolved. However, the slogan permitted to be worn shall be limited to that one slogan identified earlier in these Reasons for Decision upon which the Employer allegedly acted. As observed by the Board in *Regina Inn, supra*, at 199:

> *The employees will perform work for the Employer during the period of the interim order. Although the order may cause some disruption and inconvenience to the Employer, such disruption does not present the degree of harm that is occasioned by permitting the Employer to reduce the hours of work of employees who have been identified as Union supporters … .*

[36] Although it is not a necessary element of response to this kind of interim application, if the Employer had any evidence of disruption to its operations or discomfiture expressed by customers as a result of the wearing of the buttons, it might have been expected to bring it forward. In *Hamilton-Wentworth District School Board*, *supra*, members of the teachers' federation wore buttons in their classes bearing the message "Fair Deal or No Deal." Ruling in their favour, after reviewing the jurisprudence in Canada and the United States, the Ontario Board held that "the message itself, though critical, was not offensive, nor insulting," and stated, at paragraphs 58 and 59:

> *The courts have also said that wearing a union button is legitimate unless "the employer can demonstrate a detrimental effect on its capacity to manage or its reputation" … The limitation is similar to that expressed in Canada: wearing the button should not be disruptive of the employer's operation and it should not cause economic loss. There must be actual evidence of disruption and economic loss to justify denying employees the right to wear a union button.*

> *Communication between union members of a message from their union is a protected activity under s. 70 of the Act. That communication may be interfered with if the message is offensive or disruptive to a substantial or material extent. It is in such circumstances that the employer may legitimately claim that its business or operational interests have been interfered with to a significant degree, and the message must cease. If not, then the employer's action is interference with the representation of employees by their union.*

[37] The Board has offered to expedite the hearing of the final application, and, in fact, the Employer asked for that, albeit as an alternative to the Board hearing the application for interim relief.

[38] Accordingly, an Order will issue in the following terms:

1. The Employer is restrained from taking any disciplinary action of any kind against any of the employees of the Employer's Golden Mile store relating to the wearing of the buttons bearing the words "Workers Waiting For Winners To Negotiate";

2. The Employer shall post these Reasons for Decision and the Order in a place where they will be seen and may be read by a majority of the employees in the bargaining unit until the hearing and determination of the final application;

3. These Reasons for Decision and the Order may be served on the Employer by facsimile transmission to its solicitors of record.

DATED at Regina, Saskatchewan this **15th** day of **September, 2005.**

LABOUR RELATIONS BOARD

James Seibel,
Chairperson