The Labour Relations Board
Saskatchewan

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1400, Applicant v. CORNERSTONE CREDIT UNION, Respondent

LRB File No. 024-08; March 27, 2008
Chairperson, Kenneth G. Love, Q.C.; Members: Bruce McDonald and Joan White

For the Applicant: Drew S. Plaxton
For the Respondent: Larry F. Seiferling, Q.C.

Remedy – Interim order – Criteria – Board reviews test for granting of interim relief and Board's approach to interpretation of s. 11(1)(a) of *The Trade Union Act* – Board concludes that application does not reflect arguable case under s. 11(1)(a) and/or s 11(1)(c) of *The Trade Union Act* – Board dismisses interim application.

***The Trade Union Act*, ss. 5.3, 11(1)(a) and 11(1)(c).**

REASONS FOR DECISION

Background:

[1] United Food and Commercial Workers Union, Local 1400 (the "Union"), filed an application on March 7, 2008 alleging that Cornerstone Credit Union (the "Employer") engaged in an unfair labour practice as defined by ss. 11(1)(a), (c) and s. 12 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") by, *inter alia*:

> *g) Since the Fall of the year 2007 to present, and on a continuing basis, the employer has made a concerted effort to attempt to bargain terms and conditions of employment directly with employees and/or otherwise interfere with the collective bargaining process and the union's status as exclusive bargaining representative in the workplace. These efforts include but are not restricted to the following:*
>
> > *i. The Employer has, on at least two occasions, held captive audience meetings with members of the collective bargaining unit without the consent of the union in an effort to convince and/or intimidate them into accepting certain terms and conditions of employment and/or otherwise subvert the collective bargaining process and the union's status as exclusive collective bargaining agent.*

ii. The Employer has further conducted one-on-one meetings between members of management and members of the collective bargaining unit in an effort to negotiate with them directly.

iii. The employer has, on a number of occasions, distributed literature directly to members of the collective bargaining unit in an effort to negotiate terms and conditions of employment directly with members of the collective bargaining unit.

iv. The employer has unilaterally changed terms and conditions of employment without agreement by the union during the collective bargaining process, again in an effort to undermine the union's status as collective bargaining agent.

[2] Also on March 7, 2008, the Union filed an interim application returnable March 13, 2008 seeking interim relief including, *inter alia,* orders of the Board described as follows:

1. *An order or orders:*

   a) *Compelling the employer and anyone acting on its behalf, to bargain in good faith with the union concerning matters set out in the applicant's Unfair Labour Practice application;*

   b) *Prohibiting the employer and anyone acting on its behalf from negotiating or otherwise communicating in anyway with employees concerning matters set out in the applicant's Unfair Labour Practice application;*

   c) *Such Board decisions or other information as may be appropriate be posted throughout the workplaces in question and/or mailed or otherwise communicated to the employees at the employer's expense;*

   d) *The applicant further seeks an order declaring that the employer, Cornerstone Credit Union of Tisdale, Saskatchewan, is a successor employer to Tisdale Credit Union Limited and is bound by all orders and all proceedings had and taken before the Board, and a further order all collective agreements shall apply to the said employer.*

2. *An order for the expedited hearing of the matter within.*

3. *An order abridging the time for service of documents and/or for substitutional service if the same should be required;*

4. *An order preventing the employer from unilaterally changing any terms and conditions of employment without agreement by the union.*

5. *Such further order or orders as may be just.*

[3] The Employer filed a reply to the unfair labour practice application at the hearing of the interim application on March 13, 2008. The Employer also filed materials in response to the interim application at the hearing on March 13, 2008.

[4] These Reasons for Decision relate only to the interim application.

Evidence:

[5] The Union filed affidavits sworn by Lucia Figueiredo, Shona Litzenberger and Andrew Squires on March 7, 2008. The Employer filed affidavits of Randy Wehrkamp and Betty Bauhuis at the hearing on March 13, 2008. The Union also filed an additional affidavit of Ms. Figueiredo at the hearing on March 13, 2008. The following recitation of facts is based on those affidavits.

[6] The Union was certified as the bargaining agent for the employees as specified therein by Order dated January 13, 1981 (LRB File No. 353-80). At the time of that Order, the employer was named as Tisdale Credit Union.

[7] On January 1, 2008 Tisdale Credit Union merged with two other credit unions to form Cornerstone Credit Union, the respondent in this application.

[8] Prior to the merger of the credit unions, as early as 2006, the Union became aware that Tisdale Credit Union had entered into discussions with other credit unions for the purposes of a potential merger.

[9] To obtain information on the proposed merger, a meeting was arranged on November 9, 2006 between the Union and representatives of the Employer.

[10] On January 9, 2007 the Union received a letter from the Employer which contained further information concerning the proposed merger. The letter included a position paper, which was a staff communication to employees of the Employer, as well as a timeline for the proposed merger. The letter noted that:

> *As much as we have a history with the UFCW this is a multi-party process. Discussions around influence, positioning, etc. are equally influenced by the discussion between Cornerstone and RWDSU.*

Retail Wholesale and Department Store Union (RWDSU) is certified on behalf of the employees of one of the other merging credit unions.

[11] On March 2, 2007 the Union wrote to the Employer acknowledging a second meeting with the Employer for the purpose of providing information regarding the proposed merger. In its letter, the Union drew to the Employer's attention to comments which had been passed on to the Union concerning the Employer's "neutrality" regarding any potential choice the employees may have concerning its representation of the employees of Tisdale Credit Union.

[12] The Employer replied to this correspondence from the Union on March 21, 2007. The Employer advised that the decision to merge had been postponed. In response to the specific issue raised by the Union in its March 2, 2007 letter, the Employer replied that "[H]onest and open communication is the best strategy to increase understanding and build trust." The letter also advised the Union that the Employer would "continue our dialogue with staff on the amalgamation and other important developments and we view the UFCW as an essential partner in this process."

[13] The current collective agreement between the parties expired on December 31, 2007. The Union gave notice to bargain revisions on November 8, 2007.

[14] On November 9, 2007 the Employer wrote to the Union to update it on the proposed merger and to request dates for a meeting to "review the organizational structure and continue our dialogue on the merger."

[15] On November 20, 2007 the Union replied to the November 9, 2007 letter. In that correspondence, the Union suggested that the amalgamation issue be combined with the collective bargaining issues to make the meetings between the parties more efficient.

[16] On December 13, 2007, by an exchange of emails, the parties agreed to dates for collective bargaining. The Employer proposed dates in December 2007 but the Union was unavailable and proposed dates in January 2008 which were found to be agreeable. During that exchange of emails, the Employer proposed that it would pay a 3% "marketplace salary adjustment effective January 1, 2008 – subject to the outcome of bargaining." The Union concurred with that adjustment, again, subject to the outcome of bargaining.

[17] The Employer met with its employees on December 19, 2007. There is some disagreement between the parties as to the purpose and the matters discussed at the meeting, but it is common ground that employees were advised that they would be receiving an increase in their pay effective January 1, 2008. While the Union was aware of this increase in compensation, that knowledge had not been provided to the employees, who learned of it only at the meeting on this date.

[18] Other matters discussed at the December 19, 2007 meeting were:

(a) that the Employer had been unable to meet with the Union as yet to begin bargaining.

(b) that the Employer would attempt to extend the hours of work for employees at Tisdale Credit Union to 37.5 hours per week from 36 hours so as to have hours of work consistent with those of other employees in the new merged credit union.

(c) that the Employer was prepared to take over the staff portion of the critical illness insurance costs under the collective agreement.

(d) that the Employer was willing to commence bargaining immediately.

[19] As a result of the meeting on December 19, 2007 the Union instructed its counsel to direct a letter to the Employer suggesting that it was "inappropriate" for the Employer to have suggested at its meeting that it was prepared to start bargaining that day, when it (the Employer) was aware that dates for collective bargaining had been set.

[20] The parties met for bargaining on January 23 and 24, 2008. Initial bargaining proposals were exchanged and some progress made. Another round of bargaining was set for February 12, 2008, at which time the Employer presented a memorandum setting out a bargaining position that dealt with what the Employer felt was a critical issue in the negotiations, the move to a 37.5 hour week by its Tisdale employees. The Union considered this memorandum to be the Employer's "last proposal." The Employer asked the Union to review this proposal with its members.

[21] The Union did present the proposal to its members on February 21, 2008 but the membership rejected the proposal. Following that rejection, on February 22, 2008 Mr. Wehrkamp, the Employer's manager of human resources, says in his affidavit that, upon his arrival at work, he saw an employee named Sheila who appeared to be unhappy. When asked if she was okay, he says that she broke into tears and said that "she felt she was getting screwed again." Mr. Wehrkamp says he explained the Employer's position to Sheila in more detail and she then told him that she felt better about the situation than she did before. Mr. Wehrkamp also deposes that another employee came to see him after he had spoken to Sheila, of her own volition, for clarification as to the Employer's offer.

[22] The Employer says that, as a result of these meetings, it decided to provide further clarification to all of its staff concerning its proposal. Mr. Wehrkamp forwarded an email to employees on February 22, 2008. In that email he says, "I'd like to provide some clarity for you on what is happening with position (job) reclassifications." He went on to explain how changes in compensation were being proposed based on job classifications.

[23] There was a further staff meeting on February 26, 2008 at which further discussion occurred regarding salaries and job reclassifications. Following that meeting, the Employer sent employees a copy of its bargaining proposal made to the Union. The

email also contained clarification of some points that had arisen out of the earlier meetings.

[24] The Union objected to these meetings and the dissemination of this information to its members, which resulted in the filing of the unfair labour practice application and this interim application.

Relevant statutory provisions:

[25] Relevant provisions of the *Act* are as follows:

> *5.3 With respect to an application or complaint made pursuant to any provision of this Act or the regulations, the board may, after giving each party to the matter an opportunity to be heard, make an interim order pending the making of a final order or decision.*
>
> *. . .*
>
> *11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*
>
> *(a) in any manner, including by communication, to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any right conferred by this Act;*
>
> *. . .*
>
> *(c) to fail or refuse to bargain collectively with representatives elected or appointed, not necessarily being the employees of the employer, by a trade union representing the majority of the employees in an appropriate unit;*

Arguments:

The Union

[26] The Union argued that the communication with its members and the captive audience meetings constituted an interference by the Employer and a circumvention of the Union in bargaining directly with the employees rather than with the Union.

[27] The Union also took the position that the Employer had failed to negotiate in a meaningful way regarding terms and conditions of employment.

[28] The Union argued that there would be irreparable labour relations harm in permitting the Employer to continue to communicate with its employees by means of direct meetings, by email and in captive audience meetings.

[29] The Union argued that there was an arguable case that its rights as representative of the employees had been violated by these communications and that there was a pattern of communication that the Board should infer would continue absent an interim order.

The Employer

[30] The Employer argued that the communication with the employees was lawful and that it was done only to clarify what appeared to be misinformation regarding its proposal.

[31] The Employer further argued that it continued to negotiate with the Union as representative of the employees and that the parties had a long association and history of bargaining together.

[32] The Employer also argued that the relief requested by the Union in its interim application would require that the Board pre-judge the unfair labour practice application since it would be necessary for the Board to find an unfair labour practice had occurred in order to grant the relief requested.

Analysis:

[33] It is the Board's decision that the application for interim relief should be dismissed.

[34] The test to be met on applications for interim relief has been well established by the Board. A recent statement of the test is found in *Grain Services Union*

(ILWU – Canada) v. StarTek Canada Services Ltd., [2004] Sask. L.R.B.R. 128, LRB File Nos. 115-04, 116-04 & 117-04, where the Board stated as follows at 135 through 139:

> *[31] The test for the granting of interim relief was enunciated by the Board in Regina Inn, supra, [Hotel Employees and Restaurant Employees Union, Local 206 v. Canadian Hotels Income Properties Real Estate Investment Trust #19 Operations Ltd. (o/a Regina Inn), [1999] Sask. L.R.B.R. 190, LRB File No. 131-99] as follows, at 194:*
>
> > *The Board is empowered under ss. 5.3 and 42 of the Act to issue interim orders. The general rules relating to the granting of interim relief have been set down in the cases cited above. Generally, we are concerned with determining (1) whether the main application reflects an arguable case under the Act, and (2) what labour relations harm will result if the interim order is not granted compared to the harm that will result if it is granted. (see Tropical Inn, supra, at 229). This test restates the test set out by the Courts in decisions such as Potash Corporation of Saskatchewan v. Todd et al., [1987] 2 W.W.R. 481 (Sask. C.A.) and by the Board in its subsequent decisions. In our view, the modified test, which we are adopting from the Ontario Labour Relations Board's decision in Loeb Highland, supra, focuses the Board's attention on the labour relations impact of granting or not granting an interim order. The Board's power to grant interim relief is discretionary and interim relief can be refused for other practical considerations.*
>
> *[32] As explained above, the test is adapted from that set out by the Ontario Labour Relations Board in Loeb Highland, [1993] OLRB Rep. March 197. With respect to the* [first of the] *two parts of the test – that is, whether the main application raises an arguable case – the Ontario Board stated as follows, at 202:*
>
> > *Turning first to the idea of a threshold test with respect to the merits of the main application, we have some concern about applying a high level of scrutiny to that application at the time of a request for an interim order. To the extent that such scrutiny may imply a form of prejudgment of the final disposition of the main matter, it is not particularly compatible with the scheme for interim relief set out in the Act and the Board's Rules of Procedure. More specifically, the procedure for interim relief contemplated by the Board's Rules reflects the*

> *inherent necessity for expedition in these matters. To that end, evidence is filed by way of certified declarations which are not subject to cross-examination. Indeed, s. 104(14) of the Act and Rules 92 and 93 indicate the Board may not hold an oral hearing at all, but may receive the parties' arguments in writing as well.*
>
> > *This means that the Board is not in a position to make determinations based on disputed facts. In these circumstances, it would normally be unfair for an interim order to be predicated to any significant extent on a decision with respect to the strength or weakness of the main case. That should await the hearing of the main application when the Board hears oral evidence and can make decisions with respect to credibility based on the usual indicia, in a context where the parties have a full right of cross-examination. This is particularly important in cases such as the section 91 complaint to which this application relates, where decisions are often based on inferences and the various nuances of credibility play a key role. In other words, the granting of interim relief in this context should usually be based on criteria which minimize prejudging the merits of the main application.*

[33] With respect to the second part of the test – consideration of the respective labour relations harm – as the Board explained in Hotel Employees and Restaurant Employees Union, Local 206 v. Chelton Suites Hotel (1998) Ltd., [2000] Sask. L.R.B.R. 434, LRB File Nos. 091-00, 110-00,125-00,139-00,144-00 &3 145-00, at 444, it is an adaptation of the civil irreparable harm criterion to the industrial relations arena.

. . .

[37] On an application for interim relief we are not charged with determining whether the allegations have been proven, but rather with whether the status quo should be maintained pending the final determination of the main application: an interim order is intended to be preservative rather than remedial. As the Board observed in Chelton Suites Hotel, supra, an interim order must be consonant with the preservation and fulfillment of the objectives of the Act as a whole and of the specific provisions alleged to have been violated. The Board stated at 443:

> *Any interim order must first and foremost be directed to ensuring the fulfillment of the objectives of the Act pending the final hearing and determination of the issues in dispute. This includes not only the broad*

> *objectives of the Act but also the objectives of those specific provisions alleged to have been violated.*
>
> *[38] Accordingly, and as iterated in Chelton Suites Hotel, supra, at 446, each application for interim relief is determined according to its specific facts. Certain types of applications have particular factors that the Board takes into account in assessing the application according to the test. The factors considered are driven by the specific objectives of the particular statutory provisions alleged to have been violated. In applications such as the present one, where it is alleged that an employee was terminated for activity in support of the union, or in attempted intimidation of union supporters, the Board has considered the potential for a negative effect on the status of the union and the potential for loss of support and confidence, as well as the impact on the individual employee who was terminated. The fragility of the union's status and strength of support, and the vulnerability of its supporters to pressure exerted by the employer prior to certification, is generally accepted and not seriously disputed.*

[35] In applying the first part of the test, that is, whether the main unfair labour practice application reflects an arguable case under s. 11(1)(a) and/or s. 11(1)(c) of the *Act*, the Board finds that it does not.

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

[37] The most recent review of the interpretation that the Board has placed on this provision is found in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Temple Gardens Mineral Spa Inc. and Deb Thorn*, [2007] Sask. L.R.B.R. 87, LRB File No. 162-05. In that case, at 101 through 105, the Board said:

> *[31] The first decision of the Board which analyzed the test to be applied under s. 11 (1) (a) was the Saskatoon Co-operative Association case [Saskatchewan United Food and Commercial Workers, Local 1400 v. Saskatoon Co-operative Association Limited, [1983] Sask. Labour Rep. 29, LRB File Nos. 255-83 and 256-83]. In that case, the Board examined the lawfulness of several employer communications during the course of the parties'*

negotiations for the renewal of a collective agreement. The Board determined that the examination of the communication is not limited to determining whether the subject matter is prohibited or permitted under the Act, and stated at 37:

> *…but that is not to say that any particular subject is invariably prohibited (or permitted) under The Act. The result is that the Board's inquiry does not end once the subject being discussed is identified and categorized as permitted or prohibited. Instead, it concentrates on whether in the particular circumstances a communication has likely interfered with, coerced, intimidated, threatened or restrained an employee in the exercise of any right conferred by The Act.*

[32] The Board described a two-part test in the following terms at 37:

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

. . .

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

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

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

. . .

[50] In a more recent case, Yorkton Credit Union, supra, the Board dealt with employer communications during the bargaining of a renewal collective agreement and specifically, with respect to its allegation in s. 11(1) (a), misinformation provided by the employer to the employees. The Board, following the principles of the Canadian Linen case, supra, added at 460 through 462:

> *. . .*
>
> *In assessing whether employer communications during or in relation to collective bargaining go beyond the bounds of permitted speech into the realm of prohibited interference, the Board has considered whether they reflect an attempt to explain the position the employer has taken at the bargaining table or, rather, an attempt to disparage the union or its proposals.* ***The Board looks at the context, content, accuracy and timing of employer communications in discerning their purpose and effect.*** *Communications made after good faith bargaining has reached an impasse are less suspect than those made during early stages of bargaining, accurate statements are less suspect than inaccurate ones and, in any event,*

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

[38] Therefore, the first issue for the Board to determine is whether or not there is an arguable case placed before the Board, in this interim application, that the communications and captive audience meetings, in the circumstances at the time, would have had the effect of interfering with, restraining, intimidating, threatening or coercing an employee of average intelligence and fortitude in the exercise of rights under the *Act.*

[39] It is difficult for the Board to find, on the evidence presented for the purposes of this application, that the Employer's written communication or oral communications with employees or at captive audience meetings had any such effect on any employee in the bargaining unit. There is little in those communications other than the bargaining position of the Employer, which was known to the Union, along with some further explanation of the Employers' position with respect to bargaining. These topics are not prohibited by s. 11(1)(a) of the *Act*, as stated in the foregoing cases. The information was not presented in a way that could be regarded by the employees as disparaging the Union's position or criticizing it in its role as the employees' bargaining agent.

[40] The only inference the Board can draw from the communications with respect to the exercise of the employees' rights under the *Act* is that the Employer wanted to make sure that the employees knew the Employer's bargaining position in the event that the Union's bargaining committee sought further instructions from the members. This is not prohibited by the *Act.* There is nothing in the communications that even tried to persuade the employees to accept the Employer's position as being better than the Union's, much less anything that the Board finds would restrain, intimidate, threaten or coerce an employee of average intelligence and fortitude to accept the Employer's terms and not access any rights under the *Act.*

[41] Given the Board's view, on the evidence provided on this hearing, the Board is unable to find that there is a sufficiently arguable case before the Board which merits the Board issuing the requested interim relief.

[42] A secondary matter is that the relief here requested would, in the Board's view, constitute a final determination of the matter before it. In *Service Employees International Union, Locals 299, 333 & 336 et al. v. Saskatchewan Association of Health Organizations et al.* [2006] L.R.B.R. 375 LRB File Nos. 119-06, 122-06 & 123-06, the Board declined to make an interim order which would effectively determine the application on a final basis. That decision was also cited with approval by the Board in *Saskatchewan Insurance, Office and Professional Employees' Union (COPE) v. Saskatchewan Government Insurance*, [2007] Sask. L.R.B.R. 114, LRB File No. 003-07.

[43] However, given our earlier decision regarding the first test for granting interim relief, we make no ruling with respect to this secondary matter.

DATED at Regina, Saskatchewan, this **27th** day of **March, 2008.**

LABOUR RELATIONS BOARD

Kenneth G. Love Q.C.,
Chairperson