The Labour Relations Board
Saskatchewan

UNITE HERE UNION, LOCAL 41, Applicant v. WEST HARVEST INN, Respondent

LRB File No. 127-07; December 19, 2007

Vice-Chairperson, Catherine Zuck, Q.C.; Members: Maurice Werezak and Leo Lancaster

For the Applicant: Garry Whalen
For the Respondent: Ted Koskie

Unfair labour practice – Interference - Communication – Scope of employer's right to communicate – Employer's accurate recitation of facts relating to progress of negotiations in mature bargaining relationship would not have effect of interfering with, restraining, intimidating, threatening or coercing employee of average intelligence and fortitude – Board finds no unfair labour practice under s. 11(1)(a) of *The Trade Union Act*.

Duty to bargain in good faith – Exclusive bargaining authority – Direct bargaining – Employer's memo to employees contained information previously disclosed to union at bargaining table – Employer's memo not persuasive in tone – No evidence from which Board can infer employer was attempting to negotiate directly with employees – Board finds no unfair labour practice under s. 11(1)(c) of *The Trade Union Act*.

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

REASONS FOR DECISION

Background:

[1] Unite Here Union, Local 41 (the "Union"), filed an application on October 24, 2007 for an order determining whether the West Harvest Inn (the "Employer") engaged in an unfair labour practice contrary to ss. 11(1)(a) and (c) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") and requiring the Employer to refrain from engaging in the said unfair labour practice. The Employer filed a reply on October 30, 2007, denying the allegations made in the application. The matter was heard on November 28, 2007.

Decision:

[2] The Board finds that the Employer did not violate s. 11(1)(a) or (c) and, accordingly, the Employer did not engage in an unfair labour practice.

Facts:

[3] The Union has been the certified bargaining agent for the employees of a full service hotel, presently operated by the Employer, for approximately 23 years. There are approximately 65 employees, 61 of whom are in the Union's bargaining unit. It was estimated that 80% of the employees have more than two years of service. The Employer has operated the hotel for the past twelve years and has entered into several collective bargaining agreements with the Union, the most recent of which was for the period from October 2005 to September 2007.

[4] The Union gave notice to bargain and the parties negotiated on September 25 and October 15, 2007. Agreements were reached at both sessions. But, at the October 15, 2007 meeting, the Employer essentially drew its line in the sand and told the Union that any agreement had to be based on its wage proposals and approximately four other terms that it had proposed. The Union was not prepared to agree to those proposals and said that it did not see the point of further negotiations if the Employer was not prepared to negotiate any of these terms. The Union also indicated that this put it in a position where it might have to consider some kind of job action.

[5] Upon leaving the meeting on October 15, 2007, Garry Whalen, president of the Union, handed out buttons to its members that said "For a fair contract [in three languages] – UNITE HERE!" and spoke in passing to a few members who asked how negotiations were proceeding.

[6] The Employer followed up its verbal presentation of its terms of settlement with a letter to the Union dated October 17, 2007 that confirmed its position. It offered to meet again to negotiate but did not indicate that it was prepared to retract its position that any new agreement must contain its specified terms.

[7] Also on October 17, 2007, the Employer prepared a memo that it would include with all employees' pay cheques on October 19, 2007. The memo is the subject of the unfair labour practice application.

[8] On October 18, 2007 the Union had a meeting with its members to advise them of what was happening with bargaining. The members were advised that talks had broken off. Mr. Whalen passed out three documents to the members who attended to bring them up to date on the issues in dispute. The first document was a copy of Mr. Whalen's October 18, 2007 letter to the International of Unite Here Union, asking the International "to sanction strike action at this location." The letter set out in detail the proposals of both the Union and the Employer and explained why the Union was not happy with the Employer's wage proposals. The second document was Mr. Whalen's calculation of what the actual hourly dollar amount would be for each job classification for starting employees, employees with over one year of service and employees with over two years of service for the term of the collective agreement as proposed by the Employer. This document showed that the percentage increase being offered by the Employer to the "two year" employees was 4% - 4% - 6% over the proposed three years of the agreement, for a total of 14%. The Employer's offer for "one year" employees was 2% - 3% - 4% and there was at least a 6% increase to the starting wage. The third document presented was prepared by Mr. Whalen and had exactly the same information but was based on the Union's proposal for wage increases. This document showed that the Union's proposal for "two year" employees was 6%- 6%- 8% and 5% - 5% - 5% for "one year" employees. The Union agreed with the Employer's proposal with respect to the starting wage.

[9] The Employer did not have any input into the Union's calculation of the dollar amount of the Employer's proposals and it was unclear if the Employer had seen either of the documents described above before the hearing.

[10] There were two typographical errors in Mr. Whalen's letter to the International that the Board found significant. The letter said that one of the Employer's proposals was "Delete the Clothing Allowance clause and replace with 65% on the employees rate of pay." According to the evidence, the Employer's actual proposal was .65%, not 65%. The letter also stated that the Union's proposal was 5%-5%-5% "on 1st

year rate" and 6%-6%-6% "on 1st year rate," which latter figures should be for the "2nd year rate" according to the evidence. There was no evidence as to whether these errors were dealt with at the October 18, 2007 meeting.

[11] On October 19, 2007 each employee received the October 17, 2007 memo from the Employer with their pay cheques. While the general manager of the Employer, Christopher Regier, said that the motivation for the memo was that he was getting questions from employees that indicated to him that there was confusion about the Employer's position, he did not testify as to who spoke to him or what was said. As the memo was prepared before the Union's October 18, 2007 meeting with its members, any confusion could not have been caused by anything the Union said. The inference that the Board has drawn from the evidence is that the Employer was motivated by its desire to tell each of its employees directly what its bargaining proposals were, so that the employees would not be relying only on what the Union said in the event further job action was taken.

[12] The memo that was given to the employees said in its entirety:

MEMO

Date: *October 17, 2007*
To: *All Staff*
From: *Chris Regier, General Manager*
Subj: ***Negotiations with UNITE HERE Local 41***

As you may know, negotiations with your union began on September 25th and continued on October 15th. The parties have agreed to numerous changes to the contract language which should make it clearer and easier to understand.

We want all staff to know what the Employer has proposed to your union on the remaining issues. This is a summary of our offer to settle the contract, which was discussed with the union on October 15th. You can also obtain additional information about this offer from the union.

What Management is Asking For:

- *Delete the current clothing allowance contract language**
- *Delete the provision of separate cheques for payment of vacation pay (but no change to the amount of that pay or how it is requested)*
- *Define full time employment as 40 hrs/week (2080) hrs/year); there is no such definition in the contract now*
- *Reduce sick leave from maximum 12 days to maximum 8 days***
- *Removal of provision regarding "over scale employees"*
- *A three year contract*

What Management is Offering:

- *Add the value of the clothing allowance (.65%) to all pay rates in 2007-08 (a permanent increase, not one time money)**
- *Pay sick leave from day one if employee hospitalized***
- *Maintain Employer payment of $84 per covered employee per month for union's employee benefit plan*
- *Training premium of $.75/hour where an employee is assigned to train/orient new staff*
- *14.65% wage increases over 3 years for all employees with greater than 2 years' service (slightly smaller increases for staff not yet at the 2+ year point)*
- *New classifications and pay ranges for Front Desk and Housekeeping Supervisors and Day Cleaners*
- *Uniforms which will address summer heat concerns*

We have offered to continue meeting with the union but no further dates have been agreed to by the union at this point.
E&OE

[13] Mr. Regier said that the memo accurately set out what the Employer's position was with respect to the new collective bargaining agreement. The Union agreed that the memo contained the same Employer's position that had been given to the Union during the bargaining sessions.

[14] Tina Diana, who is on the Union's bargaining committee and who testified at the hearing for the Union, said that after the employees received the memo they asked her questions that indicated they were confused about why they got the memo from the Employer, confused about a strike and confused about the wage proposals. She testified that she found the sentence "Add the value of the clothing allowance (.65%) to all pay rates in 2007-08 (a permanent increase, not one time money)" unclear but admitted that it meant there would be no more annual clothing allowance paid and, instead, wages would go up by .65%. Ms. Diana felt it was wrong for the Employer to say that the wage increase would be 14.65% because the .65% was not a wage increase but only a substitution for the clothing allowance. Finally, the Employer's total wage proposal for "one year" employees was 9% and she did not think this could be described as "slightly smaller increases." It was these parts of the Employer's memo that caused the members to be confused. Ms. Diana also objected to the Employer's distribution of the memo to the employees as she felt that the Union should be the one to communicate this information to its members.

[15] Ms. Diana answered all the questions that the members asked her. The Union held another meeting with the members a week later where the members seemed to feel free to ask questions of the Union to clear up any confusion.

Relevant statutory provisions:

[16] Relevant statutory provisions of the *Act* include the following:

> *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;*
>
> *. . .*
>
> *5. The board may make orders:*
>
> > *(d) determining whether an unfair labour practice or a violation of this Act is being or has been engaged in;*

Union's arguments:

[17] The Union argued that the memo was drafted to confuse and did confuse the employees. The Union did not agree with the substitution of .65% on the wage rates in lieu of the yearly clothing allowance. Under the previous collective agreement, all employees received the same amount of clothing allowance. Giving a full-time employee .65% of wages would equate to approximately the same amount as the clothing allowance but a part-time employee would be receiving less than the clothing allowance. Further, the Union did not regard the substitution of .65% for the clothing allowance as an increase in wages. The Union argued that the employees were confused because the Union told them that the Employer was offering a 14% wage increase and the memo said that the

Employer was offering a 14.65% wage increase. The Union took the position that the reason for the memo was unsubstantiated talk from employees and not because of any misrepresentation by the Union. The Union argued that the Employer, in its reply, undermined the Union by wrongly accusing the Union of misrepresenting negotiation information to its members. The Union said that the memo caused its members to think that it was lying about the 14% and that, by calling into question the Union's credibility during negotiations, the Employer undermined the Union. The fact that the memo was prepared before the Union even gave any information to the employees showed bad faith on the part of the Employer.

Employer's arguments:

[18] The Employer's position was that it was only the memo that could form the basis for the unfair labour practice application, not any allegations contained in the reply filed in this matter. The Employer argued that the memo did not accuse the Union of any misrepresentation; it did not accuse the Union of anything. The memo accurately set out what the Employer was asking for in the negotiations and what it was promising. The Employer took the position that it was entitled to set out its own proposals and was not required to find out first what the Union told its members and then respond to that. The memo showed that the Employer was not debating the Union but was simply setting out its own view.

[19] The Employer argued that the memo should be put into context. This is a mature bargaining relationship where the parties have reached numerous collective bargaining agreements in the past. The process is not new between the parties. The Employer recognizes the Union as the exclusive bargaining agent for the employees and the memo was not intended to interfere with the relationship between the Union and its members. Negotiations were at an impasse and the Union had implied that there may be strike action.

[20] The Employer said that the memo was included with pay cheques specifically so that all employees would receive it and no employee or group of employees would be singled out.

[21] The Employer argued that, while the Union disagreed as to whether .65% was a good replacement for the existing clothing allowance, that did not make the memo an inaccurate reflection of the Employer's position.

[22] The Employer admitted that the memo was a "communication" within the meaning of s. 11(1)(a) but denied that there was any evidence of interference, restraint, intimidation, threats or coercion of any employees in the exercise of any right under the *Act.* The Employer urged the Board to apply an objective test to the contents of the memo and determine whether it would have had a prohibited impact on an employee of average intelligence. The Employer argued that the fact that the Union had a meeting the next week where employees could have their questions answered was evidence that there was no interference, restraint, intimidation, threats or coercion and that "confusion" on the part of employees is not evidence of interference, restraint, intimidation, threats or coercion.

[23] The Employer took the position that there was also nothing about the memo that would lead to a finding that the Employer was circumventing the Union and attempting to bargain directly with the employees.

[24] The Employer's counsel filed a written brief, which the Board has also considered, and referred the Board to *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Temple Gardens Mineral Spa Inc. and Deb Thorn*, [2007] Sask. L.R.B.R. 87, LRB File No. 162-05, *Retail, Wholesale and Department Store Union v. Canadian Linen Supply Company Limited*, [1991] 1st Quarter Sask. Labour Rep. 63, LRB File No. 029-90, *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Yorkton Credit Union Ltd.*, [1997] Sask. L.R.B.R. 454, LRB File No. 090-96, *Saskatchewan Government Employees' Union v. Government of Saskatchewan*, [1989] Fall Sask. Labour Rep. 28, LRB File Nos. 250-88 & 290-88, *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Western Grocers, Division of Westfair Foods,* [1992] 4th Quarter Sask. Labour Rep. 83, LRB File No. 168-92 and *University of Saskatchewan Faculty Association v. University of Saskatchewan*, [1994], 4th Quarter Sask. Labour Rep. 200, LRB File No. 124-94.

Analysis:

[25] The Board's approach to the interpretation of s. 11(1)(a) with respect to communication by an employer with its unionized employees is well established. Over the years, that interpretation has remained essentially unchanged whether s. 11(1)(a) contains the phrase "nothing in this Act precludes an employer from communicating with his employees" (as it formerly did) or whether it lacks that phrase as it does currently.

[26] The most recent review of the interpretation that the Board has placed on this provision is found in *Temple Gardens Mineral Spa Inc., supra.* In that case, at 101 through 105, the Board said:

> *43 The first decision of the Board which analyzed the test to be applied under s. 11 (1) (a) was the Saskatoon Co-operative Association case [Saskatchewan United Food and Commercial Workers, Local 1400 v. Saskatoon Co-operative Association Limited, [1983] Sask. Labour Rep. 29, LRB File Nos. 255-83 and 256-83]. In that case, the Board examined the lawfulness of several employer communications during the course of the parties' negotiations for the renewal of a collective agreement. The Board determined that the examination of the communication is not limited to determining whether the subject matter is prohibited or permitted under the Act, and stated at 37:*
>
> > *…but that is not to say that any particular subject is invariably prohibited (or permitted) under The Act. The result is that the Board's inquiry does not end once the subject being discussed is identified and categorized as permitted or prohibited. Instead, it concentrates on whether in the particular circumstances a communication has likely interfered with, coerced, intimidated, threatened or restrained an employee in the exercise of any right conferred by The Act.*
>
> *44 The Board described a two-part test in the following terms at 37:*
>
> > ***The Board's approach is designed to ascertain the likely effect on an employee of average intelligence and fortitude.*** *That kind of*

> ***objective approach*** *by its very nature eliminates insignificant conduct, since trivialities will not likely influence an average employee's ability to freely express his wishes.* ***It also necessitates an inquiry into the particular circumstances of each case, because it recognizes that the effect of an employer's words and conduct may vary depending upon the situation****.*

. . .

> *The employers' communications were directed to the employees as a group and made no effort to isolate them from each other or from their union representatives who had ready access to the picket lines.*
>
> *The Board heard a great deal of evidence regarding alleged inaccuracies in the written communications. It finds that the first and second communications were substantially accurate, and that in the circumstances they did not likely interfere with the average employee's ability to form his own opinion or to reach his own conclusions. Nor were they of the kind that could reasonably support an inference of improper employer motive.*

45 In Canadian Linen, supra, the employer held two meetings with employees to discuss its final offer before the union's meeting to vote on the employer's final offer. With regard to the propriety of employer communications general, the Board stated at 67 and 68:

> *It is settled law in this Province that an employer is entitled to communicate with its employees, even with respect to matters that are the subject of collective bargaining negotiations, so long as the communication:*
>
> *(a) does not amount to an attempt to bargain directly with the employees and circumvent the union as the exclusive bargaining agent;*
>
> (b) *does not amount to an attempt to undermine the union's ability to properly represent the employees; and*
>
> ***(c) does not interfere with, restrain, intimidate, threaten or coerce an employee in the esercise of any rights conferred by the Act.***

. . .

> *50 In a more recent case, Yorkton Credit Union, supra, the Board dealt with employer communications during the bargaining of a renewal collective agreement and specifically, with respect to its allegation in s. 11(1) (a), misinformation provided by the employer to the employees. The Board, following the principles of the Canadian Linen case, supra, added at 460 through 462:*
>
> > *. . .*
> >
> > *In assessing whether employer communications during or in relation to collective bargaining go beyond the bounds of permitted speech into the realm of prohibited interference, the Board has considered whether they reflect an attempt to explain the position the employer has taken at the bargaining table or, rather, an attempt to disparage the union or its proposals.* ***The Board looks at the context, content, accuracy and timing of employer communications in discerning their purpose and effect.*** *Communications made after good faith bargaining has reached an impasse are less suspect than those made during early stages of bargaining, accurate statements are less suspect than inaccurate ones and, in any event, communications of explanations or positions not first fully aired at the bargaining table are highly suspect.*

[27] Therefore, the first issue for the Board to determine is whether or not the memo of October 17, 2007, in the circumstances at the time, would have had the effect of interfering with, restraining, intimidating, threatening or coercing an employee of average intelligence and fortitude in the exercise of rights under the *Act.*

[28] It is difficult for the Board to find that the Employer's communication had any such effect on any employee in the bargaining unit. There is little in the memo other than a straightforward recitation of the facts relating to the progress of the negotiations and a straightforward recitation of both what the Employer wanted to take away from the employees in the next collective agreement and what it was prepared to give. These topics are not prohibited by s. 11(1)(a) of the *Act*, as stated in the foregoing cases. The information was not presented in a way that could be regarded by the employees as

disparaging the Union's position or criticizing it in its role as the employees' bargaining agent.

[29] The Union agreed that all of the Employer's position as described in the memo was revealed to its negotiating team at the bargaining table before the memo went out to the members. This is important to the Board's finding that the communication did not amount to an attempt to bargain directly with the members, circumventing the Union. The information in the memo is the same information about the Employer's position that the Union gave its members in the form of Mr. Whalen's letter to the International of Unite Here Union. The Union was able to give its members this information before they received the memo from the Employer, because the Union had heard it all at negotiations.

[30] The fact that the memo was sent to each employee belies any inference that the Employer was trying to interfere with the Union by pitting one group of employees against another.

[31] The only inference the Board can draw from the memo with respect to the exercise of the employees' rights under the *Act* is that the Employer wanted to make sure that the employees knew its own version of its bargaining position in the event that the current impasse in negotiations proceeded to strike action or even if the Union's bargaining committee sought further instructions from the members. This is not prohibited by the *Act.* There is nothing in the memo that even tried to persuade the reader to accept the Employer's position as being better that the Union's, much less anything that the Board finds would restrain, intimidate, threaten or coerce an employee of average intelligence and fortitude to accept the Employer's terms and not access any rights under the *Act.* The Union did not draw the Board's attention to anything in the memo that it could characterize as being restraining, intimidating, threatening or coercive.

[32] The Union's complaint with respect to the memo concerned the accuracy of the memo. A communication must be accurate in order not to cause a violation of s. 11(1)(a). The evidence was that the memo accurately documented the Employer's position at the negotiating table. The Union felt that there were inaccuracies in the memo that confused its members and that this confusion caused the members to question the

Union's credibility at this crucial time in bargaining the next collective agreement. The Union said this was interfering with the members' trust in the Union.

[33] Specifically, the Employer's memo said that its offer for wage increases was 14.65% rather than the 14% that the Union claimed in its documents. Further, the memo stated that the Employer was offering "slightly smaller increases for staff not yet at the 2+ year point" and the Union thought that the Employer's offer was quite a bit smaller.

[34] The Board understands the Union's argument that replacing an existing lump sum cash clothing allowance with .65% added to the wages is not "new money" for the employees but a different way of paying the same money to full-time employees (and less to part-time employees). Therefore, the Union was correct in saying that the Employer was only offering 14% in additional money over the last contract. However, the Employer's memo clearly stated that it was proposing to take away the clothing allowance and replace it with .65%. This does mean that the actual dollar amount of the wages would go up .65% and then up the 14% being offered over the life of the contract, for a total increase of 14.65%. The Board believes that an employee of average intelligence would understand the Employer's memo to mean that .65% replaced a benefit s/he already had and 14% was the extra amount s/he would be paid. The Board also believes that an employee of average intelligence could calculate whether .65% on the hours worked would adequately compensate the employee for the elimination of the cash annual clothing allowance.

[35] With respect to the "slightly smaller increases" statement, the memo clearly told the employees that, if they wanted additional information, they should contact the Union. An employee of average intelligence in the "less than 2 years" category would want to know the exact size of the increase and would get this information from the Union. That employee would rely on the information obtained from the Union not on the Employer's characterization of the increase as "slightly smaller" in making a decision about the Employer's proposal.

[36] Therefore, the Board does not find the memo to be inaccurate so as to make it an improper communication that interfered with the employees' ability to form their

own opinion about the Employer's proposal and about whether to exercise their rights under the *Act.*

[37] The Union said that the Employer's memo caused confusion and the Board accepts the Union's evidence that there was confusion in the minds of its members. However, the Board can see where some of that confusion was caused by the Union as a result of the typographical errors in the material that it handed out. Further, in the Union's calculation of the dollar amount of the Employer's proposals, it was unclear if the Union had used the .65% in the calculation to show the wage amounts if the Employer's proposal was accepted. The Union's calculation was never confirmed with the Employer and it is possible that it did not accurately set out what the dollar amounts would be if the Employer's proposals were accepted in their entirety. It was not the fault of the Employer if it was inaccurate. Finally, there would be confusion as to what increase, if any, the Union was proposing for the two year employees.

[38] This confusion did not interfere with the Union's role as the employees' bargaining agent but rather enhanced it. The Union was the only source for answers to the members' questions. The members did ask questions of it and the Union answered them. This was reinforced by the Employer's memo that said "You can also obtain additional information about this offer from the union." There was a union meeting a week after the Employer's memo was sent and the Union had ample opportunity to clear up any confusion surrounding the wage increase proposal. Answering the questions of the members also gave the Union an opportunity to reinforce its own view of the adequacy of the Employer's proposals with its members and persuade them to agree with the Union's proposals.

[39] Finally, the Board finds it significant that this was a mature bargaining relationship with employees who would have been through at least one previous round of bargaining, if not several. The Employer was familiar with the Union and accepted it as the bargaining agent for the employees.

[40] Therefore, the Board in these circumstances does not find that the memo, objectively viewed, had the effect of interfering with, restraining, intimidating, threatening or coercing employees in the exercise of rights under the *Act.*

[41] The Union also alleged that the Employer's memo violated s. 11(1)(c). The Board's position, as stated in *Canadian Linen, supra,* is:

> *An employer is not considered to have bargained directly with his employees, or failed to have negotiated in good faith with the union by fairly and accurately informing employees of its version of the negotiations taking place. . .*

[42] The employee of average intelligence and fortitude would not perceive the memo as a plea to ignore the bargaining agent and contract directly to accept the Employer's proposals, regardless of what the Union's position was. The memo was not even persuasive in tone. Everything in the memo was disclosed firstly to the Union's negotiation team at the bargaining table. There is no other evidence from which the Board can infer the Employer was attempting to negotiate directly with any employee or employees.

[43] Therefore, the Board does not find a violation of either s. 11(1)(a) or (c) and the application is dismissed.

DATED at Regina, Saskatchewan, this **19th** day of **December, 2007**.

LABOUR RELATIONS BOARD

Catherine Zuck, Q.C.
Vice-Chairperson