The Labour Relations Board
Saskatchewan

SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant v. TEMPLE GARDENS MINERAL SPA INC. and DEB THORN, Respondents

LRB File No. 162-05; April 9, 2007
Vice-Chairperson, Angela Zborosky; Members: Mike Carr and Duane Siemens

For the Applicant: Larry Kowalchuk
For the Respondents: Ken Cornea

Duty to bargain in good faith – Union and employer entered into agreement at conclusion of strike indicating that neither would take legal proceedings arising out of or related to strike – Employer subsequently banned non-employee under *The Hotel Keepers Act* ostensibly for activity on picket line – Board finds only reasonable interpretation of agreement that parties did not contemplate legal proceedings initiated against third party not employed by employer or member of union – Board finds no violation of s. 11(1)(c) of *The Trade Union Act*.

Unfair labour practice – Interference – Objective test – Question whether Board should draw inference that employer's conduct had likely or most probably effect of interfering with or of intimidating or coercing average employee of reasonable intelligence and fortitude in exercise of rights under *The Trade Union Act* – Under circumstances of case, Board finds no violation of s. 11(1)(a) of *The Trade Union Act*.

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

REASONS FOR DECISION

Background:

[1] Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union" or the "Applicant") filed an application alleging a violation of ss. 11(1)(a) and (c) of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*Act")* by Temple Gardens Mineral Spa Inc. (hereinafter the "Employer") and its chief executive officer, Deb Thorn (the Employer and Ms. Thorn collectively referred to as the "Respondents"). The Union alleged that Ms. Thorn, on behalf of the Employer, violated a memorandum of settlement entered into between the Union and the Employer to resolve a labour dispute in 2005 and discriminated against an employee exercising her rights under the *Act* by barring the employee's fiancé from the Employer's

premises, except for restricted hours for the wedding reception booked at the hotel the next month. The Union alleges that this action resulted in the employee being unable to utilize the free night's stay at the hotel, a gift given by the Employer to an employee getting married, which ultimately resulted in the last minute cancellation of wedding plans to be held at the Employer's facility as well as the employee's departure from employment.

[2] The Employer filed a reply which denied the allegations made by the Union and indicated that the employee's fiancé was barred from the premises for his conduct during the labour dispute, specifically, that he assaulted Ms. Thorn's husband by blowing a horn in his ear and verbally attacked Ms. Thorn in the parkade while she was leaving the workplace. The Employer claims that its actions had nothing to do with the relationship between its employee and her fiancé and that, while barring the fiancé's attendance at the premises, it made an exception to allow him to attend for the wedding booked the next month. The Employer took the position that the provision of a night's stay to an employee booking a wedding at the Employer's facilities is a gift given in Ms. Thorn's discretion, is outside the terms of the collective agreement and is not restricted in its use to the night of the wedding.

[3] Ms. Thorn did not file a reply with the Board.

[4] The application was heard by the Board on February 28 and April 20 and 24, 2006.

Facts:

[5] The Employer operates a hotel and spa in Moose Jaw, Saskatchewan. The Union and Employer were parties to a collective bargaining agreement that expired on June 30, 2005. The Union commenced a lawful strike against the Employer on July 1, 2005 that lasted until July 19, 2005 at which time a revised collective agreement was ratified by the members of the Union. The strike included a complete withdrawal of labour and the erection of a picket line at the Employer's workplace. The matters giving rise to the conduct of the Employer complained of occurred during this labour dispute and primarily on the picket line at the Employer's premises.

[6] The Union led evidence through an employee, Suzanne Casemore, her fiancé, Corey Casemore (who is not an employee) and a staff representative of the Union, Mark

Hollyoak. The Employer replied with the evidence of Ms. Thorn, CEO and president of the Employer, and Jim Thorn, Ms. Thorn's spouse who worked at the hotel during the strike.

[7] Ms. Casemore testified on behalf of the Union. At the time when these events occurred, Ms. Casemore was an employee of the Employer, working as an esthetician in the hotel spa. Prior to the strike, Ms. Casemore had begun to make plans to hold her wedding reception at the hotel on November 13, 2005. While she signed a contract with the hotel for this event prior to the strike, she made more specific arrangements following the strike.

[8] On September 13, 2005, Ms. Casemore's then fiancé, Mr. Casemore, received a letter from the lawyer for the Employer banning him from the hotel premises, except for certain stated hours related to the time of the wedding reception Ms. Casemore had previously booked with the hotel. The letter reads as follows:

> *Our office is the Corporate Counsel for Temple Gardens Spa and Resort Hotel. Staff have expressed serious concerns about your extreme goonish behaviour during the recent labour dispute. They viewed your conduct as being completely "over-the-top" and as a result have expressed concerns about their personal safety. After a careful evaluation of this matter, it has been determined that you are an individual which this Corporation deems to be* ***undesirable*** *under S12 of The Hotel Keepers Act.*
>
> *This letter is your notice that you are permanently barred from each and every premise owned or operated by Temple Gardens Mineral Spa which includes the hotel portion of the parking facility. If you attend at or on any of the premises you will be treated as a trespasser which may result in your being ejected from the hotel premises and/or charged with public mischief.*
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> *The corporation is prepared to make one limited exception for when you will be allowed to enter onto hotel premises which is:*
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> > *to attend functions already booked in connection with the Kuchinka/Casemore Wedding on November 13, 2005 and no earlier than 8:00 a.m. and to 1:00 a.m. on November 14, 2005 and only in that portion of the hotel made up of Salon A and B and Mezzanine and only for the purposes of activities booked therein.*
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> *During this limited period when you are allowed on to the hotel property you are expected to act in a manner appropriate to the occasion. Any misconduct or disrespect towards any staff of the hotel will result in your immediate ejection.*

You must govern yourself accordingly.

[9] This letter was copied to the Employer and to the Moose Jaw City Police. Section 12 of *The Hotel Keepers Act*, R.S.S. 1978, c. H-11 reads as follows:

> *12 A hotelkeeper or his representative may require any person whom he deems undesirable, to leave the hotel and, in the event of the person failing to leave, may eject him from the hotel premises.*

[10] Ms. Casemore was shocked and confused by the letter that Mr. Casemore had received. She sought the assistance of representatives of the Union and felt that the Employer's decision to ban her fiancé was revenge for the strike in which she, Mr. Casemore, and other employees had participated and for the fact that, during the strike, she had expressed employee concerns to the shareholders and directors. Ms. Casemore felt that she had been specifically targeted by Ms. Thorn because of problems Ms. Casemore had with Ms. Thorn's daughter, Jamie Thorn. Jamie Thorn was a supervisor in the café/spa area and Ms. Casemore had been critical of Jamie Thorn's work performance. In Ms. Casemore's view, the Employer's action in banning her fiancé had the effect of preventing her from using a gift from the Employer which is customarily given to employees getting married, that is, a free night's stay at the hotel.

[11] Ms. Casemore was so upset by the Employer's decision that she phoned her supervisor the evening she received the letter informing her that she was ill and would be away from work for some time. Ms. Casemore testified that she was told by her supervisor to take as much time as she needed. Ms. Casemore never did return to work. She testified that the actions of the Employer caused her to suffer with depression for which she went on medication and to ultimately quit her employment with the Employer. Ms. Casemore also testified that, as a result of the Employer's actions, in October 2005, she decided to move the location of her wedding. This required a great deal of work and additional cost. In addition, it caused inconvenience for the guests traveling to the wedding. Ms. Casemore also testified that she and her fiancé moved near Estevan in November 2005 so that they could find work and save money by living with Ms. Casemore's parents. At the time of the hearing, Mr. Casemore and Ms. Casemore were gainfully employed in Estevan, although Ms. Casemore was not able to find work as an esthetician.

[12] Given that the Union questioned the *bona fides* of the Employer's decision to ban Mr. Casemore which, in its view, caused much distress and loss to Ms. Casemore and amounted to a violation of ss. 11(1)(a) and (c) of the *Act*, much of the evidence led at the hearing dealt with the reasons the Employer had given for banning Mr. Casemore from the premises. As stated in the letter of September 13, 2005 to Mr. Casemore informing him of the ban, Mr. Casemore was banned because the staff had expressed serious concerns about his "extreme goonish behavior during the recent labour dispute" and that his conduct had been "completely over-the-top" resulting in staff concerns over their personal safety. In its reply to the Union's application, the Employer indicated that the ban resulted from certain conduct on the picket line or during the strike, including: (i) Mr. Casemore assaulting shareholder Jim Thorn while he was holding open a door for other shareholders attending a meeting at the hotel, by blowing a stadium horn in Mr. Thorn's ear, causing him injury; and (ii) Mr. Casemore verbally attacking Ms. Thorn at the hotel's parkade. At the hearing, Ms. Thorn testified in detail about the reasons for banning Mr. Casemore which included the horn blowing incident and the verbal attack on her, as well as additional incidents that led her to direct the Employer's lawyer to write the September 13, 2005 letter to Mr. Casemore.

[13] A significant portion of the hearing was devoted to evidence concerning the horn blowing incident. We heard the testimony of Mr. Casemore, Mr. Thorn, Ms. Thorn and Mr. Hollyoak in relation to this incident and, as well, we received several photographs in evidence which were taken by Mr. Hollyoak.

[14] The incident allegedly occurred just outside the hotel's main doors one evening during the strike. The Union had declared the evening "noisemaker night" because there was a shareholders' meeting to be held at the hotel and the Union wanted to bring attention to the strike. To that end, the Union asked its members to bring horns and noisemakers to use on the picket line.

[15] It is Mr. Thorn's position that, just prior to the meeting, while he was outside the hotel greeting shareholders attending for the meeting that evening, Mr. Casemore, who was walking on the picket line, blew a large red stadium horn in Mr. Thorn's ear. Mr. Thorn gave two versions as to how this occurred. In the first version, he stated he was beside the door of the hotel and, just after he opened the door for a named shareholder, the horn was blown in his ear. In the second version of events, after reviewing all of the Union's photographs of that evening,

Mr. Thorn claimed that the incident must have occurred during a 39 minute gap in the picture taking by Mr. Hollyoak. In this version, Mr. Thorn testified that he was standing in a different place, watching someone entering the hotel and, when he turned to his right, the horn was blown in his ear. Mr. Casemore denied doing what Mr. Thorn alleged and stated that he used only a small orange horn on the picket line that night, not a large red stadium horn, further indicating that he was not capable of using a stadium horn. Neither the security guard nor anyone else witnessed the incident. No complaint was made to the police and no interviews were conducted by the Employer, the Employer's legal counsel, or the security company hired by the Employer. Mr. Thorn testified that he did not check the security company's videotapes for a record of the incident and that Ms. Thorn told him that the tapes had been misplaced. Ms. Thorn indicated that the security company told her that they did not videotape the evening in question because of the chaos that night.

[16] Given our conclusions in this case, it is unnecessary for us to set out the testimony of each witness in detail. Upon review of all of the evidence, we conclude that either Mr. Casemore did not blow the horn in Mr. Thorn's ear at all or, if he did, he did not intend to do so nor did he intend to cause injury to Mr. Thorn. Some of the reasons for making this finding of fact include the following:

> (a) Mr. Casemore's testimony was delivered in a calm, straightforward, non-evasive manner and the testimony concerning his denial of the incident and his general conduct on the picket line was consistent throughout;
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> (b) The photographs support Mr. Casemore's evidence concerning the general nature of his activities on the picket line and the fact that he used only a small orange horn;
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> (c) Mr. Thorn's testimony was delivered in a confrontational manner; he was easily provoked and at times evasive;
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> (d) Mr. Thorn gave two inconsistent versions of the events in question;
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> (e) Mr. Thorn's first version of events is supported by the photographs in terms of his description of where he stood and who was present with him, including the identity of the shareholder he was opening the door for, another individual standing with him, and the identity and location of the security guard, "Paul." Mr. Thorn had testified that these photos accurately depicted what had occurred moments before the incident;

(f) The photographs that correspond with Mr. Thorn's first version of the incident show Mr. Casemore with a small orange horn;

(g) The photos which appear to support Mr. Thorn's first version, were taken shortly before the start of the shareholders' meeting and they illustrate the nature of picket line conduct as described by other witnesses at the hearing. In this regard, we accept the evidence of Mr. Hollyoak concerning the time each photograph was taken. In addition, the sequence of the photographs supports Mr. Thorn's evidence of his first version of events and supports Mr. Casemore's evidence of his own conduct;

(h) Mr. Thorn's second version of the incident, given in recall after examining all of the photographs, was based on his view of the time displayed on a wristwatch in one of the photographs. In our view, the watch is unreadable and cannot support Mr. Thorn's contention; the photographs which Mr. Thorn says support his second version do not depict the individual he initially said he was with at the time of the incident and photographs which he says would have been taken immediately following the incident show the presence of a security guard other than Paul.

[17] The second incident that the Employer indicated was a reason for banning Mr. Casemore from the Employer's premises was Mr. Casemore's alleged verbal attack on Ms. Thorn in the hotel parkade, one evening during the strike. Ms. Thorn testified that, as she was going to her vehicle in the parkade one evening at approximately 8:30 p.m., Mr. Casemore, while leaning over the railing separating the parkade from the sidewalk, started yelling insults at her, including such phrases as "when are they going to wake up and get rid of you," "I can't believe how dumb you are" and "you don't know anything about running a company like this – you're such an idiot." Ms. Thorn testified that her response to him which she "thought was pretty good after a long day" was "and coming from a man with a brain the size of a frog." Ms. Thorn testified that the comments were not intimidating to her but that she was surprised at Mr. Casemore's aggressiveness and that his behaviour was not typical. She stated that "the alarm bells were going off" and that she told Mr. Thorn she felt uncomfortable with Mr. Casemore.

[18] Mr. Casemore denied that this incident took place. He does not recall having any such conversation with Ms. Thorn stating that, given the nature of the insult Ms. Thorn says she made, he would remember if it had occurred.

[19] Ms. Thorn also testified that she had observed another incident involving Mr. Casemore and Mr. Thorn. She stated that, on one occasion when Mr. Thorn was walking

across the walkway connecting the hotel and the parkade or across the crosswalk on the street, Mr. Casemore and other picketers were present and Mr. Casemore turned around, was walking backwards and blowing his horn at Mr. Thorn, in a provoking manner. Ms. Thorn stated that it was necessary to calm Mr. Thorn by saying: “don’t hit him,” “calm down” and “they’re just trying to provoke you.” Mr. Thorn did not testify about this incident but stated in cross-examination that he had had no other incidents with Mr. Casemore other than the horn blowing incident in front of the hotel. Mr. Casemore had no recollection of this incident. Although not stated in the Employer’s reply, this appeared to be an additional incident relied on by the Employer to support the ban of Mr. Casemore.

[20] While the evidence was not clear on the order in which the alleged incidents took place, Ms. Thorn indicated that she told Mr. Thorn to stay away from the front doors to the hotel because she felt that the Union was trying to provoke him and create an altercation. Ms. Thorn stated “I felt fairly comfortable looking after myself, but when it came to my family, I was fairly protective, and I really felt that they were out to get his goat” and “I was fearful that Jim would take a swing at him.”

[21] Ms. Thorn testified that Mr. Thorn advised her of the horn blowing incident either just before or after the shareholders’ meeting. Following this and the parkade incident, Ms. Thorn brought the matters to the attention of the board of directors seeking input on appropriate action to take. She stated that her most significant concern was that Mr. Casemore might run into Mr. Thorn on the property and she was not confident that he wouldn’t “take a pop at him.” At that time, the board of directors advised that no action should be taken.

[22] Ms. Thorn testified concerning a "culminating incident" that led to her decision to ban Mr. Casemore, although this post-strike incident was not referenced in either the September 13, 2005 letter or the Employer's reply to the application. In September 2005, Ms. Thorn noticed that Ms. Casemore had parked her car in the metered parking spaces on the street next to the hotel. She asked Ms. Casemore's supervisor, Charlene Wakeford, to have Ms. Casemore move her car to the employee parking lot, as required under the collective agreement. During the course of this discussion, Ms. Wakeford advised Ms. Thorn that Mr. Casemore was “hanging around” at the hotel and that, when he did so, he often came in the back office of the spa, an area restricted to staff only. Ms. Thorn testified that Ms. Wakeford said this made her staff uncomfortable. Ms. Wakeford did not testify at the hearing.

[23] Ms. Casemore testified that Mr. Casemore often came to the hotel to pick her up or to pick up or drop off their car keys as they shared a vehicle. She acknowledged that Mr. Casemore occasionally came in the back office area but was not advised that there was a problem with him doing so. She stated that, on the day she was asked to move her car, she responded that it was public parking on the street owned by the city and as a member of the public, she was entitled to park there. Ms. Casemore said she had to return to work and that Mr. Casemore would be along shortly to get the vehicle. She also stated that, after the ban, she put "two and two together" that the action against Mr. Casemore was related to the issue over where she parked her vehicle.

[24] Mr. Casemore also acknowledged that he occasionally went in the back office of the spa area but said that he had the permission of the supervisor or coordinators to be there. He stated that, since the strike, he had been at the hotel numerous times, often waiting for Ms. Casemore in the main lobby. He recalled seeing Mr. Thorn on one occasion. Mr. Thorn was passing through the lobby and, when Mr. Thorn saw Mr. Casemore, Mr. Thorn smirked at him.

[25] Ms. Thorn testified that, upon speaking to Ms. Wakeford about Mr. Casemore's presence in the back office of the spa, she decided to ban Mr. Casemore from the premises. She had no idea and was shocked that Mr. Casemore had been in the hotel. It caused her great concern and her previous fears resurfaced. She was concerned for herself and the employees who had been referred to as “scabs” because there had been a lot of tension in the hotel following the strike. She stated that it was not her intention to hamper Ms. Casemore’s wedding plans and stated that she never looked at the contract and was not aware if Ms. Casemore had booked a hotel room. Ms. Thorn attended at the office of the lawyer for the Employer and directed him to send the September 13, 2005 letter to Mr. Casemore. She did this without consulting the board of directors and without speaking to either Mr. Thorn or Mr. Casemore about the horn blowing incident.

[26] Mr. Casemore was very surprised by the ban against him. He had not experienced any problems with anyone when he attended at the hotel after the strike. He had not been interviewed by the police, security, Ms. Thorn or the Employer’s legal counsel about any incidents that were alleged to have occurred during the strike. Mr. Hollyoak testified that he had heard no rumors concerning the alleged incidents and that neither the incidents nor the

decision to ban Mr. Casemore were ever raised by Ms. Thorn in their many meetings following the strike.

[27] Mr. Hollyoak testified about the Employer's conduct during the strike and the negotiations. He referenced certain conduct that was the subject of an application brought by the Union to the Board involving the alleged interference of the Employer, and Ms. Thorn in particular, in the matter of the fines issued to the Union's members for crossing the picket line during the strike. Mr. Hollyoak also testified concerning the agreement the parties entered into on July 15, 2005 to resolve the strike and to settle the terms of the collective agreement. Mr. Hollyoak pointed to one provision of that agreement which states as follows:

> *The Employer and the Union agree that there will be no grievances, labour relations board applications or other legal proceedings initiated by either of them arising out of or related to the labour dispute to date and that any such grievances, applications or proceedings already initiated will be withdrawn and not re-filed.*

[28] Mr. Hollyoak testified about the acrimonious relationship between the Union and the Employer during the strike. At the outset of the strike, the Employer had hired a security company to monitor and videotape the picket line. Mr. Hollyoak stated that the police were called by the Employer approximately 12 times in the first 2-3 days of the strike and at least once per day after that, for minor reasons. No one had been charged as a result. Ms. Thorn testified that she personally called the police on only one occasion and while other employer representatives or the security company may have occasionally called the police, she believed the police had also received calls from customers, nearby residents and motorists. She was aware that the police were frustrated by the many calls and she committed to the police that she would not call them again if it was something minor but only if there was “blood and guts.” She also directed security not to call either. Mr. Hollyoak also testified concerning the alleged interference of the Employer that included the Employer enticing employees to cross the picket line by offering increased wages and the Employer’s involvement in the matter of fines issued to members crossing the picket line. Ms. Thorn acknowledged that those who crossed the picket line during the strike were paid a $1.50 per hour premium on the basis that they were cross-trained to work in more than one job (the collective agreement does not provide for such a payment).

[29] Following the close of the Employer's case, the Union applied to recall Mr. Hollyoak to address matters raised by the testimony of Mr. Thorn, about which Mr. Hollyoak was not properly questioned in cross-examination. The Board allowed the application. The Employer then applied to recall Mr. Thorn on the basis of new matters raised by Mr. Hollyoak and specifically with respect to additional photographs that were disclosed following the end of Mr. Thorn's evidence. The Board allowed that application as well. Unfortunately, this testimony also raised matters that should have been put to Mr. Hollyoak concerning the new theory of the defence raised by the Employer during its recall of Mr. Thorn. The Board therefore allowed this application as well. While this procedure is highly unusual, we felt it appropriate in the circumstances and necessary to ensure that both sides had the full opportunity to put their case forward, without causing undue expense and delay. In the circumstances, it did not amount to a "splitting" of the case by either party but was due to the timing and manner in which documentary evidence was disclosed and perhaps the unexpected oral evidence that was given. In our view, the Board took all measures necessary to ensure that neither party was prejudiced by this process.

Relevant statutory provisions:

[30] The relevant provisions of the *Act* include the following:

> *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 bargain 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.*
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> *5. The board may make orders:*
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> *(d) determining whether an unfair labour practice or a violation of this Act is being or has been engaged in;*
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> *(e) requiring any person to do any of the following:*
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> *(i) to refrain from violations of this Act or from engaging in any unfair labour practice;*
> *(ii) subject to section 5.1, to do anything for the purpose of rectifying a violation of this Act, the regulations or decision of the board;*
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> *. . .*
>
> *(g) fixing and determining monetary loss suffered by an employee ...*

> *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:*
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> > *(a) in any manner, including by communication, to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any rights conferred by this Act;*
> >
> > *. . .*
> >
> > *(c) to fail or refuse to bargain collectively with the 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;*
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> *. . .*
>
> *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 require compliance with provisions of this Act, with any regulations made under this Act or with any decision in respect of any matter before the board.*

Arguments:

The Union

[31] The Union argued that the Employer's actions in banning Mr. Casemore under *The Hotel Keepers Act* amounted to a breach of the memorandum of agreement between the Union and the Employer and therefore a violation of s. 11(1)(c). The Union asked for an order voiding the collective agreement, which will then put the Union in a legal strike position. The Union argued against this breach being a matter for grievance arbitration on the basis that the remedy it seeks is not available in such proceedings.

[32] The Union also alleges that the Employer is in violation of s. 11(1)(a) of the *Act*. The Union urged the Board to accept its evidence that the horn blowing incident did not occur and that the Employer had no basis for banning Mr. Casemore from the hotel premises. In its view, the only conclusion is that the Employer was trying to get back at the Union or at Ms. Casemore because of the strike.

[33] The Union argued that the Employer engaged in threatening or coercive conduct in retaliation against Ms. Casemore because of her criticism of Jamie Thorn and her union activity, including her support for the Union and participation on the picket line. There was also an impact on all employees in the bargaining unit, who were reported to be upset by the Employer's conduct.

[34] The Union submitted that the appropriate standard for assessing a violation of s. 11(1)(a) should be made with reference to the test the Board uses under s. 9 of the *Act* to dismiss a rescission application for employer influence/involvement. In this regard, the Union referred to *Walters v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Dimension 3 Hospitality Corporation o/a Days Inn*, [2005] Sask. L.R.B.R. 139, LRB File No. 238-04,[1] a decision of the Board where the Board found employer influence in circumstances where the employee's evidence contained too many inconsistencies and was not logical.

[35] The Union urged the Board to apply both objective (how others observed and interpreted the Employer's conduct) and subjective (how Ms. Casemore felt and perceived the Employer's conduct) tests. The Union argued that this was a horrible and devastating event for Ms. Casemore that caused her great loss. The Union referred to *Reese v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Holiday Inn Ltd.*, [1989] Summer Sask Labour Rep. 84, LRB File Nos. 207-88 & 003-89[2] where the Board found a violation of the *Act* concerning the dismissal of an employee during an organizing drive, even though there was no evidence that that employee was involved in the union activity itself.

[36] In terms of remedies, the Union seeks the costs of relocating the wedding, general damages, Ms. Casemore's lost wages resulting from her forced departure from her employment, relocation costs and aggravated damages for mental distress.

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[1] Counsel for the Union mentioned the "Days Inn" case in oral argument although he provided no citation for the same. On the basis of the substance of the argument, the Board has concluded that the case cited in these reasons was likely the one referred to by counsel.

[2] Although no citation was provided by the Union for this case authority, this is the only decision involving the Holiday Inn that contains an analysis of s. 11(1)(a) of the *Act*.

The Employer

[37] The Employer argued that there was no evidence to support a finding of a violation of s. 11(1)(c) as there had been no failure to bargain collectively and, in fact, no duty to bargain collectively concerning a member of the bargaining unit.

[38] The Employer also argued that there was no basis to support a finding of a violation of s. 11(1)(a) of the *Act*. Neither Mr. Casemore nor Ms. Casemore was exercising a right under the *Act* and the Union is only speculating that their union activity was a reason for the Employer's actions. The Employer urged the Board to accept its evidence concerning the horn blowing incident and the fact that it made the determination to ban Mr. Casemore in order to protect employees in the workplace. The Employer maintained that its actions had nothing to do with a union member or employee and that s. 11(1)(a) does not apply to third parties. In addition, while characterizing Ms. Casemore's actions as a "hysterical overreaction," the Employer argued that the test for s. 11(1)(a) is not a subjective one and said that there was no evidence of a motivation by the Employer to intimidate or coerce any employee. The Employer pointed out that the ban did not extend to the wedding reception itself that had previously been booked and that Ms. Casemore had not, at that time, booked a night's stay at the hotel and, in fact, had not yet decided on how the free night's stay might be used.

Analysis and Decision:

[39] The Union alleges that the Employer is in violation of ss. 11(1)(a) and (c) of the *Act*. The argument of the Union in relation to a violation of s. 11(1)(c) focuses on the memorandum of agreement entered into by the Union and the Employer at the conclusion of the strike and specifically the provision noted above dealing with their agreement that "there will be no . . . other legal proceedings initiated by either of them arising out of or related to the labour dispute to date . . ." Given that the crux of the Union's argument appears to be that the Employer has violated a provision of their agreement settling the terms of their collective agreement; it is arguably a matter to be dealt with under the collective agreement as a grievance. However, the Union has asked that we deal with the matter as an alleged failure of the Employer to bargain collectively in violation of s. 11(1)(c) of the *Act* because it believed it could not get the remedy it sought through the grievance arbitration procedure. Aside from the question of whether the Employer's decision to ban Mr. Casemore from the premises pursuant

to *The Hotel Keepers Act*, is a "legal proceeding" itself (which is highly debatable), in our view, the Employer's action does not fall within the restriction prescribed by this provision because the only reasonable interpretation of the parties' agreement is that they contemplated legal proceedings between the parties against the Union or the employees whom the Union represents and not those legal proceedings initiated against a third party not employed by the Employer nor a member of the Union. We also note that if we were to find that the Employer's actions under *The Hotel Keepers Act* were prohibited by this provision, arguably this application to the Board by the Union seeking damages on behalf of one of its members is also a "legal proceeding . . . related to the labour dispute" and in violation of the same provision. Even if we are wrong in concluding that the Employer's action is not a legal proceeding contemplated by the prohibition in the agreement, the Union's argument under s. 11(1)(c) could only succeed if the Employer's actions were considered to be a legal proceeding affecting the Union or its members, a matter that is at the very core of our determination under s. 11(1)(a) – in other words, unless the Union establishes a violation of s. 11(1)(a) (i.e. that the conduct of the Employer interfered with or had an intimidating or coercive effect *on employees exercising rights* under the Act), there can be no possible violation of s. 11(1)(c). Given our findings below, it is unnecessary for us to deal with this issue in the context of s. 11(1)(c).

[40] We are therefore left to determine whether the Employer is guilty of violating s. 11(1)(a), that is, whether it has engaged in conduct that has interfered with or had a coercive or intimating effect upon an employee or employees in the exercise of rights under the *Act*. As the parties did not provide the Board with relevant case authority, other than the *Holiday Inn* case, *supra*, cited by the Union (where the Board dismissed the application) as support for or against a finding under s. 11(1)(a), it was necessary for the Board to undertake research in order to determine this application.

[41] Most of the cases where the Board has found a violation of s. 11(1)(a) involve either: **(i) improper communications by an employer to the employees during the course of an organizing drive or in the context of collective agreement negotiations with the union** (see for example: *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; *Retail, Wholesale and Department Store Union, Local 558 v. Canadian Linen Supply Company Limited*, [1991] 1st Quarter Sask. Labour Rep. 63, LRB File No. 029-90; *Retail, Wholesale and Department Store Union, Local 480 v. Canada Safeway Limited and Brent*

Foulger, [1986] May Sask. Labour Rep. 66, LRB File Nos. 400-85 & 046-86; *Service Employees' International Union, Local 299 v. LifeLine Ambulance Service Ltd. and Randy Crashley*, [1993] 4th Quarter Sask. Labour Rep. 149, LRB File No. 183-93; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Yorkton Credit Union*, [1997] Sask. L.R.B.R. 454, LRB File No. 090-96; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Off the Wall Productions Ltd.*, [2000] Sask. L.R.B.R. 156, LRB File Nos. 192-98 to 194-98; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Raider Industries Inc., Martin Brown and Bill Humeny*, [1997] Sask. L.R.B.R. 97, LRB File Nos. 169-96 & 170-96); or **(ii) as an adjunct to a finding of a violation of s. 11(1)(e) in circumstances where an employee involved in an organizing drive is disciplined or dismissed and the Board has found that the employer's reasons are, in part, related to the employee's organizing activity** (see for example: *Service Employees' International Union, Local 299 v. LifeLine Ambulance Service Ltd.*, [1993] 4th Quarter Sask. Labour Rep. 171, LRB File Nos. 227-93 to 229-93; *Canadian Union of Public Employees, Local 342 v. City of Yorkton*, [2001] Sask. L.R.B.R. 19, LRB File Nos. 227-99 to 281-99; *Amalgamated Transit Union, Local 588 v. Wayne Bus Ltd.*, [1999] Sask. L.R.B.R. 369, LRB File No. 117-98; *Industrial Wood and Allied Workers Canada, Local 1-184 v. Cabtec Manufacturing Inc.,* [2002] Sask. L.R.B.R. 271, LRB File Nos. 042-02 to 044-02).

[42] There are very few decisions of the Board where the impugned conduct giving rise to an independent finding of a violation of s. 11(1)(a) did not involve improper employer communications. Of those discovered by the Board, the decisions were of no assistance because either there was no violation of the *Act*, the facts were insufficient, or the decision contained no useful analysis, particularly in light of the principles that have developed over time (see for example: *Canada Safeway*, *supra* and *United Food and Commercial Workers, Local 1400 v. Madison Development Group Inc.*, [1996] Sask. L.R.B.R. 75, LRB File No. 131-95). It is therefore necessary to determine whether the Employer has violated s. 11(1)(a) according to the usual tests applied by the Board in the context of those cases involving an allegation of improper employer communications.

[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, *supra*. 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.***
>
> *For example, in Super Valu, a division of Westfair Foods Ltd. and Alberta Food and Commercial Workers Union Local 401 (1981) 3 Can LRBR 412 this Board commented on the special susceptibility of most employees to employer comment and conduct during a union organizing campaign.*
>
> *The Ontario Labour Relations Board also examines the objective factors of what has occurred and draws reasonable inferences to determine the probable effect of employer conduct upon employees of average intelligence. In Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Greb Industries Limited (1979) OLRB, February, 89 at 98 the Board stated:*
>
> > *"In evaluating conduct which leads up to the holdings of a representation vote so as to determine whether that vote ought to be set aside, the Board has sought to establish whether the employees were capable of freely expressing their true wishes in that representation vote. The party which seeks to set aside a representation vote is required to establish that the impuned conduct has deprived the employees of the ability to freely express their true wishes . . .* ***The effect of impuned conduct upon the employees is determined by looking at the objective factors of what has occurred and drawing reasonable inferences as to what is a more probable effect of such conduct upon the employees in all these circumstances*** *. . .*

> ***This is an objective test. The Board's approach is to determine the likely effect of the impuned conduct upon an employee of average intelligence and fortitude****."*
>
> [**emphasis added**]

[45] The Board went on in *Saskatoon Co-operative Association* to apply the test to the communications in question, utilizing the objective test and considering the context in which the communications took place. The Board stated at 40:

> *The Board has considered the circumstances surrounding the communications in this case in an effort to determine their probable effect. All of the communications occurred during the strike and, with the exception of the second and third communications, all of them were received by employees while they were on the picket line. In that situation it cannot be said that the employees were a highly sensitive captive audience for the employers' representations. 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.*

[46] 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 generally, 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 exercise of any rights conferred by the Act.***
>
> ***[emphasis added]***

[47] Specifically with respect to the question of whether the employer was in violation of s. 11(1)(a), the Board in *Canadian Linen* followed *Saskatoon Co-operative Association*, *supra*, and stated at 68:

> *The determination of whether, in the particular circumstances, a communication has interfered with, coerced, intimidates, threatened or restrained an employee in the exercise of a right conferred by the Act is an objective one. The Board's approach in such cases is to ascertain the likely effect of the communication on an employee of average intelligence and fortitude.*

[48] While the Board in *Canadian Linen* found that there was no violation of the *Act* in relation to the two general meetings with employees, the Board did find the employer in violation of s. 11(1)(a) of the *Act* in relation to its conduct toward one employee in particular. The Board analyzed the situation as follows at 70 and 71:

> *Although an employer is entitled to communicate with its employees, it must be circumspect when doing so during negotiations. An employer is entitled to express his views, so long as he does not use coercion, intimidation or threats in doing so.*
>
> *As already noted, the nature of the particular communications complained of were proper and did not offend the provisions of The Trade Union Act. However, the Employer's conduct in compelling Wendy Larmand's attendance at the meeting is another matter.* ***Jolly's direction to Larmand that she attend the meeting forthwith or she would be suspended and called back to work as and when he saw fit cannot be viewed as anything but a direct threat. It is difficult to imagine how an employee of average intelligence and fortitude who overheard, or was the recipient of Jolly's threat, would not feel coerced in the circumstances.***
>
> ***However, in addition to determining the existence of a threat, the Board must decide whether the threat interfered with the exercise, by an employee of average intelligence and fortitude, of a right conferred by The Trade Union Act. In reaching that determination, the Board looks not only at the nature of the communication itself, but also the context in which it occurred.***
>
> *Here, the Employer held its last meeting to communicate its bargaining proposal, within hours of when that proposal would be voted on by its*

> *employees. In order to ensure the attendance of Larmand at the meeting, the Employer threatened her with suspension.* ***In our view, it is a natural progression of reason to conclude that an employee of average intelligence and fortitude, in the position of Larmand, would have felt threatened or coerced when deciding whether or not to vote in favour of the proposal made by the Employer.***
>
> [**emphasis added**]

[49] Also of note in the *Canadian Linen* case is the Board's emphasis on the objective test, noting that the result might have been different if the test was a subjective one. At 71, the Board stated:

> *We are cognizant of the fact that the confrontation with Jolly was purposely created by Larmand and that Larmand, considering her position in the union and her knowledge of both the status of bargaining and the purpose of the meeting, could hardly been seen as the "average employee". However, the protections provided by The Trade Union Act cannot be denied by the Board because the personalities in a specific case do not appear to be in need of the same.*

[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:

> *A somewhat similar approach is reflected in the following comment of the Ontario Labour Relations Board in Forintek Canada Corp. v. Public Service Alliance of Canada, [1986] OLRB Rep. April 453, at 474:*
>
> > *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 that those made during early stages of bargaining, accurate statements are less suspect that inaccurate ones and, in any event,*

> *communications of explanations or positions not first fully aired at the bargaining table are highly suspect.*

In considering the significance of the amended wording of s. 11(1)(a) of the Act, the Board made the following comment in Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Brown Industries (1976) Ltd., [1995] 2nd Quarter Sask. Labour Rep. 71, LRB File Nos. 010-95 and 012-95, at 85:

> *The proviso which was included in the previous version of s. 11(1)(a) of the Act has sometimes been referred to as an "employer free speech" provision. It should be clear from the jurisprudence of this Board that we have never interpreted the issue as one which revolves around a public interest in protecting the right of an employer as a citizen to speak freely. We have taken the position that any communication from an employer to employees must be seen as coloured by the coercive potential present in a relationship where the employer has disproportionate power derived from control over employment, and the terms and conditions of that employment. In this context, we have stressed that an employer is not entitled to influence the decision employees make about trade union representation, and that an employer makes comments on the representation question at their peril.*

The Board went on to say, also at 85:

> *It is our view that the new wording in s. 11(1)(a) of the Act does not place new restrictions on the subject matter of employer communications, or limit all employer communication to matters which might strictly be described as ordinary questions of business. The new section does underline the view which the Board has always taken that the concept of "free speech" is something of a red herring in this context.* ***It stresses that the focus of the section is on interference and coercion, whether the vehicle is communication from the employer or other conduct.***

In arriving at this interpretation, the Board rejected the argument that the amendment to s. 11(1)(a) of the Act was meant to prohibit all communication by an employer to employees concerning matters which are the subject of bargaining. The Board accepted, as we had in the past, that not all communications are precluded.

On the other hand, the Board has repeatedly cautioned employers that a decision to communicate with employees concerning matters which are the subject of bargaining with the trade union represents a risky strategy, and that an employer can easily go too far in such communications. In

> *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Westfair Foods Limited, [1995] 2nd Quarter Sask. Labour Rep.234, LRB File Nos. 246-94 and 291-94, the Board sounded a warning note in these terms, at 259:*
>
> > *We have often stressed, however, that for an employer to decide to communicate with employees concerning matters which are the subject of bargaining with the trade union representing those employees is to enter on a course which entails significant risks. As we have indicated, the Board has not prohibited employers from presenting accurate information to their employees, stating their position on bargaining issues, or describing the status of collective bargaining. On the other hand, the Board has made it clear that communications from an employer cannot be regarded in the same benign and uncoloured light as ordinary exchanges.* ***An assessment of whether there is something objectionable about a communication from an employer must take into account the vulnerability of employees to the incalculable and often unacknowledged influence which such an utterance may have upon persons whose working conditions or employment may depend on the character of their relationship with the employer.*** *In some situations, as the Board suggested in the United Food and Commercial Workers v. F.W. Woolworth Co. Ltd. [1993] 1st Quarter Sask. Labour Rep. 62, LRB File No. 148-93 decision, there may be no room for any communication from the employer which does not have a coercive implication.*
>
> *[**emphasis added**]*

[51] The Board characterized the alleged misconduct of the employer as follows at 462:

> *The complaint of the Union centres on the memorandum dated April 10, 1996, which was reproduced earlier in these Reasons. Their objection is that the statements in the first paragraph of this memorandum significantly misrepresent the conduct of the Union negotiating committee, and that this constitutes interference with the relationship between the employees and their bargaining representatives.*

[52] Applying the objective test to the case before it, the Board determined that the employer had violated s. 11(1)(a) because the employer's misinformation in its communications with employees represented interference in the relationship between the employees and the union. At 465 and 466 the Board stated:

> *We have said earlier that an employer who chooses to communicate with employees concerning issues which are the subject of bargaining with the trade union representing those employees must be exceedingly careful in framing those communications. We have stated our view that, in assessing such communications, the question is not whether the communication is a legitimate exercise of freedom of expression, but whether there is anything about the communication which may have a coercive impact on employees or interfere with their ability to exercise their rights under this Act, taking into account the imbalance of power between employees and their employer.*
>
> *In this connection,* ***we do not think it is necessary that the Union adduce evidence to show that individual employees have, in fact, suffered coercion or intimidation resulting from the communications. As we have pointed out in the past, the assessment of the effect of the communications is generally an objective one, and does not depend on the ability of the complainant to produce evidence of a subjective impact on employees.*** *In any case, the essence of the Union complaint in this case is not that the communication was of a coercive nature, though this is the character of the allegations made in many cases of this kind. The allegation in this instance is that the misinformation in the first paragraph of the memorandum constituted interference in the relationship between the employees and their bargaining agent, because it cast doubt on the strategy being followed by the Union at the bargaining table.*
>
> *We have concluded that this complaint is well-founded. The evidence of Mr. Deutscher failed to provide a convincing explanation as to why the memorandum characterized the position taken by the Union as unchanged since November of 1995, and this was, in our view, a misleading description of what the situation actually was as of April 10, 1996.* ***This may or may not have undermined the Union in the eyes of the members of the bargaining unit, but it is not open to an employer to engage in conduct which poses a significant threat to the strength of the bond between employees and the trade union representing them.***
>
> [**emphasis added**]

[53] Based on the authorities canvassed above, the question requiring determination by the Board is whether, in the circumstances that existed on or around September 13, 2005, we should draw an inference that the Employer's conduct had the likely or most probable effect of interfering with or of intimidating or coercing an average employee of reasonable intelligence and fortitude, in the exercise of rights under the *Act*.

[54] The alleged impugned "conduct" of the Employer might be characterized in two different ways: (i) the Employer's decision under *The Hotel Keepers Act* to ban Mr. Casemore

from the premises, except for the time during which the wedding reception was to be held at the hotel; or (ii) the Employer's failure to allow Ms. Casemore to utilize the customary gift from the Employer of a free night's stay at the hotel with Mr. Casemore on her wedding night, which resulted from the Employer's decision to ban Mr. Casemore from the premises. In our view, it matters not to the final determination of this application how we characterize the conduct of the Employer, however, we will examine each characterization of the conduct separately.

[55] If we characterize the conduct of the Employer as the Employer's decision under *The Hotel Keepers Act* to ban Mr. Casemore from the premises, except for the time during which the wedding reception was to be held at the hotel, it is then necessary for us to determine whether that action of the Employer had the likely effect of interfering with or of intimidating or coercing Ms. Casemore (or other employees in her position) in the exercise of a right under the *Act*. In order to do so, we must examine the effect of the Employer's conduct by looking at objective factors of what occurred to determine whether we should draw an inference that that conduct had this probable effect on an average employee of reasonable intelligence and fortitude. The Union has urged us to find that the Employer did not have reasonable grounds to ban Mr. Casemore from its premises and that, therefore, the real intention of the Employer in taking this action was so that Ms. Casemore would not be able to use the gift of a free night's stay at the hotel on her wedding night with Mr. Casemore. At the hearing, the Employer stated that its reasons for banning Mr. Casemore included: (i) that Mr. Casemore intentionally blew a horn in Mr. Thorn's ear while on the picket line, causing damage to Mr. Thorn's hearing; (ii) that Mr. Casemore, while on the picket line, walked backwards facing Mr. Thorn and repeatedly blew his horn in an effort to provoke Mr. Thorn; (iii) that Mr. Casemore had a verbal confrontation with Ms. Thorn at or near the parkade, during the strike; and (iv) that, following the strike, there was a feeling of discomfort among spa staff concerning Mr. Casemore's repeated presence in their back office.

[56] To the extent that we are required to assess the Employer's conduct based on objective factors, in our view, the grounds put forward by the Employer for banning Mr. Casemore are weak. By making this determination, we are not attempting to usurp the role of a court to make the determination under *The Hotel Keepers Act*, but rather as a necessary part of our analysis of the objective factors concerning the Employer's conduct. We have previously found, as a fact, that Mr. Casemore did not intentionally blow a horn in Mr. Thorn's ear while on the picket line or that, if he did, he did not intend to do so or to cause injury to Mr. Thorn.

However, we do accept that Mr. Thorn had a horn blown in his ear and, whether it was by Mr. Casemore or not, we find that Mr. Thorn believed it was Mr. Casemore.

[57] It appears that, thereafter, Mr. Thorn had the belief that he was a particular target of Mr. Casemore and this likely clouded his perspective, as well as that of Ms. Thorn's, concerning subsequent events. The alleged incident of Mr. Casemore walking backward blowing his horn, was not, in our view, a memorable or extraordinary event on the picket line such that Mr. Casemore might even recall it. Given Mr. Thorn's lack of testimony about that incident, we doubt it was significant. In any event, given Mr. Thorn's special susceptibility and the ease with which he appeared to be provoked (this conclusion having been based on both his conduct on the picket line and on the witness stand), this event likely added to Mr. and Ms. Thorn's views that they did not want Mr. Casemore on the premises.

[58] We do not accept the evidence of Ms. Thorn that one of the reasons for the ban was the alleged confrontation with her in the parkade. In this regard, while we prefer the evidence of Mr. Casemore, we find that, even if this conduct occurred, Ms. Thorn was not at all personally intimidated or bothered by any comments he made (in this regard we note the disparaging comment she says she made to Mr. Casemore) but rather, as admitted by her, she was more concerned about Mr. Thorn's reaction to Mr. Casemore.

[59] Lastly, while we have some doubt over the truthfulness or extent of the discomfort of the spa staff concerning Mr. Casemore's continued presence in the back office in the months following the strike, we do not accept that this allegation was a reason supporting the Employer's decision to ban Mr. Casemore, although Ms. Thorn's knowledge of Mr. Casemore's presence at the hotel may have been what prompted Ms. Thorn to resurrect her concerns over the perceived issue between Mr. Thorn and Mr. Casemore. We also note that this reason was not indicated in the Employer's reply to the application nor was any post-strike conduct mentioned in the September 13, 2005 letter banning Mr. Casemore. The first time it was brought up was during the course of the hearing and specifically not until the cross-examination of Mr. Casemore, the Employer having failed to raise the issue in its cross-examination of Ms. Casemore.

[60] In addition, while we have the credible evidence of Mr. Casemore concerning the reasons and circumstances of Mr. Casemore being present in the back office, including that he

had the permission of the supervisor on shift to be there, there is no other evidence to support Ms. Thorn's assertions in this regard, which we note are hearsay in nature. In these circumstances, given the importance of the allegation and the potential unreliability of hearsay evidence, we prefer the direct evidence given by Mr. Casemore. Also, it appears that this reason may have been put forward by the Employer because it was the only purported ground for the ban that related to conduct that occurred following the strike and that did not involve Mr. or Ms. Thorn personally. In addition, we note that it is suspect whether the decision to ban Mr. Casemore was actually made by the Employer and not just by Ms. Thorn, given that the directors' initial reaction to Ms. Thorn's concerns during the course of the strike was to not take such a step. The evidence suggests that the decision to ban Mr. Casemore was likely made unilaterally by Ms. Thorn on her own, however, because she purported to act on behalf of the Employer, it is the Employer who bears responsibility for this decision. We also note that the decision was made by Ms. Thorn without consulting either Mr. Thorn or Mr. Casemore for their version of the events.

[61] The fact that we have found that the Employer did not appear to have a reasonable basis for banning Mr. Casemore does not end our inquiry into the nature of the Employer's conduct. In our view, the most probable way to characterize the purpose or effect of the Employer's conduct in banning Mr. Casemore is that Ms. Thorn wanted Mr. Casemore off the premises because of his effect on Mr. Thorn. In fact, Ms. Thorn stated that she was worried about Mr. Casemore's continued presence because of her concern that Mr. Thorn was likely to "pop him." In our view, the ban arose out of a personal reaction of Mr. Thorn to what he perceived as Mr. Casemore's wrongful and provoking behaviour toward him. Whether that provides proper grounds for banning him under *The Hotel Keepers Act* is not for us to decide as that is a determination to be made by a court upon application by Mr. Casemore, if he chooses to make one. However, the characterization of the Employer's conduct assists us in our determination of whether we should draw a reasonable inference that the likely effect of that conduct would be to cause an average employee of reasonable intelligence and fortitude to feel interfered with or intimidated or coerced in exercising of a right under the *Act*. In all of the circumstances of this case, no such reasonable inference can be drawn.

[62] As stated, this determination is made on an objective test and therefore the subjective views of Ms. Casemore are irrelevant. Ms. Casemore was understandably upset by the effect on her of the Employer's conduct in banning Mr. Casemore, but for the hours of their

wedding reception. If the ban was not lifted, it foreclosed the possibility of her being able to utilize the gift of a free night's stay by spending her wedding night at the hotel with her spouse. After speaking with the Union, Ms. Casemore felt that the Employer's actions amounted to interfering with her ability to utilize the gift or intimidating her because of her support for the Union, as evidenced by her participation on the picket line during the strike.

[63] It is our view that the inability of Ms. Casemore to use the gift of a free night's stay with her spouse on her wedding night simply is not interference with a right she has which has been conferred by the *Act*. The ability to utilize the gift in the manner in which she wishes may not even be a right under the collective agreement between the parties, but that is a matter for a grievance arbitrator and not this Board. In any event, we also do not accept that the likely effect of the Employer's conduct, *as viewed by an average employee of reasonable intelligence and fortitude*, would be to interfere with the exercise of her rights under the *Act*. In this regard, we look not only at the conduct itself but at the timing of the conduct and the context in which it occurred.

[64] On September 13, 2005, at the time the Employer banned Mr. Casemore, the strike was over, the Union had successfully negotiated a renewal collective agreement and, aside from some continued tension in the hotel concerning the Union's fines of members who crossed the picket line and Ms. Thorn's interference with the same (see LRB File No. 217-05), Ms. Casemore herself was experiencing no particular problems at work, except for a concern she had about Ms. Thorn's daughter's performance as a supervisor at the spa, a factor which we find played no part in this matter. Of particular relevance to our determination is the fact that the ban did not prohibit Mr. Casemore from attending the wedding function that Ms. Casemore had already booked with the hotel. That, combined with the following facts: (i) that the issue of the gift had not yet arisen between Ms. Casemore and the hotel; (ii) that the gift was given to an employee in lieu of employees contributing to a gift for an employee getting married and not because of a booking of the reception at the hotel; (iii) that the gift could be used at any time; (iv) that a night's stay had not yet been booked; (v) that Ms. Casemore had not yet decided whether to use the gift of a night's stay for her bridesmaids the night before the wedding or for her wedding night; and (vi) that no attempt was made to obtain a further exception to the ban to spend their wedding night there, if they so chose; lead us to conclude that the likely effect on an average employee of reasonable intelligence and fortitude would not cause that employee to

view the Employer's conduct as interference with the exercise of the employee's rights under the *Act*.

[65] Similarly, we do not accept that the Employer's conduct had the probable effect of intimidating or coercing an employee in the exercise of any rights under the *Act*. Again, we have difficulty reaching the conclusion that Ms. Casemore was exercising rights under the *Act* by reason of her inability to utilize the gift in the manner she wished but, even if the Union were to overcome that hurdle, we still find, on the basis of our conclusions above with regard to the timing and context of the conduct, that the Employer's purpose was not to intimidate or coerce Ms. Casemore. While the Union urged us to accept the evidence of Ms. Casemore that she must have been intimidated or coerced upon learning of the ban because she took ill, did not return to work, moved her wedding from the hotel to a facility in Saskatoon and ultimately quit her job and moved away, it is necessary for us to determine this matter on an objective basis and not from Ms. Casemore's personal perspective and subsequent actions. We simply do not find that the average employee of reasonable intelligence and fortitude would perceive the Employer's conduct as intimidating or coercive such that being a member of the Union and participating in its lawful activities was so intolerable that all connections with the Employer had to be severed. Aside from the fact that Ms. Casemore's departure from her position and Mr. and Ms. Casemore's relocation to Estevan appear to have been motivated by additional considerations, we do not accept that this is relevant evidence for us to consider under the appropriate test for s. 11(1)(a) and we find that it does not reasonably flow from Ms. Casemore's inability to use the gift in the manner she wished.

[66] The alternate characterization of the conduct of the Employer as identified at the outset of our analysis also does not give rise to a finding of a violation of s. 11(1)(a). Specifically, we find that the Employer's failure to allow Ms. Casemore to utilize the gift from the Employer of a free night's stay at the hotel with Mr. Casemore on her wedding night, which resulted from the Employer's decision to ban Mr. Casemore from the premises, did not have the probable effect of interfering with or intimidating or coercing an average employee of reasonable intelligence or fortitude in the exercise of rights under the *Act*.

[67] In answering this question, the only portion of our analysis that differs from that above in relation to our first characterization of the Employer's conduct, is that the focus is on the probable effect on other members of the bargaining unit concerning the totality of the

Employer's conduct affecting both Mr. and Ms. Casemore. With such an analysis, we must presume that the exercise of rights by employees under the *Act* would be considered to be their past and continued participation in the lawful activities of the Union, including their support for the strike and their participation on the picket line in July 2005 (and their decision to not cross the picket line to gain favour with the Employer and Ms. Thorn). However, given the timing and context of the conduct as outlined earlier, we cannot draw an inference that the totality of this conduct had the likely effect of interfering with, intimidating or coercing employees in the exercise of these rights. In our view, an average employee of reasonable intelligence and fortitude would view the matter as we have, that the Employer's decision to ban Mr. Casemore from the premises was based on the personal reaction (or overreaction) of Mr. Thorn to what he perceived as Mr. Casemore's conduct during the strike, and Ms. Thorn's need to "protect" her spouse.

[68] Although this action had the unfortunate effect of foreclosing Ms. Casemore's choice to utilize the gift of a free night's stay with Mr. Casemore on her wedding night, it did not, as of the date of the ban, foreclose the giving of the gift by the Employer for use by Ms. Casemore in another manner. While it is not necessary to lead evidence of the subjective views of employees on this question, we also do not believe that this conduct, viewed objectively in this manner, would intimidate or coerce other employees in the exercise of rights under the *Act*.

[69] In addition, there can be no suggestion that the conduct, viewed in any manner, caused interference with other employees' relationships with the Union. We also note that the conduct did not foreclose the ability of Mr. Casemore to challenge the Employer's actions in an appropriate forum and/or the ability of the Union to file a grievance on Ms. Casemore's behalf, if it considered that she was denied a benefit to which she was entitled. There is simply no basis upon which to conclude that the Union was undermined in any way by the actions of the Employer or that the actions of the Employer threatened the bond between the Union and its members.

[70] We wish to make it clear that our conclusions on this matter are not merely premised on the fact that the initial conduct of the Employer was directed to a non-employee which then led us to an analysis of the indirect effect of the Employer's conduct on an employee or employees. While it is obviously easier to draw a connection between the purpose and the effect required to establish a violation of s. 11(1)(a) if the Employer's actions are directed solely

at an employee, an indirect action of the Employer does not of itself foreclose the possibility of a finding of a violation of s. 11(1)(a). For example, the banning of a union representative who is not an employee, might lead to such a finding if the effect of the conduct was to interfere with or intimidate employees in the exercise of the right to receive representation by that union representative. Of primary importance to our conclusion in this case was the lack of a connection between the conduct and a prohibited effect on employees, given the timing and context and as viewed on an objective basis, as well as the lack of connection between any possible purpose or effect and the exercise of rights conferred by the *Act*.

[71] For the foregoing reasons, the application is dismissed.

DATED at Regina, Saskatchewan, this **9th** day of **April, 2007.**

LABOUR RELATIONS BOARD

Angela Zborosky
Vice-Chairperson