Labour Relations Board
Saskatchewan

SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant v. STARBUCKS COFFEE CANADA, INC., Respondent

LRB File No. 138-06; November 3, 2008
Chairperson, James Seibel; Members: Ken Ahl and John McCormick

For the Certified Union: Larry Kowalchuk
For the Employer: Eileen Libby

Unfair Labour Practice – Discrimination – terms and conditions – Employer cites "unwritten" policy in force the instant the union was certified – employer failed to provide credible reason for change in policy – discriminated against union members by denying the opportunity to request a transfer – Board finds employer guilty of unfair labour practice under s. 11(1)(e) of *The Trade Union Act*.

Unfair Labour Practice- Unilateral change – terms and conditions – Employer should have negotiated changes to terms and conditions under which an employee can request a transfer – employer did not establish change in policy as "business as before" – Board finds employer guilty of unfair labour practice under s. 11(1)m of *The Trade Union Act.*

Unfair Labour Practice – Remedy – Unilateral change – Where employer committed unfair labour practice by unilaterally changing terms and conditions without negotiating same with union, Board directs employer to post Reasons for Decision and Order in workplace,

***The Trade Union Act*, ss. 5(d), 5(e), 11(1)(e) and 11(1)(m).**

REASONS FOR DECISION

Background:

[1] Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union") is designated as the certified bargaining agent for a unit of all employees (exceptions include managers and assistant managers) of Starbucks Coffee Canada, Inc. in the City of Regina (the "Employer") by a certification Order dated January 18, 2006. The Union filed the present application alleging that the Employer committed unfair labour practices in violation of Sections 11(1)(a), (c), (e) and (m) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act* "), in unilaterally changing the practice of

permitting employees to transfer to other stores owned by the Employer. The crux of the complaint is a purported Employer policy restricting the transfer employees in unionized stores to other unionized stores only. The vast majority of its other stores are not unionized.

[2] No first collective agreement had been reached at the time of hearing.

[3] In its reply, the Employer took the position that it was an established, not a new, policy.

Evidence:

[4] Trevor Holloway has worked for the Employer since September, 2003. He testified that prior to certification, employees were eligible to apply for internal transfer to any other store owned by the Employer in North America, although it was within the Employer's discretion to allow or deny a transfer. The criteria on which the discretion was exercised included, inter alia, whether the employee had worked for at least 6 months, whether the manager at the new location required employees, and whether the applicant had a performance appraisal in which the assessment was that he/she at least "met expectations." After certification, he said, the Employer advised the employees at the Regina store that they were only eligible to apply to transfer to another unionized store. He testified that he first learned of the matter when an employee from one of the Employer's non-union stores in Calgary transferred to the unionized Regina store for the summer, but was having difficulty transferring back to Calgary. Mr. Holloway testified that he spoke to the Regina store manager, Steve Gialeonardo, and confirmed that the policy had been changed because Regina was now a unionized store.

[5] Steve Gialleonardo has been the Regina store manager since February 2007, and has been employed with the Employer's organization since 2003. He confirmed that he had a conversation regarding the issue with Mr. Holloway. He testified that he told him (as he said was communicated to him by his superiors) that employees could not transfer from a unionized store to a non-unionized store, but only to another unionized store. His superiors did not give him a reason for the policy. As far as he knew or was told, the policy existed in the Employer's downtown Vancouver stores (then

the only other unionized stores in its organization to his knowledge), but was not in writing.

[6] Paul Boardman is a manager of partner relations for the Employer. He described the alleged policy as eligibility to request a transfer, but not a right to transfer. He described the process and the eligibility requirements. He said the policy was even more restricted than Mr. Gialleonardo described in that employees in unionized stores could only obtain transfer to stores whose employees were in the same bargaining unit. If, however, an employee actually terminated their employment at a unionized store, they were then eligible to seek employment anywhere – this would not be a transfer, but an obtaining of new employment. He said that the reason for the policy was that to allow employees to seek work outside their bargaining unit would create the possibility of grievances and challenges over non-bargaining work. He testified that the policy was applied consistently in the Employer's unionized British Columbia stores, and applied to Regina when it was unionized.

[7] In cross-examination, Mr. Boardman admitted that he did not communicate the policy to Mr. Gialleonardo until after the present unfair labour practice was filed. As the situation presently stands, because the Regina store employees are the only ones in their bargaining unit, they cannot transfer anywhere else.

Statutory Provisions:

[8] Relevant statutory provisions include ss. 11(1)(a), (c), (e) and (m) of the *Act*, which provide as follows:

> *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) to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any right conferred by this Act, but nothing in this Act precludes an employer from communicating with his employees;*
> >
> > *. . .*

> *(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;*
>
> *. . .*
>
> *(e) to discriminate in regard to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including discharge or suspension or threat of discharge or suspension of an employee, with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in a proceeding under this Act, and if an employer or an employer's agent discharges or suspends an employee from his employment and it is shown to the satisfaction of the board that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right under this Act, there shall be a presumption in favour of the employee that he was discharged or suspended contrary to this Act, and the burden of proof that the employee was discharged or suspended for good and sufficient reason shall be upon the employer; but nothing in this Act precludes an employer from making an agreement with a trade union to require as a condition of employment membership in or maintenance of membership in the trade union or the selection of employees by or with the advice of a trade union or any other condition in regard to employment, if the trade union has been designated or selected by a majority of employees in any such unit as their representative for the purpose of bargaining collectively;*
>
> *. . .*
>
> *(m) where no collective bargaining is in force, to unilaterally change rates of pay, hours of work or other conditions of employment of employees in an appropriate unit without bargaining collectively respecting the change with the trade union representing the majority of employees in the appropriate unit;*

Arguments:

[9] Larry Kowalchuk, counsel on behalf of the Union, argued that the situation disclosed a violation of s. 11(1)(m) of the *Act*, in that the Employer had changed a pre-certification policy affecting employee rights at the Regina store without negotiating

the matter with the Union – a unilateral change in the terms and conditions of employment. A "dispute" between the parties includes a disagreement over privileges, rights, duties, tenure and working conditions per s. 2(i) of the *Act*. The Employer had a duty to bargain with respect to the change (see, s. 11(1)(c)). Counsel for the Union argued that the eligibility to request a transfer (subject to the eligibility conditions on the exercise of the Employer's discretion) is a term and condition of employment, because it is in the employee manual, but the alleged different policy in regard to employees in unionized stores is not in writing. Moreover, the explanation of the reasons for the different policy as described by Mr. Boardman make no sense.

[10] In the present case, Mr. Kowalchuk asserted, the employees in Regina were being punished for organizing. Being discrimination in regard to a term or condition of employment on the basis that the Regina employees are exercising rights under the *Act*, it is a violation of s. 11(1)(e) of the *Act*. Counsel also asserted that it was a violation of s. 11(1)(a) as interference with the employees in exercising rights under the *Act*.

[11] Eileen Libby, counsel on behalf of the Employer, argued that the Employer committed no unfair labour practice. There is no company policy affording employees an "absolute right to transfer." Ms. Libby referred to the four findings of fact that the Board must make to found a violation of s. 11(1)(m) of the *Act* set out in *Construction and General Labourers Union, Local 890 v. Brekmar Industries Ltd*., [1993] 1st Quarter Sask. Labour Rep. 126, LRB File No. 113-92, as follows:

> *(1) No collective agreement is in force;*
> *(2) What terms and conditions were preserved by s. 11(1)(m);*
> *(3) The employer has changed one of the preserved terms; and,*
> *(4) The employer has failed to bargain collectively prior to making the change.*

[12] Counsel also submitted that *Brekmar, supra,* is also authority for the proposition that the section cannot be used to confer rights that did not exist before certification.

[13] Further, referring to *Canadian Union of Public Employees, Local 3477 v. Saskatoon Society for the Prevention of Cruelty to Animals*, [1994] 3rd Quarter Sask. Labour Rep. 100, LRB File Nos. 007-94 to 012-94, counsel submitted that s. 11(1)(m) does not protect the employees from all change, but only established terms and conditions of employment, and cannot put the employees in a better position than they were before certification.

[14] Ms. Libby asserted that the policy existed in the Employer's organization nationally and was consistently applied in British Columbia and Saskatchewan. Counsel iterated that allowing unionized employees the opportunity to transfer to locations outside the bargaining unit would open the door to grievances.

[15] With respect to the assertion of violation of s. 11(1)(a), Ms. Libby provided there was no evidence that the Employer "punished" anyone.

[16] With respect top the assertion of violation of s. 11(1)(e), Ms. Libby submitted that the onus was on the Union, as it was not a case of suspension or discharge, and the onus was not discharged in the present case.

[17] In response, Mr. Kowalchuk pointed out that in both *Brekmar, supra,* and *Saskatoon SPCA*, *supra*, the Board stated that the application of s. 11(1)(m) included "policies and practices prior to certification." There is no evidence of a written policy regarding a difference in the availability of application for transfer for employees in certified bargaining units.

Analysis and Decision:

[18] All parties appearing at the hearing of this matter were provided with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. These reasons for decision are based on the whole of the evidence, the demeanour of the witnesses, and consideration for reasonable probability. Where witnesses have testified in contradiction to the findings we have made, we have discredited their testimony as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible or unworthy of belief.

[19] On the whole of the evidence, it is our opinion that the Employer committed an unfair labour practice in violation of each of ss. 11(1)(e) and (m) of the *Act*. The Employer discriminated against the employees, because they were exercising rights under the *Act*, with respect to the opportunity to request and be considered for transfer, and the Employer unilaterally changed the terms and conditions under which an employee could request a transfer, immediately upon certification and without bargaining collectively.

[20] In our opinion, on the evidence, the only policy that the Employer had on transfer was the one that was in writing in the employee or policy manual, with which the employees were familiar, and it made no distinction between union and non-union employees or locations. The only employees that may have been aware that a different policy applied to them were those in the Employer's organized Vancouver locations. It was impossible for any other employee in its organization to know that there was a different policy for unionized employees and locations. Indeed, Mr. Gialleonardo, the Regina manager who has been with the Employer since 2003, was not aware that there supposedly was a different policy until he was so advised *after* the present application was filed. That is, during the whole time since certification, let alone before, the Employer did not communicate to its employees or its Regina management that a different policy on transfer applied upon certification.

[21] According to the Employer's witness, Mr. Boardman, the change from the application of the written policy to the application of a different unwritten and unpublished "policy" (of which the location manager was not even aware) occurred the instant the Regina location was certified.

[22] We have difficulty understanding Mr. Boardman's rationale for the different "policy." That it would lead to grievances regarding bargaining unit work makes no apparent sense. Although it is not the basis on which this decision is made, we cannot understand how he believes that the Employer is otherwise disadvantaged, in that the written policy merely establishes the right to apply for transfer; the Employer still retains its discretion in granting the request on the conditions that apply in any case of transfer.

[23] Quite frankly, we have difficulty accepting that such a different policy was ever communicated or meant to apply outside of Vancouver until this application was filed. Certainly there was no way for the employees to be aware of it, and the location manager was not even aware of it.

[24] We find that the Union has discharged the onus under s. 11(1)(e) of the *Act*. And we have made the necessary findings of fact to have found a violation of s. 11(1)(m). Accordingly, we find that the Employer has committed unfair labour practices in violation of both provisions. An Order will issue ordering the Employer to cease and desist from committing the violations and to post a copy of the Order and a copy these Reasons for Decision upon receipt in the workplace where they are likely to be seen by all employees for a period of thirty (30) days.

DATED at Regina, Saskatchewan this **3rd** day of **November, 2008.**

LABOUR RELATIONS BOARD

James Seibel,
Chairperson