The Labour Relations Board
Saskatchewan

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

LRB File No. 082-07; November 6, 2007
Vice-Chairperson, Catherine Zuck, Q.C. Members: Ken Ahl and Bruce McDonald

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

Duty to bargain in good faith – Unilateral change – Wage rates at core of collective agreement and must be negotiated with employees' exclusive bargaining representative - Employer unilaterally implemented change in probationary wage rate without bargaining collectively with union – Board finds violation of s. 11(1)(c) of *The Trade Union Act*.

Duty to bargain in good faith- Remedy – Rectification plan – All proposed remedies present practical difficulties and may not address needs of parties or fully remedy breach of *The Trade Union Act* – Board gives employer opportunity to present rectification plan and union opportunity to review and respond to plan before issuing remedial order.

***The Trade Union Act*, ss. 5.1 and 11(1)(c).**

REASONS FOR DECISION

Background:

[1] 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 (the "Employer") in Regina. 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.

Decision:

[2] It is the Board's decision that the Employer failed to meet its duty to bargain collectively with the Union with respect to the matter of increasing the wage rates for probationary employees. However, the Union did not prove that the Employer in any manner, including by communication, interfered with, restrained, intimidated, threatened or coerced any employee in the exercise of any right conferred by the *Act.*

Facts:

[3] The Employer provides transportation services for disabled people in Regina. It negotiates a contract with the city of Regina, whereby the city of Regina provides it with a lump sum payment for this service. The contract also stipulates that the Employer is fined $25.00 for every ten minutes that service is not provided. The Employer has the discretion to decide how to apply the lump sum payment to its Regina operation but the amount must cover all of its Regina expenses and profit; each contract that the Employer has for transportation services must be self-sufficient. The Employer employs approximately 44 employees to drive its vehicles and escort the passengers. The employees choose the schedules and routes that they wish to drive and casuals are then called in to fill any unclaimed routes or schedules.

[4] The parties negotiated a collective bargaining agreement with a term from July 1, 2005 to June 30, 2008. Both parties agreed that it was a difficult round of bargaining. A conciliator was called in. The Union served strike notice on the Employer on September 13, 2005 and an agreement was reached between the parties shortly thereafter.

[5] The Employer dealt with monetary issues at bargaining by telling the Union that it had a lump sum for this purpose and the Union could decide if it wanted the money applied to the benefits being requested or to wage increases. The Employer's lump sum approach was based on the way that it was paid under its contract with the city of Regina. The Union chose to apply the money to the wage rates.

[6] The collective bargaining agreement covers the driver operators of disabled persons' vans and buses with lifts for wheelchairs ("van operators" and "lift

operators"). It also applies to probationary employees in both categories. The terms of employment of the probationary employees were an issue during bargaining. The Union thought that the wage rates were too low but the Employer did not want to increase them. The compromise reached was a reduction to the probationary period from one year to six months and provision of the same 4% - 4% - 3% wage increase that the other employees received. This meant that the hourly wage rates in the collective agreement were as follows:

SCHEDULE "A" – WAGES

(Effective July 1, 2005)

	July 1, 2005	***July 1, 2006***	***July 1, 2007***
	(4%)	***(4%)***	***(3%)***
Lift Operators	***$14.15***	***$14.72***	***$15.16***
Probationary Rate	***$ 8.32***	***$ 8.65***	***$ 8.91***
Van Operators	***$11.49***	***$11.95***	***$12.31***
Probationary Rate	***$ 7.28***	***$ 7.57***	***$ 7.80***

[7] As the collective bargaining agreement was being signed by the parties, the minimum wage rates established under *The Labour Standards Act*, R.S.S. 1978, c. L-1 were set for the period from September 1, 2005 to March 1, 2007. The effect was that, starting on March 1, 2007, the rate agreed upon for the probationary van operators was lower than the minimum wage of $7.95 per hour. Both parties accepted that the probationary van operators would be paid $7.95 per hour rather than the bargained $7.57 per hour (and later $7.80 per hour) commencing March 1, 2007. Neither party felt that this required any discussions or formal amendment to the collective bargaining agreement.

[8] In the spring of 2007, the Employer decided that, rather than simply meeting the minimum wage rate, it would increase the rates of both the probationary van operators and probationary lift operators. The problem as the Employer perceived it was that it was having trouble recruiting new drivers at the wage rates it had agreed to in the collective agreement. The Employer felt that it needed some additional lift operators; it had a sufficient complement of van operators. It had experienced some difficulties with replacing unavailable operators and, if drivers could not be replaced, there was a possibility of inconvenience to its disabled clients or even a lack of service. Generally, the operators co-operated when they were asked to do replacement work but there had been

some occasions when the out-of-scope supervisor, Darren Breitkreuz, had to drive because he could not find a replacement operator. On one occasion when Mr. Breitkreuz was also unavailable a run had to be cancelled. The Employer was concerned both about its level of service to its clients and monetary fines that were imposed by the city of Regina if the Employer failed to meet its service obligations. The Employer expressed concern that it did not want its operators burned out by the added workload. It was also not in a position to take on extra work that arose from time to time, i.e. football game charters, because it did not have enough operators.

[9] On a couple of occasions, when Mr. Breitkreuz was meeting with the president of the Union, Mike Ehmann, on other issues, Mr. Breitkreuz mentioned in passing that he was having trouble recruiting and retaining new drivers and that he and the Union should discuss this sometime. Mr. Breitkreuz actually never had a discussion with anyone from the Union about the issue of recruitment and retention.

[10] In March 2007 senior management of the Employer decided that the solution for the problems in recruiting and retaining new operators was to increase the probationary wage rate, starting April 1, 2007, to $10.00 per hour for van operators and $11.00 per hour for lift operators for the rest of the term of the collective agreement. This decision was made by Deanna Ladouceur, director, human resources and labour relations, Greg Logel, contract manager for Regina and southern Saskatchewan and the CEO of the Employer. One reason for the decision was that Mr. Logel, who took over administration of the Regina contract In January 2007, thought that the gap between the bargained probationary wage rates and the normal operator wage rate was too large. There also was not a big enough gap between the minimum wage rate and the probationary wage rates. Mr. Logel said that, for him, overtime was not an issue except as it impacted on the wellness of the operators. He felt that the Employer was asking the existing operators to go above and beyond their normal duties by asking them to work more shifts and be more flexible. The Employer's overall concern was to provide the service that its customers needed.

[11] In April 2007 Mr. Ehmann received a phone call from Ms. Ladouceur. Ms. Ladouceur told Mr. Ehmann that the Employer was having trouble attracting new drivers, existing drivers were not getting enough time off and the Employer therefore wanted to

raise the probationary wage rates to $10.00/$11.00 per hour. Mr. Ehmann suggested that the top rate be only $10.50 per hour. He also told Ms. Ladouceur that this change would have to go to the executive of the Union and then to the Union's members for ratification at their regular monthly meeting.

[12] Ms. Ladouceur followed up on April 11, 2007 with an e-mail to Mr. Ehmann that attached a letter of understanding for execution by the Union. The executive of the Union considered the letter of understanding at its next meeting, which was in May 2007, and decided that they would recommend acceptance of the letter of understanding to the Union's members.

[13] The notice for the Union's May monthly membership meeting included the item "vote for wage increases for new operators." There were two meetings held on May 29, 2007 to accommodate the shifts that the operators worked. A total of 21 members attended the meetings. At both meetings, the Union's executive indicated that they had received the offer from the Employer to raise the probationary rates to $10.00 for van operators and $11.00 for lift operators, retroactive to April 1, 2007, and these rates would remain in effect for the rest of the term of the collective agreement. The executive told the members, both verbally and in writing, that they were recommending acceptance. Some members said that the existing operators had "been working their tails off" for the Employer and were not getting any recognition for this. They were coming to work sick, because they had no paid sick leave. Instead, the Employer was giving more money to new hires. There was only one probationary lift operator in the bargaining unit at this time, Harvey Stevenson. His sense of the meeting was that, if a raise had been offered to everyone, the membership would have ratified the new probationary rates. The ratification vote was held by secret ballot and there were 7 votes in favour of the increase and 14 votes against it.

[14] As soon as the last meeting ended, Mr. Ehmann e-mailed Ms. Ladouceur "We have just finished our general meeting, the members have voted to reject FirstBuses Letter of Understanding."

[15] The next day, Ms. Ladouceur e-mailed Mr. Ehmann back:

I find it very interesting Mike that the union would reject an employee's ability and a union member's ability to receive more wages. It really flies in the face of what union's say they do in terms of improving working conditions for its unionized employees. And further, you, yourself suggested a rate of $10.50 vs $11.00. If the ATU philosophy is to improve conditions for workers, how then is it that it rejects an improvement to wages? I am curious as to the true, underlying reasons for this rejection. There must be an ulterior motive here. Care to share?

[16] Mr. Ehmann e-mailed in response:

I sure can share, we the Executive of A.T.U. Local 588 made the recommendation to accept your Letter Of Understanding. It was my members that are sick and tired of the way FirstBus has treated them for all the years that turned down your offer to help the new person out. Your improvement of wages are a joke. Why wouldn't you look at the top first? These people have been busting their tails, coming to work sick and you won't help them. Shame on FirstBus, you only look after yourselves first.

You say that this would improve the working conditions, I don't believe so. Who wants to come work for a company that is offering $8.00 or even $11.00 if it were accepted to work with no benefits. What do you think the underlying reasons are? Could you please share this with us. Maybe you should open the monetary section of the agreement and let's start at the top.

[17] Ms. Ladouceur replied:

The rates were negotiated and at a rate of 4%, 4% and 3% in the respective years of the contract, it is considerably higher than the cost of living increase in Saskatchewan. The union members ratified the agreement which means they accepted the terms as is. The current rates in the agreement for probationary employees stands at less than minimum wage. Do you really think it is fair to have such a broad gap between the probationary rate and the regular rate? Do you believe that minimum wage is a fair wage? It appears you do and I am appalled. We will not be opening the agreement until it is ready to exprire. You ask a valid question, Who wants to come to work for a company offering $8.00 per hour? Yet, the union is the agency holding them back.

[18] Mr. Ehmann e-mailed back:

> *You were told almost three years ago that the probationary rates were to low, why didn't you look after it when this Union first told you? By Labour Standards you will have bring your rate up to minimum wage. A.T.U. believes that minimum wage is not fair, but our members have spoken.*

[19] The final e-mail was from Ms. Ladouceur:

> *As I recall, it was the employer's proposal to increase and deal with the probationary period, and the training rates. The union was not receptive.*

[20] Mr. Ehman assumed that, as the increase had not been ratified by the Union's members, this was the end of the matter. He interpreted Ms. Ladouceur's e-mail to say that there was not going to be a change in any wage rate from that in the collective agreement.

[21] Mr. Breitkreuz told Mr. Stevenson (the only probationary employee) sometime after the May 29, 2007 meeting that his wage rate would be going up to $11.00 per hour and it did, effective June 22, 2007. No one from the Union was ever told about this increase by the Employer but the Union's vice president for paratransit, Brenda Shalanski, did find out about it. She had a disagreement with Mr. Stevenson about it and the filing of a grievance was mentioned. She also told Mr. Ehmann, who went to the Union's counsel and this application was filed.

[22] John McCormick, former president of the Union, Mr. Ehmann and Greg Yablonsky, secretary-treasurer for the Union, all explained the Union's position for the Board. The Union was in favour of higher wages for the probationary employees and had tried to obtain them at bargaining. During bargaining the Employer was satisfied with the gap between probationary and regular wages and knew that the probationary wages were going to be below minimum wage. Mr. McCormick, Mr. Ehmann and Mr. Yablonsky do not work for the Employer and were not in a position to explain why the Union's members did not ratify the offered wage increase. However, the Union's members have the power to accept or reject an offer from the Employer during the term of the collective agreement and the members made their choice to reject clear to the Employer.

[23] Mr. McCormick, Mr. Ehmann and Mr. Yablonsky thought that it was wrong for the Employer to ignore the Union and its members and to unilaterally impose wage rates instead of negotiating in good faith with the Union. They felt that, after the Union's members did not ratify the offered wage increase, the Employer should have agreed to the Union's proposal to negotiate a change to all of the wage rates, including the probationary rates, looking first at the rates of those employees who had been there the longest and working their way down.

[24] Mr. McCormick, Mr. Ehmann and Mr. Yablonsky said that the impact of the Employer's unilateral action is that the Union has been undermined in the eyes of its members. The Union's members observe that the Employer is doing whatever it wants in the face of the Union's objections and think that the Union is powerless to stop the Employer. The members are unhappy that they were not offered a raise and feel that they were not appreciated or treated fairly by the Employer. Mr. McCormick, Mr. Ehmann and Mr. Yablonsky opined that this was going to make bargaining difficult down the road. The Union's members realize that the Employer bargains with "one pot of money" and know that more given to some means less for others. This makes it discriminatory to give the money to some and not to others. It is divisive to the bargaining unit to offer a benefit to a few; there would be no division if the collective agreement was simply followed as bargained.

[25] Mr. Stevenson agreed that he sees the unilateral change by the Employer as undermining the Union's authority and, although he liked the increase, thought that the members' decision should have been respected by the Employer.

[26] The Employer explained its side of the story to the Board through the testimony of Mr. Breitkreuz and Mr. Logel. The Employer could not understand why the membership of the Union turned down an increase to the lowest rates. They speculated that maybe the members did not want more drivers because they would miss out on the extra hours of work but there was no evidence presented to support this. Mr. Logel still saw the major problem as being the large gap between probationary and regular wages. He did not see a problem in giving a raise to new hires but not the existing workforce.

[27] The Employer never advised anyone other than Mr. Stevenson that it was implementing the higher rates because no one other than him was affected. There was no explanation for why the Employer did not pay Mr. Stevenson the increased wage rate retroactive to April 1, 2007, which was what it had proposed.

[28] The Employer said that it did not implement the increased wage rate unilaterally with the intention of undermining the Union nor did it think that its decision was arbitrary, discriminatory or made with malice. It felt it could implement the increase because of the service expectations of the disabled community. Its only excuse for going ahead with the rate increase, despite the lack of ratification by the Union's membership and the lack of negotiation with the Union, was that it was in a hurry to recruit more operators. The Employer felt that it was not getting any co-operation from the Union. It felt that it had met its duty to bargain with the Union by giving it the proposal in the first place. Mr. Logel agreed that an exchange of e-mails was not his understanding of how negotiations should be conducted.

[29] The rate increase was effective in attracting approximately 9 new hires as probationary lift operators and the Employer felt that there was an improvement in the service that it was offering. Four of the new hires started in July 2007 and the rest were hired later. The only impact the Employer saw if it had to go back to the rates as bargained in the collective agreement would be that the existing operators would have to work extra hours.

Relevant statutory provisions:

[30] Relevant provisions of the *Act* include:

> *2 In this Act:*
>
> *(b) "bargaining collectively" means negotiating in good faith with a view to the conclusion of a collective bargaining agreement, or a renewal or revision of a bargaining agreement, the embodiment in writing or writings of the terms of agreement arrived at in negotiations or required to be inserted in a collective bargaining agreement by this Act, the execution by or on behalf of the parties of such agreement, and the negotiating from time to time for the settlement of disputes and grievances of employees*

covered by the agreement or represented by a trade union representing the majority of employees in an appropriate unit;

. . .

(d) "collective bargaining agreement" means an agreement in writing or writings between an employer and a trade union setting forth the terms and conditions of employment or containing provisions in regard to rates of pay, hours of work or other working conditions of employees;

. . .

3. Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively.

. . .

5. The board may make orders:

(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;

5.1 In making an order pursuant to subclause 5(e)(ii), the board may consider a plan, submitted by a person found to have violated the Act, the regulations or a decision of the board, for rectifying the violation.

. . .

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;*
>
> *. . .*
>
> *42. The board shall exercise such powers and perform such duties as are conferred or imposed on it by this Act, or as may be incidental to the attainment of the objects of this Act including, without limiting the generality of the foregoing, the making of orders requiring compliance with the provisions of this Act, with any regulations made under this Act or with any decision in respect of any matter before the board.*

Union's arguments:

[31] The Union reviewed the above facts from its perspective. After the Union membership rejected the Employer's offered wage rates, there was no evidence that the Union was uncooperative; rather, what was required was further discussion and negotiation between the Employer and Union. The unilateral increase in wage rates, after the Employer was informed that the Union membership did not ratify a change to the collective agreement, was a failure to bargain in good faith in violation of s. 11 (1) (c) of the *Act*. Implementing the increase and communicating its implementation directly with an employee, the comments by Ms. Ladouceur questioning the Union's motives and the pitting of one group of employees against another was a violation of s. 11 (1) (a) of the *Act*.

[32] Counsel for the Union argued that the Board need not find anti-union animus in order to find the Employer guilty of an unfair labour practice. In this case, the Employer's unilateral change to the wage rates led to an undercutting of the Union and showed that the Employer lacked respect for the Union as the employees' bargaining agent. In effect, the Employer was making it clear that it would do what it wanted,

irrespective of its collective bargaining agreement obligations or the role of the Union as bargaining agent.

[33] The Union was now placed in an untenable position. It was entitled to be returned to the position that it would have been in had this unilateral action not been taken. However, this would mean that the probationary rates would return to those in the collective agreement (as amended by the minimum wage regulations). This would upset the new members and make the Union appear as the "bad guy." On the other hand, if the probationary rates remained at $10.00/$11.00 per hour, then the Employer would be able to benefit from its unlawful act and there would be no motivation for it to negotiate or compromise on the issue.

[34] The Union argued that this case is different than most that the Board deals with because it is concerned with the duty to bargain mid-term amendments to an existing collective agreement. Simply ordering the Employer to cease and desist its violation of the *Act* and resume bargaining in good faith is not sufficient because neither party can strike or lockout if necessary to get an agreement during the term of a collective agreement.

[35] The Union also argued that the unilateral act of the Employer would have a significant impact on the next round of bargaining if there is no remedy granted by the Board. The Employer wanted to attract new drivers and, because of its unilateral illegal action, the Union cannot use this desire as a bargaining chip against the Employer. Also, the increased probationary wage costs will make any raises for the other employees harder to achieve.

[36] The Union argued that the Board has broad remedial powers under the *Act* which should be used to foster the ability of the Union to fulfill its obligations as bargaining agent to its members in a manner that promotes a relationship of trust and respect between the Employer and Union. More is needed than simply an order that the Employer should refrain from future breaches of the *Act.* The Union asked the Board to consider the following with respect to remedy:

1. *Restoring the previous wage rates will not assist the Union. The damage has been done and the Union is not asking for an order that re-establishes the old wage rates.*

2. *It would be more fair to the new hires if all of them received the higher rate. Therefore, the higher probationary wage rate should be made retroactive to July 1, 2005, which is the beginning of the term of the current collective agreement, and paid to everyone hired since that date. In the alternative, the higher wage rate should be retroactive to April 1, 2007 which is what the Employer said it was going to do in its proposed letter of understanding.*

3. *The regular wage rates should also be adjusted, because it is likely that the Union would have achieved this if the Employer had bargained the probationary wage increase. The probationary employees got a $2.00 per hour raise, so all the wage rates should be increased by $2.00 an hour.*

4. *A raise to all rates is justified because the new hires have led to a reduction in overtime. If the Board does not order an increase of all wage rates by $2.00 an hour, it should order that the money saved by less overtime should be applied to the regular wage rates.*

5. *The Employer should be ordered to refrain from further violations of the Act and the Board's order should be posted until the next round of bargaining commences.*

6. *The Employer's actions have forced the Union to incur legal fees to correct the situation. Therefore, the Employer should pay for the Union's legal costs.*

7. *In the alternative, the Union would be willing to consider and review a rectification plan if the Employer was prepared to address each of the above remedial issues.*

[37] The Union asked the Board to consider *Canadian Union of Public Employees, Local 2569 v. Santa Maria Senior Citizens Home Inc.*, [1994] 4th Quarter Sask. Labour Rep. 134, LRB File No. 192-94, *International Brotherhood of Electrical*

Workers, Local 2067 v. Saskatchewan Power Corporation, [2000] Sask. L.R.B.R. 314, LRB File No. 207-98, *Lasko v. International Union of Painters and Allied Trades, Local 739 and L.C.M. Sandblasting and Painting Ltd.*, [2003] Sask. L.R.B.R. 82, LRB File No. 234-02, *Energy and Chemical Workers Union, Local 649 v. Saskatchewan Power Corporation*, [1988] Winter Sask. Labour Rep. 64, LRB File No. 022-88, *Canadian Union of Public Employees, Local 3078 v. Board of Education of the Wadena School Division No. 46 of Saskatchewan*, [2004] Sask. L.R.B.R. 199, LRB File No. 188-03, *Prince Albert Police Association v. Prince Albert Board of Police Commissioners*, [1998] Sask. L.R.B.R. 296, LRB File No. 005-97, *The Newspaper Guild of Canada/Communications Workers of America v. Sterling Newspapers Group*, [2000] Sask. L.R.B.R. 558, LRB File Nos. 272-98 & 003-00, and *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.

Employer's arguments:

[38] The Employer admitted that the Union's relationship with its predecessor, Wayne Bus Limited, was difficult but said that, despite that, the parties were able to reach a collective agreement in 2005. The issue before the Board is not past bargaining history but only the increase to the probationary rates in 2007. The Employer took the position that neither party foresaw the increase to the minimum wage and the Employer thought that, as it had to raise the probationary rates anyway, it would be a good idea to increase them to a competitive level. The Employer argued that the increase did result in more drivers being hired so it was the correct decision. The Employer acted out of desperation and may have done the wrong thing but it did it for the right reasons.

[39] The Employer argued that its only intent was to improve service to its disabled customers. The Employer has been in an untenable position because, if it is short of drivers, it must have its out-of-scope supervisor perform bargaining unit work.

[40] The Employer argued that, while it is being accused of singling out a special group for benefits, it is the Union which is discriminating against young employees. The Union wanted an increase in probationary rates during bargaining and it should not change its position now. The older members of the Union should not have made a selfish

decision to turn down an increased probationary wage rate. The Union's members are not thinking about the disabled.

[41] The Employer took the position that the existing drivers were not negatively impacted by the Employer's action. There was no harm to anyone in what the Employer did. There was only an impact on one probationary driver.

[42] The Employer indicated that it cannot afford a raise for everyone because the city of Regina gave it a fixed amount of funds for this contract and that amount did not take into account higher wage rates. If there are no more drivers, there will be fines that the Employer has to pay and, therefore, no money for raises for anyone. If there is a raise for everyone, the Employer will have to lay off staff. This will lead to a cut back in services and, ultimately, it will be the disabled who suffer. The Employer also said that it does not have the money for a retroactive wage increase for more probationary employees, although it may be able to consider retroactivity to April 1, 2007. The Employer is paying money to recruit drivers so that it does not have overtime which tires the existing drivers. The Employer has needed to spend less money on recruiting with the higher wage rates.

[43] The Employer noted that the Union did not contact the Employer to bargain the matter further or discuss the increase in the wage rate after it found out about it.

[44] The Employer opined that a rectification plan would not be accepted by the Union if it had anything less than an increase in wages for all, so there was no point in the Board ordering the Employer to present a rectification plan.

[45] The Employer took the position that it should not have to pay the Union's legal costs because that is why the Union collects dues. Hiring a lawyer was the Union's choice.

[46] The Employer argued that the Union's position that the Employer's actions would cause future bargaining problems is speculative and false.

[47] The Employer said that it is not discouraging union activity and is not preventing membership in the Union. The Employer did not hide anything because it paid dues to the Union on the increased wage amount.

[48] The Employer asked the Board to apply a common sense approach to the matter.

Union's rebuttal:

[49] Counsel for the Union argued that there was no evidence that the members of the Union only cared about non-probationary employees. In response to the Employer's argument that there was no harm to the regular employees, the Union pointed out that the hiring of more operators resulted in less work hours for the regular employees and said that, if there was no impact on van operators at all, the Employer should not have unilaterally changed the van operators' rate.

[50] The Union conceded that it is important for the Employer to attract new employees but argued that the Employer did not raise this at bargaining or propose a large increase in the probationary wage rates at that time. The Union argued that it was not an option for the Employer to make a unilateral wage increase when it discovered its mistake in keeping the wages low. The Employer's option was to negotiate with the Union and, if there was no mid-term agreement, its option was to raise the matter in the next round of bargaining.

Analysis:

[51] The first issue for the Board to consider is whether or not the Employer's implementation of a wage increase in these circumstances constitutes a failure or a refusal to bargain collectively with the Union.

[52] Section 3 of the *Act* describes the role of a trade union as follows:

> *...[T]he trade union designated or selected for the purpose of bargaining collectively by the majority of employees in a unit appropriate for that purpose shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively.*

[53] The certification Order issued by the Board for this bargaining unit provides that the Union is the exclusive bargaining agent for the employees.

[54] The Board has clearly set out what the obligation to bargain in good faith means for an employer. In *Canadian Union of Public Employees v. Saskatchewan Association of Health Organizations*, [2002] Sask. L.R.B.R. 624, LRB File No. 057-02, another case where an employer unilaterally implemented a scheme aimed at recruitment and retention of employees, the Board said at 632:

> *[31] This Board and other labour relations boards and courts have interpreted the duty to bargain in good faith as imposing two key obligations on an employer: (1) an obligation to recognize the union as the exclusive representative of the employees in the bargaining unit for the purpose of "bargaining collectively;" and (2) an obligation to make every reasonable effort to conclude a collective agreement. . .*
>
> [citations omitted]

[55] The Board, in the *Saskatchewan Association of Health Organizations* case, *supra*, reviewed numerous Supreme Court of Canada and Board decisions reinforcing the obligation on an employer to recognize the exclusivity principle with respect to a union. Saskatchewan Association of Health Organizations was found guilty of an unfair labour practice because it implemented a scheme to give wages higher than provided for in the collective agreement without negotiating the higher wages with the union.

[56] Both parties are bound by the terms of a collective bargaining agreement unless there is a mutual agreement to amend its terms. Wage rates are at the core of a collective bargaining agreement and are, without a doubt, something that must be negotiated with the employees' exclusive bargaining representative.

[57] "Bargaining collectively" is defined in s. 2(b) of the *Act* as "negotiating in good faith with a view to the…revision of a bargaining agreement." Therefore, it is clear that the Employer is under an obligation to make every reasonable effort to conclude a

revision to a collective agreement as well to conclude a collective agreement in the first place.

[58] The Board has commented on the meaning of negotiating in good faith and on behaviour that falls short of negotiating in good faith on several occasions. In *Santa Maria Senior Citizens Home, supra,* the Board said at 145:

> *In Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. O.K. Economy Stores (A Division of Westfair Foods Limited), LRB File No. 039-94, the Board made the following comment:*
>
> > *Though the Board has stated on many occasions that it does not attempt to regulate the bargaining process as such in any direct or detailed way, leaving it up to the parties to devise a process which will achieve the objective of reaching agreement by whatever combination of discussion, persuasion, trading off and economic pressure proves effective, it is our conclusion that the decision of the Employer to proceed to unilateral implementation without communicating to the Union a clear choice or clear consequences, and without giving them any actual opportunity to consider the choice and respond, did not constitute bargaining in good faith.*
>
> *Though, as we have stated before, rational discussion is not the only component of collective bargaining, the opportunity for rational discussion is essential to the health of the process. Whatever else goes on in the course of bargaining, each party must have an opportunity to disclose and explain their positions, gain an understanding of the position of the other party, and respond in a complete and rational way.*

[59] In a case such as this, where the Employer is purporting to give some employees a better benefit than contained in the collective agreement, the Employer is still under an obligation to negotiate the increase with the Union. A similar situation occurred in *Lasko, supra* and the Board ruled, at 96 through 98, as follows:

> *[60] The Board has come to a similar conclusion in past decisions. In I.W.A., Local 1-184 v.Moose Sash and Door Co. (1963) Limited [1980] May Sask. Labour Rep. 69, LRB File No. 312-79, the Board found the Employer guilty of an unfair labour practice by paying employees wages in excess of those contained in the collective agreement between the Union and the Employer. At 70, the Board found as follows:*

> *As stated previously, the employer, by telling each employee who gave evidence that he would be paid a wage rate in excess of that called for under the collective agreement and by in fact paying that pay rate is dealing with the employee when the certification order of the Board makes the union the exclusive representative of the employees with respect to wages and working conditions. This constitutes a refusal to bargain collectively with the union, an unfair labour practice under Section 11(1)© of The Trade Union Act. The Board finds support for its decision in Regina v. Davidson Rubber Co. Inc., 69 C.L.L.C., Case No. 14190 and Le Syndicat Catholique des Employes de Magasins de Quebec,Inc v. La Dompagnie Paquet Ltee, 59 C.L.L.C., Case No. 15409. In the latter case the Supreme Court held that freedom of individual contract was abrogated when a union is certified and that there is no room left for private negotiation between employer and employee.*
>
> . . .
>
> *[64] In the present case, the Employer's conduct in dealing directly with employees and offering wage increases that did not conform to the terms of the collective agreement is rendered more egregious by the tough bargaining stance it took in negotiations for a first collective agreement with the Union. We conclude from the Employer's conduct that it negotiated rates with the Union that are not viable for its business in the sense that the rates are too low to attract and retain employees. If the Employer found itself in the position where the rates were too low to meet its purposes, it was obligated to negotiate different rates of pay with the Union and not to solve the problem by negotiating different rates of pay directly with employees. All of this conduct undermines the role of the Union as the exclusive bargaining agent for employees and renders the Union an impotent advocate of employees.*

[60] In the case before us, the Employer similarly took a hard position against any improvements in the working conditions of the probationary employees. The Union was able to negotiate a shortened probationary period but could not achieve any significant increase in the starting wage rate over and above the increase all employees received. The Employer now finds itself in a position where it cannot recruit and retain new employees with the wage rate it insisted on at bargaining. It is also now uncomfortable with the gap between the probationary wage and the regular wage – it apparently did not feel this discomfort at bargaining.

[61] The Employer is obligated, by the certification Order of the Board designating the Union as the exclusive bargaining agent for the Employer's employees and by s. 11(1)(c) of the *Act*, to contact the Union and negotiate in good faith any changes that the Employer would like to make to the collective agreement to deal with the wage rate that it insisted on at bargaining in 2005.

[62] Instead of meeting this requirement, the Employer told the Union what it wanted to do about raising the probationary rates both by telephone and by e-mailing a letter of understanding. When the Employer was advised that the Union's members did not accept the Employer's proposal as contained in the letter of understanding, the Employer implemented the wage increase unilaterally. It did not advise the Union that it was doing this. Instead, it told one of the Union's members that his wages would be increasing.

[63] The Board does not consider any of the interaction that occurred between the Employer and the Union sufficient to satisfy the obligation on the Employer to negotiate in good faith with a view to concluding a revision to the collective agreement. What was lacking was a rational, respectful and full disclosure of the Employer's concerns and its proposals for alleviating those concerns. There then needed to be an opportunity for the Union to examine the Employer's position and formulate a position of its own in response. The Union should have had an opportunity to explain its point of view and respond to the Employer's proposal. At a minimum, both sides should have been in a position where each knew the other party's views, had an opportunity to disclose their own views and to exchange rational responses. Nothing remotely resembling this occurred. The Employer simply put into place a new wage rate and told the employee affected that this had been done.

[64] As stated in *Santa Maria Senior Citizens Home Inc., supra*, it is not a requirement for the Board to find that the Employer was motivated by an anti-union intention in order to find a violation of s. 11(1)(c). The Board accepts the Employer's claim that it did "the wrong thing for the right reasons." However, the Employer did do the wrong thing.

[65] The Board therefore finds the Employer guilty of an unfair labour practice under s. 11(1)(c), because it implemented the change in the probationary wage rates without bargaining collectively with the Union.

[66] The second issue for the Board to determine is whether or not the Employer in any manner interfered with, restrained, intimidated, threatened or coerced any employee in the exercise of any right conferred by the *Act.*

[67] The Union argued that the Employer's communication with Mr. Stevenson (rather that with the Union) about his new wage rate, the comments by Ms. Ladouceur questioning the Union's motives and the pitting of one group of employees against another supported a finding of a violation of s. 11(1)(a) of the *Act*. The Board does not regard these incidents to be sufficient to warrant such a finding. The Employer's communication with Mr. Stevenson about the increase to his wages had no effect on Mr. Stevenson's ability to exercise any right conferred by the *Act.* Nor did the fact that Mr. Stevenson was alone in receiving a wage increase as the only probationary employee at the time prevent him from exercising any of his rights under the *Act*. Ms. Ladouceur's comments were only made to Mr. Ehmann and had no effect on the exercise of his, or the Union's members' rights, under the *Act.*

[68] The Board believes that the unilateral implementation of a new wage rate and the failure to even inform the Union, much less negotiate with it, undermines the Union in its role as the employees' exclusive bargaining agent. It threatens the members' faith in the Union to negotiate their terms and conditions of employment and to enforce those terms and conditions against the Employer. It sends the message to both the Union and its members that the Employer will do whatever it wants, regardless of what the Union says or wants and regardless of the collective bargaining agreement that the parties entered into. It shows that the Employer does not respect the rights of its employees to engage in collective bargaining through their exclusive bargaining agent. It also shows that the Employer does not respect the Union as the exclusive bargaining agent.

[69] The Union is entitled to a remedy from the Board that will reverse the harm done to it. As the Board said in *Loraas Disposal Services Ltd.*, *supra*, 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.*

[70] The fact that this was a mid-term revision to an existing collective agreement rather than a situation arising during the bargaining of a renewal of the collective agreement, makes it difficult to undo the harm done to the Union by simply putting the Union and its members in the position they would have been in but for the Employer's breach. This is made more difficult by the fact that the wrongfully implemented wage rate is only for the probationary period, which is quickly reaching an end.

[71] It is the Board's opinion that much of the harm done to the Union can be remedied by giving the Union an opportunity to negotiate the matter of recruiting new operators and retaining them with the Employer which would have happened if the Employer had obeyed the *Act*. However, this will not completely address the harm done, because the Union would not have the same bargaining strength that it would have had in the spring of 2007, in that the Employer has achieved what it set out to do. The Employer has recruited eight new operators and there is no longer the urgency that it originally felt to hire more operators.

[72] If the Board reverses the wage increase very soon, the Employer will have the same reasons it initially had when it made its unilateral increase to negotiate a similar increase with the Union. The Employer has incurred costs in training employees who may not wish to remain with the Employer if the wage rates are not higher. The Employer has also proven to itself that it needs to increase the rates in order to recruit operators. It did not pay as much as it originally proposed because it did not pay the increased rates retroactively. It should be motivated to negotiate with the Union to find a compromise that will allow it to keep the additional operators and not lose its existing operators and this may reduce some of the harm that the Union has suffered.

[73] However, the Union specifically asked the Board for an order maintaining the new wage rates. The Union wants to minimize any further harm to it and its members that could occur if the Union was viewed as the reason that the new wage rates were reduced. It would be difficult for the Board to restore the parties to the position that they would have been in before the violation of the *Act* without considering a reversal of the unlawfully implemented wage rates. The Union should be given an opportunity to decide for itself how it is prepared to negotiate and compromise with the Employer if it wants to retain the higher probationary rates and keep the support of its new, as well as its regular, members. The employees chose the Union to perform this role as their exclusive bargaining agent. If the Union is allowed to operate in this role in its usual way on this issue, this should undo much of the harm that has been done to it.

[74] The Board also believes that there are possible solutions to the recruitment and retention problem other than the one unlawfully implemented by the Employer. Both the Union and the Employer have an interest in hiring new operators. The parties themselves are in the best position to discover a mutually acceptable solution that meets both of their needs.

[75] The Board agrees that the Employer's unlawful unilateral action caused harm to the Union and its members that will also extend into the next round of bargaining. The Employer made it clear to the Board that there is only "one pot of money" for these employees and its unilateral increase to the wages of one group is likely to impact on the amount in the "pot" for the other employees. Again, one solution for this would be to reverse the wrongfully implemented wage rate but this would not reverse all of the harm done as the new members would be able to keep the extra money wrongfully paid to them while the existing operators received nothing. The Union also specifically asked the Board not to order this.

[76] The Board could reverse the wage rate and order that the money wrongfully paid to the probationary operators be returned to the "pot of money" and/or be paid to others. However, this would be a hardship on the probationary employees and could cause them to quit their employment with the Employer. The Employer would be back to its original problematic position of being unable to attract new operators because of its low probationary wage rate.

[77] Another solution urged by the Union is for the Board to order an increase to the wages of the regular employees. This would penalize the Employer for its unfair labour practice. However, the difficulty with this remedy is that it is not entirely clear that, if proper collective bargaining had occurred with respect to the Employer's wage rate increase proposal, a raise for everyone else in the bargaining unit would have been the outcome.

[78] All of these proposed remedies present practical difficulties and may not address the needs of the parties or fully remedy the breach of the *Act.* Because of the Board's concerns with respect to fashioning a remedial order, we are therefore prepared to give the Employer the opportunity to present a rectification plan and the Union the opportunity to review and respond to the plan before the Board issues a remedial order relating to the Employer's unfair labour practice. Acceptance of the plan by the Union would be an important consideration for the Board when it makes its remedial order.

[79] Therefore, pursuant to s. 5.1 of the *Act*, the Employer is ordered to present a rectification plan, together with its rationale for the plan, to the Board and counsel for the Union within 7 days of the date of these Reasons for Decision. The Union shall file a response to the rectification plan with the Board and send a copy to the Employer within 7 days of the Union's receipt of the plan. The Board will issue its usual order under ss. 5(d) and (e)(i) of the *Act* and will reserve jurisdiction to make further orders under s. 5(e)(ii) of the *Act* upon receipt of the rectification plan and the Union's response thereto.

DATED at Saskatoon, Saskatchewan, this **6th** day of **November, 2007**.

LABOUR RELATIONS BOARD

Catherine Zuck, Q.C.,
Vice-Chairperson