Labour Relations Board
Saskatchewan

STEWART MARTIN UNIQUE, Applicant v. TEAMSTERS LOCAL UNION 395, Respondent

LRB File No. 006-08; August 22, 2008
Chairperson, Kenneth G. Love, Q.C.

The Applicant: Stewart Martin Unique
For the Respondent: Juliana Saxberg

Duty of fair representation – Contract negotiations – Applicant alleged Union failed to properly represent him and other employees respecting a "special adjustment" and failed to disclose that adjustment not retroactive at ratification meeting. Board finds no fault in the conduct of the Union's negotiations. Board concludes that information provided to members for ratification was sufficient for a reasonable person to vote in an informed manner. Board found union's negotiations not to be arbitrary, discriminatory or in bad faith.

***The Trade Union Act,* 25.1.**

REASONS FOR DECISION

Background:

[1] Stewart Martin Unique (the "Applicant") filed an application under s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") on January 11, 2008, alleging that the Teamsters Local Union 395 (the "Union") had failed in its duty to fairly represent him as follows:

> *The union held a vote on a tentative agreement on November 20th 2007. Included in the documentation provided to the membership were yearly wage increases and some special adjustments to certain classifications. The proposed term was for a three years commencing Jan 1, 2007. (attached)*
>
> *At no time did our union representative Randy Powers report to the membership that the special adjustments to certain classifications were not retroactive to Jan 1st 2007.*
>
> *Members voted on the tentative deal under the understanding that these adjustments would be retroactive.*

> *When the employees in those certain classifications received there retroactive pay, the adjustments were not included.*
>
> *I spoke with human resources Susan Brown and she told me that there was an agreement at the table that the special adjustments would not be retroactive.*
>
> *I raised this matter with our union representative Randy Powers and he confirmed the information that I received from human resources that there was a verbal agreement with the employer to the effect that these rate adjustments would not be retroactive.*
>
> *The membership was not made aware of this verbal agreement prior to voting on the tentative agreement.*
>
> *When I asked our union representative why this was not reported at the meeting he stated "well you didn't ask if the adjustments were retroactive".*
>
> *If there was a verbal agreement with the employer then our union representative has a legal obligation to disclose this at our meeting prior to the members taking the vote.*

[2] A hearing of this matter commenced on May 9, 2008 and the Union denied that it had failed in its duty of fair representation. At the commencement of that hearing, the Union raised a preliminary objection to the jurisdiction of the Board to hear and decide the application brought by the Applicant. The Board considered that objection and ruled that it had jurisdiction to hear the matter. Written reasons for decision regarding the preliminary objection were provided to the parties on June 6, 2008. The matter was then heard by Board on August 21, 2008.

Facts:

[3] The Applicant testified on his own behalf and provided he is employed at Plastipak Industries Inc. (the "Employer") in Regina, Saskatchewan. The Applicant stated that he is a member of the Union, is employed as a materials handler and prior to his becoming a materials handler, he was a fork lift operator.

[4] Randy Power, president of the local of the Union, testified on behalf of the Union. The collective agreement between the Union and the Employer expired on December 31, 2006. Prior to its expiration, the Union began preparations for collective

bargaining. Mr. Powers testified that he began the process by surveying the employees to determine what items they wanted to have brought up during negotiations. Mr. Powers testified that he also served notice on the Employer that they wished to renegotiate the terms of the collective agreement.

[5] Negotiations between the Union and the Employer commenced in 2007. The Union, through Mr. Powers, introduced documents related to the positions of the parties in the negotiations. Not unexpectedly, the issue of wage increases was a key element in the discussions as were changes to two positions in the bargaining unit.

[6] It appears that both the Union and the Employer were in agreement that the duties of the former position of fork lift operator should be expanded to allow the fork lift operator to assist with some of the aspects of shipping and receiving of goods which was normally done by either a shipper or an assistant shipper. Mr. Powers described the situation that routinely occurred where the fork lift operators were asked to assist with shipping and receipt of goods in the plant. He advised that when the fork lift operator was utilized for this additional function, that person would receive a higher rate of pay for the hours spent performing that function. To allow for greater flexibility, the Union and the Employer agreed to create the position of materials handler, which would allow the persons who were previously fork lift operators to assist in the shipping function.

[7] Similarly, the Union and the Employer determined that a historical difference in wage rates for various press operators should be eliminated. One position was a lid press operator and another was a cup press operator. It was determined to simplify this classification as press operator at a common rate of pay. This change would also facilitate cross training of employees, which the Employer wished to do.

[8] Negotiations for other items such as wages took some time. In October of 2007, the Union took an offer by the Employer to the Union membership for a vote. The proposal was not supported by the bargaining committee and was turned down. The bargaining committee returned to the table and continued negotiations.

[9] A final offer from the Employer was then received by the Union on November 6, 2007. That final offer was taken to the membership at meetings held on November 19, 2007. The proposal from the Employer, which was reviewed at the November meeting, differed only slightly from the proposal considered in October, 2007. The significant changes as described by Mr. Powers in his evidence were:

> 1. *The effective date of the renewal agreement was changed from January 1, 2007 to January 1, 2008. This change was made to reflect the time which had occurred between the end of the previous contract (December 31, 2006) and present date, as well as to provide for a shorter contract duration, something the membership had requested at the October meeting.*
>
> 2. *Provision was made for general wage adjustments to be retroactive to January 1, 2007.*
>
> 3. *The general wage adjustment was enhanced over the retroactive period and for the contract duration.*

[10] The effect of the change in the effective date of the contract also had the effect of delaying the implementation of the changes to the fork lift operator position and the lid press operator position. While Mr. Powers testified it was the intention of the parties that the changes would be implemented upon ratification of the contract, in practice, the changes did not come into effect until January 1, 2008 because the plant underwent a shut down in December of 2007.

[11] Retroactive pay for 2007 was calculated and paid to the employees prior to Christmas, 2007. In January of 2008, the Applicant says he noted that he had not received any retroactive pay with respect to the change in the position description. He approached a representative of the Employer who, he testified, advised him that the Employer and the Union had agreed that those adjustments would not be retroactive. He then contacted his Union representative, Mr. Powers, who gave him similar advice. He then brought this application, claiming that the Union had failed to disclose that there would be no retroactivity with respect to the pay adjustment for the change related to the position description change (the “special adjustment”). He claimed that had the membership known that that adjustment was not retroactive that it would have changed how they would have voted on the Employer’s final proposal.

[12] The Applicant also called Angela Fichtner to testify. Ms. Fichtner is a press operator and prior to January 1, 2008 was a lid press operator. With the change in her position description, she would also have been entitled to a "special adjustment." She also testified that her vote would have been different at the November meeting had she been aware that the special adjustment was not retroactive.

[13] While it is not critical to the decision with respect to this matter, Mr. Powers testified that the results of the vote were very close. It may well have been that had the Applicant and Ms. Fitchner not supported the proposal, it would have been lost and a strike might have occurred.

[14] The Applicant, however, in his argument, suggested that the Union had failed in its duty to negotiate with the Employer in the best interests of the employees and had been "incompetent" in their representation of him and the other employees subject to the "special adjustment" in not having that adjustment retroactive. For the reasons set out below, the Board cannot agree with the Applicant's assessment of the Union's representation of him and the other employees.

[15] As a part of its case, the Union provided a copy of the Employer's final settlement offer dated November 6, 2007. That offer was provided to all employees at the ratification meeting on November 19, 2007. At the top of that proposal the following appears:

> *ARTICLE 37 – DURATION OF AGREEMENT*
>
> *January 1, 2008 to December 31, 2010*
>
> *Retro pay from January 1, 2007 on regular hours, OT, DT, Stat, Bereavement and Union hrs. paid*

Statutory Provisions:

[16] Section 25.1 of the *Act* reads:

> *Every employee has the right to be fairly represented in grievance or rights arbitration proceedings under a collective bargaining agreement by the trade union certified to represent his bargaining unit in a manner that is not arbitrary, discriminatory or in bad faith.*

Analysis & Decision:

[17] The Board has determined that the duty of fair representation includes that duty in the context of collective bargaining. The duty of fair representation was outlined by the Board in *Mary Banga v. Saskatchewan Government Employees' Union,* [1993] 4th Quarter Sask. Labour Rep. 88, LRB File 173-93, at 97 and 98:

> *…As we have pointed out before, the duty of fair representation arose as the quid pro quo for the exclusive status as bargaining agent which was granted to trade unions under North American collective bargaining legislation. Once a certification order is granted on the basis of majority support, members of the bargaining unit have no choice as to who will represent them, whether or not they were among those who supported the union. This exclusive status gave trade unions security and influence; it was, however, viewed as imposing upon them an obligation to represent all of those they represented in a way which was not arbitrary, discriminatory or in bad faith.*
>
> *The concept of the duty of fair representation was originally formulated in the context of admission to union membership. In the jurisprudence of the courts and labour relations boards which have considered this issue, however, it has been applied as well to both the negotiation and the administration of collective agreements.* ***Section 25.1 of The Trade Union Act, indeed, refers specifically to the context of arbitration proceedings. This Board has not interpreted the section in a way which limits the duty to that instance, but has taken the view that the duty at "common law" was more extensive, and that Section 25.1 does not have the effect of eliminating that duty of fair representation in the context of union membership, collective bargaining, or the grievance procedure.***
> *[Emphasis added]*

[18] The duty of fair representation requires the Union to act in a manner that does not demonstrate bad faith, arbitrary treatment or discrimination. The general requirements were set out by the Supreme Court of Canada in *Canadian Merchant Services Guild v. Gagnon, [1984] 84 CLLC 12,181*: In particular, the Court held that "the representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employees."

[19] The onus of showing a breach of the duty of fair representation falls upon the Applicant in these proceedings.

[20] In *United Steelworkers of America v. Six Seasons Catering Ltd.,* [1994] 3rd Quarter Sask. Labour Rep. 311, LRB File No. 118-94, the Board examined the application of the duty to bargain in good faith in relation to the negotiation of a collective agreement and commented as follows at 318:

> *In the case of the negotiation of provisions for a collective agreement, however, there are obvious difficulties of determining what constitutes a breach of the duty of fair representation. Unlike the situation which obtains in the case of decisions made in relation to grievances, the range of considerations of policy, practicality, strategy and resources which are legitimately taken into account are virtually limitless. Although labour relations tribunals and courts have acknowledged that this aspect of the duty exists, they have shown themselves reluctant to contemplate the chastisement of trade unions for a breach of the duty to negotiate fairly.*
>
> *The difficulty of determining how the principles of the duty of fair representation would apply where the issue arises in the context of the bargaining process is particularly acute in the case of an allegation that the conduct of the union is "discriminatory," which is the sort of charge the Union fears here. Collective bargaining is by nature a discriminatory process, in which the interests of one group may be traded off against those of other groups for various reasons - to redress historic imbalances, for example, or to reach agreement within a reasonable time, or to compensate for the achievement of some other pressing bargaining objective. The role of the union is to think carefully about the implications of the choices which are made, and no employee or group of employees can be assured that their interests will never be sacrificed in favour of legitimate bargaining goals or strategies.*

[21] As noted above, the collective bargaining process, is by its nature discriminatory in the purest sense of that word. Different positions will be treated differently based upon the negotiation process. As here, there was agreement with respect to a need to change the position descriptions of the fork lift operator and the lid press operator, but, that agreement did not extend to making a wage adjustment for a period in 2007 when that change in description had not taken effect.

[22] For discrimination in the collective bargaining process to be found, as pointed out by the British Columbia Labour Relations Board in *Robson v. United Food*

and Commercial Workers' International Union, Local 1518 [1999] B.C.L.R.B. No. 67, BCLRB Decision No B67/99, at para 28:

> *a charge of discrimination requires more than an unequal distribution of benefits…The mere existence of such differences does not constitute improper discrimination unless the distinctions are without reason.*

[23] In this instance, retroactivity was applied universally for the 2007 wage adjustment. Furthermore, the "special adjustments" did not come into effect until 2008. That was made clear in the material that was presented to the membership by the Union as noted above. The Board can find no basis upon which the Union can be faulted for the conduct of its negotiations with respect to the "special adjustments" nor the retroactivity of wage adjustments for the hiatus period of the collective agreement in 2007.

[24] Nor can the Board find that the conduct of the Union was in any way arbitrary in respect of its negotiations. We agree with the comments of former Chairperson Seibel in *Hidlebaugh v. Saskatchewan Government and General Employee's Union*, [2003] Sask. L.R.B.R. 272, LRB File No. 097-02, where he set out the test for arbitrariness in the conduct of collective bargaining at para 52:

> *… in the absence of any specific evidence of deficiency in collective bargaining representations by the Union, or evidence that it did not fairly assess the interests of its collective membership and the interests of individual members likely to be affected, we are not prepared to find any culpable failure on its part to fulfil this arm of the duty of fair representation..*

[25] The Applicant took the view that Mr. Powers failed to disclose at the ratification vote on November 19, 2007 that the "special adjustments" would not be retroactive. He suggested that this was as a result of bad faith on the part of Mr. Powers. However, the evidence does not support such a claim. Mr. Powers testified that the Applicant had, from time to time, been a shop steward in the plant. He also testified as to a good personal relationship between himself and the Applicant. Both the Applicant and Mr. Powers testified that when Mr. Powers was asked by the Applicant about the lack of retroactivity in January of 2008, he replied to the effect that he could have asked the question at the meeting. There was certainly no evidence of a clandestine plot to fail to disclose this information at the meeting, and as noted above, it is clear from the materials

presented by the Union at the meeting that the only certain items would be retroactive and that the changes to the position descriptions would not be in place until January, 2008.

[26] The information provided to the members at the November 19, 2007 ratification meeting was sufficient for a reasonable person to vote in an informed manner on the proposed agreement. Nothing was being held back from the membership for any improper purpose. The Union made full disclosure of the proposals to its membership. Accordingly, the Board can find no basis for any allegation of bad faith on the part of the Union in its disclosure of the terms of the proposed agreement to the membership or the Applicant.

[27] For the reasons set forth above the application is dismissed. An order will issue accordingly.

DATED at Regina, Saskatchewan this **22nd** day of **August, 2008.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson