The Labour Relations Board
Saskatchewan

AMALGAMATED TRANSIT UNION, LOCAL 588, Applicant v. FIRSTBUS CANADA LIMITED, Respondent

LRB File No. 082-07; December 11, 2007
Vice-Chairperson, Catherine Zuck, Q.C. Members: Ken Ahl and Bruce McDonald

For the Applicant: Bettyann Cox
For the Respondent: Deanna Ladouceur

Remedy – Unfair labour practice – Collective bargaining – Board's goal in designing remedy to place union and its members in position they would have been in but for employer's violation of *The Trade Union Act* – Board orders employer to cease paying wage rates unilaterally implemented by employer and to pay collective agreement wage rates.

Remedy – Monetary loss – Award – But for employer's unfair labour practice, union would have been able to negotiate more money for regular employees – Board therefore concludes that regular employees suffered monetary loss as result of employer's failure to bargain collectively with union and orders employer to pay regular employees monetary loss.

Remedy – Monetary loss – Calculation – Board calculates monetary loss by taking total amount employer unilaterally paid to probationary employees and dividing pro rata among all employees based on paid hours from date of violation to date of Board's Order – Board orders employer to pay regular employees pro rata amount.

Remedy – Costs – Board declines to order payment of legal costs for bringing successful application – Because employer failed to file meaningful rectification plan and failed to provide rationale for proposals in rectification plan filed, Board orders employer to pay union for extra costs incurred to review and respond to rectification plan filed.

Remedy – Posting of notice – Members of bargaining unit entitled to explanation of what occurred as result of application – Board orders employer to mail copies of decisions and orders to each member of bargaining unit and to post decisions and orders in workplace.

***The Trade Union Act*, ss. 5(e) and 5(g).**

REASONS FOR DECISION

Background:

[1] The Applicant, Amalgamated Transit Union, Local 588 (the "Union"), is the certified bargaining agent for all of the paratransit bus and van operators employed by FirstBus Canada Limited in Regina (the "Employer"). The Union filed an unfair labour practice application on July 23, 2007 alleging that the Employer violated ss. 11(1)(a) and (c) of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*Act*"). The Employer filed a reply on August 8, 2007 denying the allegation. The matter was heard on October 15 and 16, 2007 and Reasons for Decision were rendered by the Board on November 6, 2007. In its Reasons for Decision dated November 6, 2007, the Board ruled that the Employer failed to meet its duty to bargain collectively with the Union by unilaterally increasing the wage rates for probationary employees, contrary to s. 11(1)(c) of the *Act*.

[2] In its Reasons for Decision dated November 6, 2007, the Board said that the Union was entitled to a remedy that would reverse the harm done to it and went on to quote from *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Loraas Disposal Services Ltd.*, [1998] Sask. L.R.B.R. 556, LRB File Nos. 208-97 to 227-97, 234-97 to 239-97, at 568:

> *The overriding goal of the Board in designing an appropriate remedy is to place the Union and its members in the position they would have been but for the Employer's breach of the Act. In so doing, the Board avoids punitive remedies and seeks to design remedies that support and foster the underlying purposes of the Act, which includes the encouragement of unionized workplaces and the encouragement of healthy collective bargaining.*

[3] The Board made its usual order pursuant to ss. 5(d) and (e)(i) but reserved jurisdiction to make orders under s. 5(e)(ii). The Board outlined its view of the harm done to the Union and the Board's difficulty with creating a remedy for the unfair labour practice, which difficulty mainly arose because this was a situation where the Employer failed to meet its mid-term duty to bargain in good faith rather than the usual situation where the failure to bargain collectively arises during negotiations for a first or subsequent collective agreement.

[4] The Board therefore ordered the Employer to present a rectification plan, together with its rationale for the plan, to the Board and the Union and encouraged the Employer to seek the Union's acceptance of the Employer's proposed rectification plan before it was filed. The Union was then to file its response to the rectification plan.

[5] The rectification plan filed by the Employer in its entirety says:

> *Pursuant to an order of the Labour Relations Board of Saskatchewan, the following outlines a rectification plan to resolve the matter of an unfair labour practice.*
>
> *We suggest 3 options for consideration by the union:*
>
> *1. Considering the Union has not demanded a reduction in the probationary rate as changed by the Employer, that the Employer carry on doing business as usual until the expiry of the collective agreement.*
>
> *2. The elimination of the probationary rate in its entirety, but retain the probationary period as outlined in the current collective agreement.*
>
> *3. The Amalgamated Transit Union, Local 588 and FirstBus Canada Limited commence negotiations in January, 2008 for renewal of the collective agreement between the parties.*
>
> *The current agreement would remain in full force and effect until it expires in June, 2008. In the event option number 3 is accepted, the Employer would be prepared to negotiate monetary increases for all employees effective April 1, 2008.*
>
> *FirstBus Canada requests that the Board direct the Union to co-operate with the Employer in meeting the service levels and requirements for the ParaTransit operations. Employees assigned work will be required to complete the assignment, unless relieved by dispatch at the end of their daily working hours.*

[6] There is nothing about this rectification plan that corrects, makes right or exchanges what was done wrong for what is right with respect to the harm done to the Union which is what is expected from a rectification plan. The Employer's first proposal is that it be allowed to continue with its unfair labour practice, now with the sanction of the Board. Its second proposal exacerbates its unfair labour practice further and equates to a request to the Board to permit the Employer to make an even greater increase to

probationary employees' wages without negotiation with the Union. The third proposal, to commence bargaining for the next collective agreement, is something that the Employer can do without a Board order as is the Employer's indication that it would "be prepared to negotiate…."

[7] In the last paragraph, the Employer manages to insult the Union and its members by implying that, without an order of the Board, the Union and its members will not co-operate with the Employer to give the service that the Employer and its employees have always given to the disabled clients of the paratransit system. The Employer then appears to ask the Board to order a further unilateral change to the collective agreement by forcing the employees to work extra hours. If the Employer does not have a provision in the collective agreement that "employees assigned work will be required to complete the assignment, unless relieved by dispatch at the end of their daily working hours," then this is also a matter that should be negotiated with the Union.

[8] Finally, nowhere in the rectification plan as filed is there any rationale given for any of the Employer's proposals, which was specifically ordered by the Board.

[9] In making its remedial order, the Board has considered the following principles that have been established with respect to remedial orders for unfair labour practices, specifically as they apply to s. 11 (1)(c), confirming the Employers duty to bargain collectively with the Union:

1. The overriding goal of the Board in designing an appropriate remedy is to place the Union and its members in the position they would have been in but for the Employer's breach of the *Act* (*Loraas Disposal Services Ltd.*, *supra*);
2. The remedy should support and foster the encouragement of unionized workplaces and the encouragement of healthy collective bargaining, which the Board has on numerous occasions found to be the underlying purpose of the *Act* (*Loraas Disposal Services Ltd.*, *supra*, for example);

3. The remedy should not be punitive in nature (*Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369 (S.C.C.));
4. The remedy should not infringe on the Canadian *Charter of Rights and Freedoms* and, specifically, should not require a party to make statements that it does not wish to make (*Royal Oak Mines Inc.*, *supra*);
5. There must be a rational connection between the breach, its consequences and the remedy (*Royal Oak Mines Inc.*, *supra*); and
6. The order must be within the Board's jurisdiction as defined by the *Act*.

[10] The Board was asked by both parties to retain the unilateral increase to the probationary employees' wage rates. In this particular case, the Board has determined that it would not encourage healthy collective bargaining if the Board permits the Employer to keep the change the Employer desires without having to negotiate (and make any compromise that those negotiations require) to obtain what it desires. If the new wage rate is retained the Union will also not be in the same position that it was to obtain any concessions in the upcoming round of negotiations in exchange for its agreement to a term that the Employer so strongly desires. The Board does not wish to inconvenience any probationary employee who has innocently made financial decisions based on the wage rate until now paid by the Employer. Therefore, the Board orders that, effective the date of the Board's Order accompanying these Reasons for Decision, the Employer will pay the collective agreement wage rates (subject to minimum wage regulations*)* unless an alternate agreement is made with the Union provided however that, if there is any probationary employee at the date of the Order who has not completed probation, that employee will be paid $11.00 per hour if a lift operator and $10.00 per hour if a van operator until that employee's probationary period has ended.

[11] The Union consistently throughout this matter took the position that, if there was extra money available for wages, the Employer should apply that money to the wage rates of the regular employees as well as to the wage rates of the probationary employees. The Board believes that the Union would have continued with this position if the Employer had fulfilled its duty to bargain the wage increase with the Union and would

not have agreed to a wage increase for the probationary employees unless the regular employees received some additional money. It was clear to the Board that the Union knew that any such amendment to the collective agreement would have to be ratified by the members of the bargaining unit and was very aware that ratification would only be possible if there was extra money also for the regular employees.

[12] The Board also believes that, if the Employer had negotiated with the Union as it was required to do, it would have been highly motivated for various reasons to obtain an higher wage rate for the probationary employees. It needed new operators and was not able to obtain them at the current starting wage rates. It wanted that starting wage increase so much that it was willing to commit an unfair labour practice to obtain it. It is therefore highly probable that, if bargaining in good faith had occurred, the Employer would ultimately have agreed to some additional money for the regular employees in order to obtain the wage rate it so badly wanted for probationary employees. If faced with a Union position that either everyone received extra money or no one received extra money, it is highly probable that the Employer would have chosen to give everyone extra money, in order to get its increase to the probationary rates. The fact that all three of the Employer's proposals in its rectification plan indicate that it is prepared to pay more money than it is obligated to pay by the collective agreement reinforces the probability that the Employer would have given additional money to the regular employees in order to obtain what it wanted with respect to the probationary wage rates.

[13] The Union asked the Board to award the regular employees a wage increase and presented two different suggestions as to how this could be calculated. The Board is not prepared to order another unilateral increase to the wages set out in the collective agreement or to otherwise interfere with the collective agreement. As we said previously, wage rates are at the core of a collective bargaining agreement as defined in s. 2(d) of the *Act* and are without a doubt a matter that must be negotiated with the exclusive bargaining representative. This applies to the Union as well. The Board would not be fostering healthy collective bargaining if it ordered an increase to the wages set out in the collective agreement for the regular employees instead of encouraging both parties to bargain this with each other.

[14] However, the Board does have the jurisdiction under s. 5 (g) of the *Act* to fix and determine the monetary loss suffered by the regular employees as a result of the Employer's violation of the *Act.* Because it is the Board's opinion that, but for the Employer's unfair labour practice, the Union would have been able to negotiate more money for the regular employees, the Board finds that the regular employees did suffer a monetary loss as a result of the failure of the Employer to bargain collectively with the Union when the Employer wished to raise the probationary employees' wage rates. In order to return the members of the Union to the position that they would have been in if the unfair labour practice had not occurred, it is necessary to compensate them for their monetary loss.

[15] At a minimum, the regular employees lost in income the extra money paid only to the probationary employees instead of shared with the regular employees after the Employer committed the unfair labour practice until the date of the Order accompanying these Reasons for Decision. That money wrongfully paid would have been part of the "pot of money" available for the employees either in this mid-term situation or in the next round of negotiations but for the Employer's breach of the *Act.* The Board calculates that 9 probationary employees were paid at least an excess of $2.09 per hour for the 520 hours of probation each of them served, for a total of $9,781.12. The Board orders the Employer to divide the amount of $9,781.12 among all of its probationary and regular employees on a pro rata basis based on their paid hours from June 22, 2007 to the date of the Order accompanying these Reasons for Decision. The Board orders the Employer to forthwith pay this additional money to the regular employees; the probationary employees have already received extra money and have therefore not suffered any monetary loss. The Board further orders the Employer to provide the Union with written confirmation of the number of paid hours during the period described above for each employee so that the Union can confirm that the correct amounts have been paid to each regular employee.

[16] This remedy also helps to repair the harm done to the Union by the Employer's unfair labour practice. As the Board stated previously, part of the harm done by the Employer's actions was the erosion of the members' faith in the Union to be able to enforce their rights against the Employer. If the Board had ordered any one of the Employer's rectification plan proposals, the members' faith would have been further

eroded because the Employer would have, in fact, been able to do whatever it wanted regardless of the Union's wishes or the terms of the collective agreement. With this remedial order the members will hopefully observe that the Union acted as a conscientious and strong bargaining agent in bringing this application and the Union will be restored in the eyes of its members.

[17] The Union requested that the Board order the Employer to pay the Union's legal costs for bringing the application. This is not the Board's usual practice and the Board is not prepared to make an exception to its usual practice in this case. However, the Employer did not follow the Board's order to file a rectification plan, i.e. a plan that corrects, makes right or exchanges what was done wrong for what is right with respect to the harm done to the Union. Further, although it was ordered to do so, the Employer did not provide any rationale for any of its proposals in the rectification plan filed. Therefore, the Union should not be held responsible for the extra costs it incurred to review the Employer's rectification plan and file its response with the Board and the Employer. The Employer is ordered to pay the Union for those costs that the Union incurred which may include, but are not limited to, legal fees and wage replacement costs for union officials.

[18] The Board further notes that the Employer has not offered any kind of apology to its employees for the lack of respect shown for their rights and for the lack of respect shown to the Union that they have chosen as their exclusive bargaining agent. The Board cannot order the Employer to say anything that it does not wish to say. However, each member is entitled to an explanation of what has occurred with respect to this application and the Union should not have to bear the cost of the explanation. The Employer is ordered to mail a copy of these Reasons for Decision, the Reasons for Decision dated November 6, 2007, the Order dated November 6, 2007 and the Order accompanying these Reasons for Decision to each member of the bargaining unit. The Employer is also ordered to post all four documents in a place in the workplace which is accessible to all employees in the bargaining unit.

[19] The Board reserves jurisdiction to adjudicate any issues arising out of the calculation and implementation of the Order accompanying these Reasons for Decision.

DATED at Saskatoon, Saskatchewan, this **11th** day of **December, 2007.**

LABOUR RELATIONS BOARD

Catherine Zuck, Q.C.,
Vice-Chairperson