Labour Relations Board
Saskatchewan

SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant v. PRAIRIE HOTELS INC., o/a HOWARD JOHNSON INN and o/a IMPERIAL 400, Respondent

LRB File Nos. 155-06, 156-06 & 157-06; November 20, 2008
Vice-Chairperson, Angela Zborosky; Members: Kendra Cruson and John McCormick

For the Applicant: Larry Kowalchuk
For the Employer: Iqbal Nurmohamed

Unfair Labour Practice – Failure to remit union dues – Employer deducted union dues from employees' wages and failed to remit same to union for period of nine months – Employer not permitted to set-off monies it believes owing from union – Employer making full payment prior to hearing, no defence – Board finds employer violated s. 32 for failure to remit union dues deducted from employees' wages – Board orders declaration of violation, cease and desist, payment of pre-judgment interest.

Unfair Labour Practice – Duty to bargain in good faith – Employer failed/refused to name nominees to arbitration board and refused to meet further with union to discuss grievances – Board finds employer in violation of s. 11(1)(c) for failing to bargain collectively, specifically, failing to process grievances under parties' grievance procedure.

Unfair Labour Practice – Duty to bargain in good faith - Employer failed/refused to meet with union to bargain renewal collective agreement after union made requests for meeting dates – Board finds violation of s. 11(1)(c) by reason of Employer's failure to respond to union's requests and based on pattern of behaviour of employer – Employer's subsequent compliance no defence to unfair labour practice – Board orders declaration of violation, cease and desist, and direction to employer to name nominees and comply with grievance procedure.

Unfair Labour Practice – Duty to bargain in good faith - Having arrived at terms of collective agreements, employer failed to execute copies of same and return to union – Board finds violation of duty to bargain in good faith.

Unfair Labour Practice – Duty to bargain in good faith - Employer refuses to execute copy of return to work agreement – Employer not obligated to negotiate ancillary agreements but once agreed on terms of an ancillary agreement, it is a violation of the duty to bargain to fail to execute such an agreement - Board finds violation of duty to bargain in good faith.

Deferral to Arbitration – Union alleges employer failed to implement collective agreements and return to work agreement – Board defers to arbitration that portion of complaint that relates to disputes arising out of collective agreement, including claims for retroactive pay, improper scheduling, and whether proper wages paid to employees – Board also orders that grievances may be filed without Employer raising timeliness as a defence.

Unfair Labour Practice – Duty to bargain in good faith - Union alleged employer failed to negotiate and implement return to work agreement – Board exercises its discretion to decide issue and not defer to grievance arbitration – factors beyond employer's control led to employer not re-opening business premises in time agreed to - Pre-conditions to re-opening business not met – Board finds no violation of s. 11(1)(c).

***The Trade Union Act*, ss. 2(b), 2(d), 5(d), (e) and (g), 11(1)(c), 18(l), 25 and 32.**

REASONS FOR DECISION

Background:

[1] The Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union") is the certified bargaining agent for two bargaining units of employees employed by Prairie Hotels Inc. (the "Employer"); one unit of employees working at the Howard Johnson Inn in Yorkton, Saskatchewan and the other unit of employees working at the Imperial 400 in Swift Current, Saskatchewan. While the Employer purchased these hotels in the summer of 2003, the Union has long held separate certification orders for each of these bargaining units (when they were owned by predecessor companies) and separate collective agreements have been entered into for each bargaining unit.

[2] On October 6, 2008 the Union filed three applications with the Board alleging that the Employer has committed various unfair labour practices under *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"). Specifically, the Union alleges that:

> *(i) The Employer is in breach of s. 32 of the Act by failing to remit dues to the Union for a period of nine months for employees of the Howard Johnson Inn (LRB File No. 155-06);*

(ii) The Employer has violated ss. 11(1)(a) and (c) of the Act by refusing to cooperate with the grievance procedure (by failing to name its nominee) and by failing to bargain a renewal/revision of the collective bargaining agreement in relation to the bargaining unit at the Howard Johnson Inn (LRB File No. 156-06); and

(iii) The Employer has violated s. 11(1)(c) of the Act by failing to execute and implement three ratified agreements relating to the Imperial 400 bargaining unit (LRB File No. 157-06).

[3] On October 27, 2006, the Respondent filed separate replies to each of the three applications, denying it has committed any unfair labour practices and taking the following positions in each of the applications:

(i) It has now remitted the outstanding dues to the Union (LRB File No. 155-06);

(ii) It has not refused to bargain collectively and it will name an arbitrator once all of the Union's grievances have reached the point of arbitration (LRB File No. 156-06); and

(iii) It has not refused to sign the agreements in question and the Union did not send it appropriate copies for signing (LRB File No. 157-06).

[4] The applications were heard consecutively by the Board on January 23 and 24, 2007. Mark Hollyoak, a staff representative employed by the Union responsible for servicing the two bargaining units since approximately 1989, testified in support of each of the applications. Iqbal Nurmohamed, the principal of the Employer, testified in relation to LRB File Nos. 155-06 & 157-06. The Employer did not lead evidence on LRB File No. 156-06. Although there is some overlap in the background and factual circumstances of each of the Union's applications which warrants dealing with them in one decision, each of the applications were heard separately and each application contains distinct allegations of violations of the *Act*. As such, we shall deal with each application separately in terms of the evidence led, arguments made, and our findings and analysis.

LRB File No. 155-06

Evidence:

[5] In its application, the Union asserted that the Employer has deducted union dues from employees but failed to remit those dues since November 2005, a period of approximately nine months as of the date of the application. In its reply, the Employer stated that the dues were now paid in full.

[6] Mr. Hollyoak testified that since the Employer purchased the Howard Johnson Inn, it had often been late in remitting the union dues it had deducted from the employees. The Employer has never challenged the obligation to pay dues but has needed frequent reminders to remit the same.

[7] Mr. Hollyoak testified concerning the circumstances leading up to the bringing of this unfair labour practice application by the Union. He stated that despite frequent requests for payment sent to Mr. Nurmohamed by Bernie Olynick, the Union's secretary-treasurer, during the time period February to July 2006, the Employer failed to remit dues for the time period December, 2005 up to the date the application was filed on October 6, 2006, putting the Employer some nine months in arrears.[1] It was the Union's understanding that throughout this time period, dues were being deducted from the employees' pay cheques every pay period which was twice per month. Mr. Hollyoak testified that the Employer provided no response as to why the dues were being deducted but not remitted.

[8] Article 7 of the collective agreement deals with the deduction and remittance of union dues:

> *Upon request in writing of any employee, and upon request of the Union, the Company shall deduct union dues, assessments and initiation fees from the wages due to each employee and shall remit same to the person designated by the Union on or before the 15th day of each month. The Company shall furnish the Union each month with a written list of:*
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> *(a) names of employees from whom the deductions have been made;*
>
> *(b) names of employees who have been newly hired, laid off, recalled or terminated;*

[1] As the collective agreement allows until the 15th of the month following for payment of the previous months' dues, the dues for September were not yet in arrears as of the date of the filing of the application.

(c) home address of all newly hired employees, subject to the approval of the employee.

[9] Mr. Hollyoak testified that on October 27, 2006, following the filing of the Union's unfair labour practice application on October 6, 2006, the Union received five cheques from the Employer totaling $7,865.53, which covered Union dues for the period December, 2005 to September, 2006.[2] The Employer also provided the properly completed dues remittance forms with these cheques.

[10] Mr. Hollyoak testified that since receiving this bundle of cheques on October 27, 2006, the Employer became in arrears for the October, 2006 dues but paid both October and November dues on December 19, 2006.

[11] In cross-examination by the Employer, Mr. Hollyoak was questioned concerning the Union's late payment of benefit premiums it was making to the Employer in relation to the employees of the Imperial 400 hotel in Swift Current (a different bargaining unit), who had been locked out by the Employer from December, 2004 until July, 2006. It was suggested to Mr. Hollyoak that at one point in time the Union was over $10,000 in arrears in premium payments. Mr. Hollyoak testified that he does not believe that the Union was, at any time, in arrears of $10,000 in benefit premiums. He stated that the first few payments to be made by the Union were late for a number of reasons. Firstly, the Union was not initially aware of the cost of the premiums. Secondly, there was an issue to be resolved at the outset whether the Union would pay the insurer directly or pay the Employer (who would in turn remit the premiums to the insurer). As soon as the Union knew the cost of the premiums, it remitted the same to the insurer (approximately two or three cheques) but when those cheques were returned, the Union sent a cheque to the Employer to cover those amounts. He stated that these matters were not cleared up until January or February of 2005. Mr. Hollyoak

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[2] The first cheque, in the amount of $4,378.11 was dated May 31, 2006 and covered dues owing for December 2005 through May 2006. The dues for June 2006 were paid through a cheque dated June 30, 2006 in the amount of $802.11. The dues for July 2006 were paid through a cheque dated July 31, 2006 in the amount of $876.53. The dues for August 2006 were paid through a cheque dated August 31, 2006 in the amount of $973.94. The dues for September 2006 were paid through a cheque dated September 30, 2006 in the amount of $834.84. There was no explanation given why all five cheques, bearing different dates, were sent all together to the Union on October 27, 2006.

stated that once the process for payment was agreed upon, the Union made monthly payments to the Employer until the labour dispute was resolved in July, 2006.

[12] When confronted in cross-examination with a series of emails from Mr. Nurmohamed to Ms. Olynick that show that the Employer made one request for more timely payments in October, 2005 and two such requests in November 2005, along with a request that dues be paid by the first of the month, Mr. Hollyoak recollected that the Union initially understood that the payments were due by the 15th of the month and the Union therefore had sent them at the beginning of the month. He stated that as soon as the Union knew that the payments had to be made by the first of the month, the Union complied. Mr. Hollyoak also testified that it was a practice in the office to send cheques one to two days after they were written.

[13] Mr. Nurmohamed testified on behalf of the Employer. He testified that from the time the Employer purchased the hotel in 2003, union dues were paid every month - that they were sometimes late, but generally they were paid on time, up until December, 2005. He stated that the Employer did encounter a problem paying on time in some cases because dues could not be calculated until the payroll was completed and although this was done in Yorkton, the cheques made out to the Union had to be sent to him in Calgary to sign before being mailed to the Union. He said this occasionally caused the payments to be a few days' late.

[14] In Mr. Nurmoahmed's cross-examination, however, a very different pattern of payments by the Employer was revealed. In fact, leaving aside the nine months of dues owing as of the date this application was filed, seldom did the Employer pay on time (by the 15th of the following month) and the payments were not made on a monthly basis. The Union, with the Employer's agreement, entered into evidence documents indicating when the Union received dues' payments from the Employer. The parties agreed that these documents, including remittance sheets prepared by the Employer and receipts prepared by the Union, were to be accepted by the Board as evidence of the amount of dues owing in given months and that the Union received these payments very close to the date the receipt was issued. These documents establish that the following months' dues were paid on the following dates:

Dues owing for:	Dues paid on:	Amount Paid:
January and February 2004	March 24, 2004	$ 1527.71
March to July 2004	August 18, 2004	$ 4284.10
August to December 2004	April 29, 2005	$ 3844.36
January and February 2005	April 29, 2005	$ 1519.08
March 2005	(no receipt in evidence)	$ 692.47
April to August 2005	September 19, 2005	$ 3568.17 [3]
September 2005	November 16, 2005	$ 745.51
October – November 2005	December 19, 2005	$ 1360.66

[15] Following a review of the above documentary evidence, Mr. Nurmohamed agreed that his testimony concerning the Employer's history of paying union dues, was false.

[16] Much of Mr. Nurmohamed's evidence in chief and cross-examination focused on what purported to be the Employer's excuse for not paying dues for the nine months leading up to the filing of this application. Mr. Nurmohamed explained that the reason the Employer was not remitting to the Union the dues it deducted from the employees at the Howard Johnson in Yorkton from December 2005 onward, was because it was "setting off" those payments against what the Union should have been paying the Employer for the benefit premiums to cover the employees of the Imperial 400 in Swift Current during the labour dispute there. He characterized these two items as a "payable" and a "receivable" which he could set off against each other and that because the Employer was owed more than the Union, the Employer was justified in not paying these dues.

[17] Mr. Nurmohamed testified that the labour dispute at the Imperial 400 in Swift Current commenced in December, 2004 and that after the Union indicated it

[3] The documentary evidence indicated that the Employer was short on its payment made on September 19, 2005 in relation to its April through August 2005 dues remittances. The sum of $151.92 was paid on November 16, 2005 to cover the shortfall in those months.

intended to pay the premiums for the continuation of benefits for the employees there,[4] the Employer gave the Union all of the information it needed (i.e. the total amount of the premiums) in order to make the payments. In examination in chief, Mr. Nurmohamed stated that for the first five to six months (December, 2004 to March or April, 2005), the Union did not pay any of the premiums, which he stated were $2900 per month. He stated that the Union was at that time (March or April, 2005) over $10,000 in arrears. He stated that he believed that Mr. Hollyoak had submitted one cheque to the insurer directly but that that cheque had been rejected by the insurer back in December 2004. Mr. Nurmohamed testified that the Union's first payment to the Employer for benefits was made in April 2005 and included four months of premiums.

[18] Mr. Nurmohamed stated that after the Union made the payment in April 2005, it continued to be difficult to get money from the Union. He says the Union was always late with its payments and in some cases, two months late. He stated that he was pressured by the insurer for the payments to be made and that he was in constant contact with the Union, usually with Ms. Olynick. He stated that he told the Union that the cheques were required by the first of the month as the premiums were paid in advance, not in arrears. He also stated that he always cashed cheques from the Union within one to two days of receiving them.

[19] Mr. Nurmohamed introduced into evidence some emails between himself, Ms. Olynick and the insurer dated in October and November, 2005, stating that these were just examples of the types of emails he would send to the Union approximately twice per month. The October 13, 2005 email advised that he had not yet received the Union's payment and that in the future, the Union should ensure he receives payment by the first of the month. On November 16, 2006, Mr. Nurmohamed sent an email to Ms. Olynick indicating he had not yet received the Union's cheque for November, 2006 benefits, that the premiums have been "consistently late," that they should be paid by the first of the month, and that by paying late, the Union was "jeopardizing the employees' claims." Mr. Nurmohamed went on to indicate that he would not pay the insurer until the cheque cleared from the Union and that if the insurer cancels the insurance, he will not be responsible. On November 23, 2006, Mr. Nurmohamed once again emailed Ms.

[4] Section 47 of the *Act* permits the Union to pay the benefit premiums of any group insurance plans during a strike or lock out such that the employees may have continuous coverage during such a labour dispute.

Olynick, noting that a cheque dated November 11, 2006 from the Union arrived November 22, 2006. He reiterated what he wrote in the November 16, 2006 email, having not received a reply to that email by the Union.

[20] Mr. Nurmohamed also introduced in his examination in chief a set of email messages dated April 20, 2006 between him and the insurer where in response to a request for payment from the insurer, Mr. Nurmohamed replies that he just received payment from the Union that week and would be remitting it that day. Mr. Nurmohamed offered this as proof of late payment by the Union, however, in cross-examination, he acknowledged that this chain of emails also included email messages between himself and Ms. Olynick on April 6 and 7, 2006 where Ms. Olynick clearly states on April 6, 2006 that the cheque had already been mailed.

[21] Mr. Nurmohamed stated in his examination in chief that he regularly paid the premium payments to the insurer before he received the Union's cheque, often paying the insurer by the first of the month, although he was occasionally late. He stated that he did not want the policy to lapse for non-payment. However, upon the introduction of the email messages between himself and the insurer on April 20, 2006 and himself and Ms. Olynick on April 6 and 7, 2006, it appears that Mr. Nurmohamed was waiting for the Union's cheque before paying the premiums to the insurer. The Union questioned Mr. Nurmohamed about his belief that the insurer would cancel the plan if premiums were not paid by the first of the month, suggesting that there is a grace period which would allow the plan to remain in place for a certain period of time if the payments were not made by the first of the month. While stating that he was constantly getting emails from the insurer threatening to cancel the plan, no such documents were put into evidence and in fact, the April 20, 2006 email between himself and the insurer does not make such a suggestion, even though Mr. Nurmohamed first tells the insurer that it has not received payment from the Union and that "non-payment implies that they may not wish to be covered any more." Ultimately, Mr. Nurmohamed admitted that he believes the insurance policy has a 30-day grace period at which time a registered letter would be sent to the Employer demanding payment. No such registered letter was received by the Employer during the period the Union was paying the benefit premiums.

[22] In the cross-examination of Mr. Nurmohamed, many inconsistencies and inaccuracies in his evidence were identified. Documents were entered into evidence by the Union which Mr. Nurmohamed agreed were accurate records of the benefit cheques sent by the Union. These documents revealed that at the outset of the lock-out, the Union did, in fact, make three cheques payable to the insurer directly, the first of which, written on January 21, 2005 for the December, 2004 benefits was cashed by the insurer. Cheques dated in February and March, 2005 (for January and February benefits) were returned by the insurer to the Union some time after March 10, 2005. Therefore it could not have been until at least February (and more likely, March) when the insurer advised the Union that it would not accept payments directly from it. Thereafter the Union made a payment to the Employer on March 30, 2005 to cover benefit premiums for the January to April, 2005 time period. Based on information on the back of this cheque, it appears the Employer did not cash it until April 25, 2005. Mr. Nurmohamed acknowledged that based on this information, the Union was not in arrears of over $10,000 at the end of March 2005, as he had suggested in his examination in chief. While the amounts of each monthly benefit premium varied slightly, the monthly premium for the last fifteen months was $2,545.87, not $2,900.00 as Mr. Nurmohamed suggested in his evidence.

[23] Also in cross-examination, it became clear that the Union did in fact send cheques to the Employer in advance of the first of the month – in six of the last seven months for which the Union paid the premiums (January to July, 2006). Mr. Nurmohamed suggested that he never received the Union's cheques prior to the first of the month, yet on examination of copies of the cheques, it appears that at least some of them were cashed by Mr. Nurmohamed before the first of the month. The documents also appear to indicate that for the months before January 2006, the Union was sending cheques before the 15th of the month, as Mr. Hollyoak suggested was the Union's understanding about when the payments had to be made.

[24] In addition to the Union's March 30, 2005 cheque not being cashed until April 25, 2005, the Union went through a series of cheques with Mr. Nurmohamed that indicated they were not cashed by Mr. Nurmohamed until somewhere between three and nine weeks after the dates of the Union's cheques. Mr. Nurmohamed continued to insist he would deposit the cheques within one to two days of receiving them, perhaps

three to four at the most, yet he had no reason to dispute that the cheques were cashed on the days indicated on the backs of those cheques (as date-stamped by the bank).

[25] Mr. Nurmohamed acknowledged that he did not plead the defence of "set-off" in his October 27, 2006 Reply to this application. He stated he never did advise the employees or the Union that he was "setting off" the premium payments to be made by the Union for the Swift Current employees against the dues he had deducted from the Yorkton employees and agreed that the hearing before the Board would be the first time the Union would have heard about his explanation of the set-off. He also stated that it did not occur to him that even if he was "setting off" the premium payments against the union dues, that he should still have sent the Union the dues remittance forms every month.

[26] Mr. Nurmohamed stated that he was uncertain why his October, 2006 payment was late because by that time, he was no longer "holding back funds" given that the labour dispute in Swift Current had been resolved. Mr. Nurmohamed also acknowledged that as of June 22, 2006 (when the final premium payment was paid by the Union for benefits in Swift Current), no money was owing to the Employer to "set off" against what the Employer owed in dues for Yorkton. Further, he acknowledged that the Union owed the Employer nothing in January, 2006 for the benefit payments for the Swift Current employees (the Union having remitted the January, 2006 premiums on December 22, 2005), yet that is when the Employer began to fail to make any further remittances to the Union for dues for the Yorkton employees. Mr. Nurmohamed's only explanation for this failure was that it had become a "habit" for the Union to pay late and he was concerned he would not get the funds on time from the Union.

[27] In re-examination, Mr. Nurmohamed attempted to establish that Mr. Hollyoak was wrong in saying that the Union mailed out its cheques within one to two days after writing them by entering into evidence a letter from the Union dated the 12th of the month but where the envelope indicates it was mailed on the 10th. In our view, this evidence is irrelevant given that (i) it was a letter and not a cheque; and (ii) it only proves that the letter must have been dated incorrectly and it does not prove that the Union mailed out the letter later than the date it put on the letter.

Argument:

[28] The Union argued that the facts establish that the Employer has violated s. 11(1)(c) of the *Act* and it seeks a declaration of such a finding, along with the following orders:

> *(i) An order directing the Employer to pay dues by the 15th of each month by certified cheque for the next 24 months;*
>
> *(ii) An order for pre-judgment interest on the amount of dues owing in each month, from December 2005 to October 27, 2006 (the date of payment); and*
>
> *(iii) An order that the panel of the Board hearing this application remain seized with regard to the issue of the Employer's failure to pay dues by the 15th of each month, allowing the Union to bring the matter back to the Board for further and better orders on 30 days notice.*

[29] In addition, the Union suggested it was not opposed to the Board extending to the Employer an opportunity to file a rectification plan within the meaning of s. 5.1 of the *Act* within fifteen days. The Union also asked that the Board, in its written reasons address the issue of Mr. Nurmohamed's credibility in order that it may be considered in relation to the other two applications heard by the Board with this application.

[30] In response, the Employer stated that payment of dues by certified cheques was not appropriate as he has never had a cheque to the Union go NSF and because such a procedure would further delay the Employer getting payment to the Union. The Employer also indicated that it would be interested in filing a rectification plan.

Relevant Statutory Provisions:

[31] The relevant statutory provisions include ss. 5(d), (e) and (g), 5.1, and 32 of the *Act*, which reads as follows:

> *5 The board may make orders:*
>
> *. . .*

(d) determining whether an unfair labour practice or a violation of this Act is being or has been engaged in;

(e) requiring any person to do any of the following:

> *(i) to refrain from violations of this Act or from engaging in any unfair labour practice;*
> *(ii) subject to section 5.1, to do any thing for the purpose of rectifying a violation of this Act, the regulations or a decision of the board;*

. . .

(g) fixing and determining the monetary loss suffered by an employee, an employer or a trade union as a result of a violation of this Act, the regulations or a decision of the board by one or more persons, and requiring those persons to pay to that employee, employer or trade union the amount of the monetary loss or any portion of the monetary loss that the board considers to be appropriate;

. . .

5.1 In making an order pursuant to subclause 5(e)(ii), the board may consider a plan, submitted by a person found to have violated the Act, the regulations or a decision of the board, for rectifying the violation.

. . .

32(1) Upon the request in writing of an employee, and upon request of a trade union representing the majority of employees in any bargaining unit of his employees, the employer shall deduct and pay in periodic payments out of the wages due to the employee, to the person designated by the trade union to receive the same, the union dues, assessments and initiation fees of the employee, and the employer shall furnish to that trade union the names of the employees who have given such authority.

(2) Failure to make payments and furnish information required by subsection (1) is an unfair labour practice.

Analysis and Decision:

[32] At the conclusion of the evidence, the Board made a finding that the Employer committed an unfair labour practice pursuant to s. 32(2) by failing to make payment to the Union of dues and assessments deducted in periodic payments out of the employees' wages as required by s. 32(1) of the *Act*. The Board stated that the obligations under s. 32 of the *Act* do not allow the Employer to set-off any amounts it believes may be owing to it from the Union against the dues and assessments it deducted from the employees' wages. Lastly, the Board stated that it matters not to its finding of a violation of s. 32 of the *Act* that the Employer made full payment of the dues owing (as alleged in the application) after the application was filed but prior to the hearing. At the hearing, the Board indicated it would provide written reasons for its findings and proceeded to hear the parties' submissions concerning remedies.

[33] After hearing the parties' submissions on the issue of remedies, the Board indicated to the parties that it would suspend the making of an order for a period of fifteen days to allow the Employer the opportunity to file a rectification plan with the Board pursuant to s. 5.1 of the *Act*. The Board indicated that a copy of the rectification plan should be given to the Union in order that it may have an opportunity to comment on it (or, in the event the Employer did not provide the Union with a copy, the Board would do so), but if no rectification plan was received within fifteen days of the date of the hearing, the Board would proceed to make a decision on the remedy without such a plan. The Employer did not file such a plan with the Board within fifteen days or otherwise. Therefore, these written reasons also deal with the issue of remedies.

[34] The Board has infrequently reviewed an employer's obligations to remit dues and assessments and information under s. 32 of the *Act*. This is likely because the employer's obligations are very clearly spelled out in s. 32 so as to leave little doubt as to the meaning and intent of that section. In *International Union of Bricklayers and Allied Craftsmen, Local No. 1 v. Pro Masonry Construction Ltd*., [1997] Sask. L.R.B.R. 328, LRB File No. 343-96, the Board heard an application by the union in circumstances similar to that before us. There the employer failed to remit dues and assessments as well as the information necessary to calculate those dues and assessments, for several months. The Board concluded that the employer had violated s. 32 of the *Act* and stated at 332:

[23] Once it has been established that a majority of employees in a bargaining unit wish to be represented by a trade union for the purpose of bargaining collectively with their employer concerning the terms and conditions of their employment, and a certification Order has been issued by this Board reflecting that fact, that trade union becomes the exclusive representative of the employees in dealing with the employer. As the provisions of the Act indicate, both parties are placed under a number of obligations by the certification Order. In the case of an employer, these obligations include those of providing the trade union with information which will permit the calculation of dues and assessments, and the remission of appropriate dues and assessments.

[24] ***It cannot be stressed strongly enough that these are obligations of a legal nature.*** *Whatever the nature of the relationship between the employees, the trade union and the employer prior to the issuing of the certification Order,* ***once that Order has been granted, the obligation to provide the information indicated in s. 32 of the Act, and to remit dues and assessments, is legally binding on the employer, and the employer may not simply decide to ignore them, or to comply with them in some less complete form. A failure to comply with these obligations, as well as with the obligations set out in other parts of the Act, may ultimately be the subject of a finding by this Board, and an assessment of monetary loss, which can then be enforced by the trade union through the courts.***

[25] In our view, the Union made every effort to accommodate the Employer. The Union indicated that they will not pursue dues which were owed in relation to the period prior to May 1, 1996, although there is nothing to prevent them from doing that. They have not, until now, asked the Employer to pay the entire amount at once, and they have been willing to discuss further arrangements which might be in the interest of the Employer.

[26] We have concluded, however, that the Employer made no serious effort to meet the obligations which rest on them under the Act, and that the actions of the Employer are in violation of the Act. We have also concluded that the remedies sought by the Union are reasonable in the circumstances.

[27] ***The regular remission of union dues and assessments is clearly of vital interest to a trade union; these sums of money make it possible for the trade union to provide representation to the employees who have chosen to have that bargaining agent.*** *These payments are particularly vital in the construction industry, where they affect not only the vitality of the trade union as an organization, but the integrity and*

> *soundness of pension and benefit plans on which employees depend.* ***The interest of trade unions in being able to rely on regular periodic payment of these levies is an interest which the legislature has chosen to protect by the enactment of s. 32 of the Act. A trade union is not required to depend on the generosity or whim of an employer, but may insist on receiving this money, and a means has been provided, through the process of this Board, for making and enforcing such claims.***

[35] In this case, the Employer suggested that it was entitled to set off the amount it owed the Union for dues deducted from employees' pay in the bargaining unit at the Yorkton Howard Johnson Inn against the money the Union owed for benefit premium payments in relation to a different bargaining unit at the Swift Current Imperial 400. Leaving aside, for the moment, whether the Employer has even proven that the Union owed it money at the time it invoked a "set-off," the Board has found that the obligations prescribed by s. 32 of the *Act* do not allow the Employer to set-off any amounts it believes may be owing to it from the Union against the dues and assessments it deducted from the employees' wages. In *Pro Masonry*, *supra*, the Board made it clear that the obligations in s. 32 are of a legal nature and that it is not open to an employer to "comply with them in some less complete form." In our view, there is no ability to set off any sums owing by a union to an employer against the union dues that were deducted from employees' pay cheques. These sums must be deducted and remitted by the Employer to the employees' bargaining agent in regular, periodic payments. The Employer has therefore has committed an unfair labour practice within the meaning of s. 32(2) by failing to remit the dues it deducted from the employees' pay.

[36] Even if we were to accept in principle the Employer's assertion that it is entitled to set-off in the manner it has (a principle which we clearly reject), on the facts, no entitlement to set-off has been proven. Firstly, and perhaps what the Board finds most offensive in this case, the Employer has tried to set-off money it deducted from employees in one bargaining unit against the money the Union apparently owed in relation to a completely different bargaining unit. We find this wholly improper. Secondly, the evidence before us falls far short of establishing that the Union even owed any money to the Employer at the time the Employer supposedly invoked the set-off.

[37] It was apparent to the Board that the Employer concocted the set-off defence in preparation for the hearing, having no other excuse for failing to remit dues it had deducted from employees for a period of up to nine months at the date of the application. Firstly, the Employer plead no such defence in its reply. Secondly, the Employer at no time advised the Union that he was setting off the payments. Thirdly, he eventually sent the completed remittance forms which showed that dues had been deducted from the employees, leading us to conclude that he simply ignored the obligation to *pay* those dues to the Union. Fourthly, the facts do not bear out that money was owed by the Union for benefit premiums such that Mr. Nurmohamed would determine that those amounts could have been "set-off" against the union dues the Employer should have paid. In this regard, there was no temporal relationship between the payment of dues and the owing for benefits - only early on in the labour dispute (December 2004 to March or April, 2005) did the Union owe the Employer some money for the benefits,[5] yet the Employer did not begin holding back dues until December, 2005. By that point in time, the Union had begun paying the benefits in advance of the first of the month and there was therefore no money owed by the Union at all for benefit coverage. In addition, as of July 2006, the labour dispute in Swift Current was over and thus there was no longer an obligation on the Union to pay benefit premiums, yet the Employer continued (from July to October, 2006) to withhold payment of the dues.

[38] We also note that prior to December 2005, there was no pattern to the Employer's withholding of dues – the payment of dues was sporadic and in this regard we find Mr. Nurmohamed to have given false testimony in that the Employer rarely paid dues on time and on a monthly basis. Furthermore, at no time was the Union over $10,000 in arrears on benefit payments, as suggested by Mr. Nurmohamed.

[39] Mr. Nurmohamed suggested that he was very concerned the employees would lose coverage because of the Union's late payment of benefits and that to ensure they did not do so, he says he paid the insurer by the first before getting the Union's cheque. Based on the evidence above, we find this untrue. Considering the email message he wrote to the insurer on April 6, 2006, we find that his concern was not genuine and he certainly did not pay the insurer before the first of the month without

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[5] Except for the period of time the Union was paying by the 15th of the month instead of the 1st of the month, in which case it was, at most, two weeks late with a cheque.

waiting for the Union's cheque. Mr. Nurmohamed also stated that he always cashed the Union's cheques within one to two days of receiving them, a fact which also was not borne out by other evidence (the cheques appeared to have been cashed three to nine weeks after they were dated) and which leads us to conclude that Mr. Nurmohamed was not as concerned about the payments and retention of benefits as he attempted to lead the Board to believe.

[40] We turn now to the issue of remedies. The Union asked for a declaration of a violation of the *Act*, an order directing payment of dues by certified cheque by the 15th of each month for a period of 24 months, pre-judgment interest on the outstanding dues from the date they were owed until they were paid, and an order that the Board remain seized of the application in the event the Employer fails, in the future, to make payment of the monthly union dues by the 15th of each month.

[41] In determining an appropriate remedy for an employer's breach of s. 32 of the *Act*, the Board in *Pro Masonry*, *supra*, stated:

> *[28] The Union has, in our view, a legitimate concern in recouping the dues and assessments which are now owing to them, and also ensuring that the events which have given rise to this application are not repeated. We will therefore make Orders to the following effect, as requested by the Union:*
>
> ** That the Employer cease and desist from further violations of the Act, and, in particular, that the Employer refrain from any further withholding of dues and assessments to which the Union is entitled.*
>
> ** That the Employer forthwith provide the Union with the information required to calculate and verify the amount of dues and assessment to which the Union is entitled.*
>
> ** That Mr. Terry Stevens, Executive Director of the Labour Relations, Conciliation and Mediation Branch, Saskatchewan Labour, or his designate, be appointed as agent of the Board to facilitate discussion between the parties of the amount of monetary loss suffered by the Union as a result of the violations of the Act by the Employer, and of the mechanism to be followed by the parties in the future to ensure that no further breaches of s. 32 of the Act occur.*

> ** That Mr. Stevens, or his designate, shall report to this Board, within 60 days after the date of these Orders, indicating whether the parties have reached agreement on these matters; in making his report, Mr. Stevens, or his designate, may recommend that the Board issue further Orders or hold further hearings on any point relating to the provision of information by the Employer, or the deduction and remission of dues and assessments under s. 32 of the Act, or the payment of dues and assessments owing to the Union at the time of these Orders or at the time of his report.*

[42] In addition to a declaration of a violation of the *Act*, we think it appropriate to grant the first order stated in *Pro Masonry*, *supra*, namely, that the Employer cease and desist from further violations of the *Act* and refrain from withholding any further dues and assessments. The second order in *Pro Masonry*, *supra*, that directs that the employer provide certain information about dues owing is not necessary in the present case because the Employer had paid the outstanding dues by the date of the hearing of this application.

[43] The Union asked that the Board order that the Employer provide payment of dues by way of certified cheques for the next 24 months. We do not find that such a remedy addresses the breach in question – whenever the Employer paid the dues, it had sufficient funds to cover its cheques. The only breach to be remedied is that the Employer has failed to send cheques to the Union on time. Furthermore, we agree with the Employer that making such an order would only have the effect of causing further delay in the Union receiving payment, as the certified cheque can only be made after the amount of dues is calculated each month.

[44] The Union also requested that the Employer be required to pay pre-judgment interest on the amount of dues owing from the date on which they were owing to the date of payment. The dues owing for the period December 2005 to August 2006 were paid on October 27, 2006, the same date that the Employer filed its reply to the Union's application. The Union has therefore established that it was necessary to file this application in order to compel the Employer to pay these outstanding dues. While this might be an appropriate case in which to order costs, no such request was made. In these circumstances, we find it appropriate to order the payment of pre-judgment interest on the outstanding dues from the date each month's dues were owed, as a fair means of compensating the Union for its loss and for the necessity of having to bring an

application to the Board. Although the dues owing for October and November 2006 were not paid until December 19, 2006, we will not order the payment of pre-judgment interest on this payment as the dues were not owing as of the date of the Union's application and therefore cannot be said to be included in the claim of the Union brought before the Board.

[45] Although we recognize that the Board in *Pro-Masonry*, *supra*, made an attempt to address the possible future delinquency in monthly dues payments by the employer through the appointment of a board agent to facilitate discussion between the parties concerning, among other matters, a mechanism for future payments of dues to avoid further breaches of s. 32 of the *Act*, we do not find such an order appropriate in the circumstances of this case. In the *Pro Masonry* case, the Board was dealing with a situation where the union/employer relationship was only recently established because one local of the union had taken over the business of another local of the union and the prior local union had largely been ignored by the employer. Thus, there was no established employer/union relationship and mechanism for paying dues, whereas there is such a relationship and mechanism in the present case. In this case, the Employer has simply chosen not to send cheques to the Union for an inordinate amount of time. In addition, in the *Pro Masonry* case, it was necessary to appoint a Board agent to discuss other matters, including the amount of monetary loss owing to the Union for a breach of s. 32. The order also contemplates that in the event the parties are unable to resolve the outstanding issues, the Board will have the benefit of the Board agent's report to assist in making further remedial orders. In the present case, by the time of the hearing, no such monetary loss for outstanding dues was owing to the Union and there is no need for any remedial orders in that regard. It is for these reasons that we do not think it necessary or appropriate to appoint a Board agent or to have the parties develop a different mechanism for future payment of dues.

[46] It is for similar reasons that we decline to make an order that the Board remain seized with the application to deal with any further failures by the Employer to make payment of monthly dues by the 15th of the following month. The application before us covered only the claims for unpaid dues for the period December 2005 to August 2006 and as such, any further failures to remit dues must be the subject of a new application to the Board. If the Employer fails to remit dues in the future, the Union may

file another application seeking further and better orders given that the Employer would not only be in breach of s. 32 of the *Act* but also in contempt of the Board's order in this case to cease and desist from further violations of s. 32 of the *Act*. Such orders might include solicitor/client costs and/or penalties for contempt, to name a few. We do not find that such a process is unduly onerous for the Union, as few additional steps are required to proceed in that fashion.

[47] The Board will therefore order:

(i) that the Employer has committed an unfair labour practice within the meaning of s. 32 of the *Act*;

(ii) that the Employer cease and desist from any further violations of the *Act*, and, in particular, that the Employer refrain from any further withholding of dues and assessments to which the Union is entitled;

(iii) that the Employer pay to the Union pre-judgment interest on the amounts of dues owing from December, 2005 to September, 2006 from and after the date each set of monthly dues was owing to the date of payment (i.e. pre-judgment interest calculated on the amount of dues owing for December, 2005 from January 15, 2006 until October 27, 2006; pre-judgment interest calculated on the amount of dues owing for January, 2006 from February 15, 2006 until October 27, 2006, etc.); and

(iv) that the Board remain seized with respect to any issues that arise in relation to the calculation and payment of pre-judgment interest in (iii) above.

LRB File No. 156-06

Evidence:

[48] In its application, the Union stated that it had filed four separate grievances on behalf of employees in the bargaining unit at the Howard Johnson in Yorkton, all of which have been processed up to the point in time where the Union

served the Employer notice of its intent to proceed to arbitration and named its nominees to the arbitration boards. The Union stated that the grievance procedure in the collective agreement requires the Employer to respond within five days naming its nominees to the arbitration boards. The Union alleges that the Employer has not done so to date and is therefore in violation of s. 11(1)(c) of the *Act*.

[49] In its Reply, the Employer stated that the "[g]rievances have not proceeded to Arbitration" and that it "will name arbitrator as soon as all grievances reach to a point of arbitration."

[50] In its application, the Union also stated that having properly served a notice to bargain a renewal or revision of the collective agreement with regard to the Howard Johnson in Yorkton, the Employer has refused to bargain collectively unless the Union withdraws its grievances. The Union alleges that the Employer thereby acted in violation of s. 11(1)(c) of the *Act*. In its reply, the Employer stated that there had been no refusal to commence collective bargaining; that Mr. Nurmohamed had sent bargaining dates by email to Mr. Hollyoak; and that no mention has been made of the grievances in relation to collective bargaining discussions. At the outset of the hearing, the Union advised the Board that as of the date of the hearing, this failure to bargain was not a continuing issue as the Employer had provided the Union with meeting dates just prior to filing its reply.

[51] At the hearing, the Board advised that it would consider the evidence led in relation to the hearing on LRB File No. 155-06 in relation to this application as well.

[52] Mr. Hollyoak testified on behalf of the Union. In his evidence, Mr. Hollyoak provided information about the four grievances filed by the Union. The first grievance filed was in relation to the loss of hours of work of a kitchen employee due to the Employer's improper performance of bargaining unit work, for which the Union filed a grievance dated May 14, 2005, which grievance was received by the Employer on May 19, 2005. The second and third grievances were in relation to verbal warnings issued on September 6, 2005 to two employees who had engaged in an altercation in the workplace, which discipline the Union grieved on behalf of each of those employees on September 16, 2005. The fourth and final grievance filed was in relation to the

Employer's denial of vacation leave to an employee who requested vacation leave for the period November 6 to 12, 2005 and while the Union did not enter a copy of the grievance into evidence, it appears to have been filed shortly before September 20, 2005, that being the date of the Employer's first written response to the grievance.

[53] In relation to the first grievance concerning management's performance of bargaining unit work, the documentary evidence indicates that Union and Employer representatives held a grievance meeting on May 19, 2005. Mr. Hollyoak testified that that meeting was the "step 2" grievance meeting. The Employer replied on May 26, 2005 denying the grievance stating that management assistance was only provided as needed and not on a daily basis. In its letter the Employer indicates that although the grievance is dated May 14, 2005, the date it was filed with the Employer was actually May 19, 2005. The Employer also replied on May 31, 2005, stating that it was responding to the Union's letter of May 24, 2005, received by the Employer on May 27, 2005 (i.e. after the Employer's May 26, 2005 letter), clarifying what it believed had occurred at the parties' May 19, 2005 meeting. The Employer also stated, in reference to the meeting of May 19th, that "*[t]his meeting was called as step 1 to follow proper steps in a grievance procedure. A scheduled meeting in step 1 had not taken place. There also was confusion since no scheduled meeting had taken place nor a written grievance filed prior to that time.*" The Union responded on August 24, 2005 stating that it found the Employer's response unsatisfactory and that it wished to proceed to arbitration. The Union also named its nominee to that arbitration board in that letter. Mr. Hollyoak testified that he does not know why the Employer has not named a nominee and that the Employer has not requested any further grievance meetings with the Union.

[54] In relation to the second, third and fourth grievances referenced above, the Employer responded to the grievances by writing three separate letters to the Union, each dated September 20, 2005, advising that the Employer maintains its position with respect to the discipline issued (on the second and third grievances) and the denial of the vacation leave (on the fourth grievance), citing relevant provisions of the collective agreement. Mr. Hollyoak testified that the Union sent three separate letters to the Employer dated September 21, 2005, indicating that given that the Employer refused to answer any of the Union's questions about the incident (on the second and third grievances) and because there was little dispute as to the facts (on the fourth

grievance), the Union proposed that the matters proceed directly to arbitration. In each of those letters, the Union named its nominee to the arbitration boards.

[55] The documentary evidence indicates that on September 28, 2005, the Employer responded to the Union's request to proceed to arbitration on each of these three grievances by three identical letters which stated that it is opposed to proceeding to arbitration before all of the steps in the grievance procedure had been followed. The Employer took the position that the Union has not completed step 2 of the grievance procedure for any of those grievances and invited it to do so. The Employer relied on portions of articles 20.06 and 20.08 of the collective agreement (the entire Article 20 deals with the grievance procedure), which provides as follows:

> *20.06 Any employee, or the Union in the case of a policy grievance, may process a grievance which shall be dealt with as follows:*
>
> *Step 1: The matter shall be discussed at a meeting between the grievor, the Shop Steward if he/she wishes, and the General Manager or Assistant Manager who shall render a written decision on the grievance within five (5) calendar days from the date of such meeting.*
>
> *Step 2: If a satisfactory settlement is not reached in Step 1 above, then within then (10) working days of the Company's reply under Step 1, the grievance may be submitted in writing to a senior representative of the Company and to the Union's Grievance Committee which shall consist of three (3) members. A grievance meeting, if requested, shall take place within seven (7) days from the date the grievance was referred to a senior representative of the Company and the senior representative of the Company shall render a written reply to the Grievance Committee within seven (7) days of the date of the meeting.*
>
> *. . .*
>
> *20.08 The Company and the Union may, by mutual agreement in writing, agree to bypass a step or steps in the grievance procedure and expedite a grievance directly to arbitration.*

[56] Mr. Hollyoak testified that in response to the Employer's September 28, 2005 letters asking for a step 2 meeting on the last three grievances, the Union proposed a date for meeting. He stated that the Employer then wrote to the Union

advising that it was not able to meet on the date the Union suggested and proposed alternate days in October. In cross-examination, Mr. Hollyoak was shown a letter dated September 29, 2005 from the Employer to the Union which he acknowledged was the communication in question. In this letter the Employer indicates that it is unable to meet on September 30, 2005 (as proposed by the Union) and lists six dates in the first two weeks of October 2005 on which the Employer would be able to meet. Mr. Hollyoak testified that the Union was in bargaining with another employer on the days proposed by the Employer and he advised Mr. Nurmohamed of this while suggesting alternate dates to meet. In cross-examination, Mr. Hollyoak was asked to show the Board the dates the Union requested, however, Mr. Hollyoak had indicated those dates were discussed with Mr. Nurmohamed and not contained in a letter. In his examination in chief, Mr. Hollyoak stated that he heard nothing further from the Employer with respect to a date for a second step meeting nor did he receive the name of the Employer's nominees to the arbitration boards. He stated that having received no response from the Employer, the Union again requested that the Employer name nominees to the arbitration boards. In cross-examination, Mr. Hollyoak acknowledged that there had been no step 2 meeting in relation to the last three grievances.

[57] Mr. Hollyoak testified that the Union wrote to the Employer on January 13, 2006 indicating that if the Employer does not name its nominees to the arbitration boards by January 20, 2006, the Union would be applying to the Minister of Labour to appoint nominees for the Employer. Mr. Hollyoak testified that having received no response from the Employer to either name nominees or request second step meetings, he wrote to the Minster of Labour on May 16, 2006 to request that the Minster appoint an Employer nominee and chair of the arbitration board for each of the four grievances in question. He said he received a verbal, "off the record," response from the Minister's office that it was not interested in granting the Union's request and that the Union should take the matter to the Labour Relations Board.

[58] On August 24, 2006, Mr. Hollyoak wrote to the Employer indicating that if it has not appointed its nominees by August 31, 2006, the Union would be charging the Employer with an unfair labour practice under s. 11(1)(c) of the *Act*. Mr. Hollyoak stated that he attached a copy of a decision of this Board dealing with such an issue. Having

received no response, the Union filed this unfair labour practice application on October 6, 2006.

[59] Mr. Hollyoak testified that after the Union had served its notice to bargain a renewal collective agreement and was awaiting dates to negotiate, he was advised by the shop stewards of the Howard Johnson in Yorkton that the manager of that hotel told them that Mr. Nurmohamed was refusing to meet until the grievances had been dealt with or withdrawn.

[60] In cross-examination, Mr. Hollyoak was questioned concerning prior collective agreement negotiations between the parties. He acknowledged that the collective agreement at both the Yorkton Howard Johnson and the Swift Current Imperial 400 expired June 30, 2003 but that bargaining had not begun in Yorkton until late 2003/early 2004, several months after the expiry date. He also acknowledged that the Union did not start bargaining with respect to the Imperial 400 until after an agreement was reached in Yorkton, acknowledging it could possibly have been in May 2004, some 11 months following the expiry if that agreement. Mr. Hollyoak added however, that it took the Union that many months to get the Employer to the bargaining table and that the Union had initially proposed dates in September 2003 at both locations at a common table, but the Employer would not agree and wanted to begin with the Howard Johnson location first.

[61] Mr. Hollyoak also testified that he wrote to the Employer on August 24, 2006 asking for dates to meet to bargain collectively with respect to the hotels in Yorkton and Swift Current, having previously served a notice to bargain in Yorkton, and still awaiting the signed copies of the collective agreements the parties had negotiated in Swift Current (including the one effective to June 30, 2006 and another effective to June 30, 2008). Mr. Hollyoak testified that since filing this application on October 6, 2006, the Employer had responded with meeting dates for the Yorkton hotel and two meetings had been held by the date of the hearing.[6] Mr. Hollyoak notes that at neither of these meetings did the Employer indicate it was prepared to proceed with the grievances to arbitration.

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[6] Bargaining issues in relation to the Imperial 400 in Swift Current are the subject of LRB File No. 157-06, which was heard with the present application and is dealt with later in these written Reasons.

[62] Following the close of the Union's evidence, Mr. Nurmohamed, on behalf of the Employer, declined to lead any evidence, even after repeated cautions by the Board that any statements he has made throughout the hearing would not be considered as evidence in the Board's deliberations concerning the matter.

Arguments:

[63] The Union argued that the Employer, by reason of its failure to observe the grievance procedure in the parties' collective agreement by not naming its nominees to an arbitration boards in relation to four grievances filed by the Union, has violated s. 11(1)(c) of the *Act*. The Union argued that s. 11(1)(c) of the *Act* makes it an unfair labour practice to fail to "bargain collectively" with the Union and that "bargaining collectively," as defined in s. 2(b) of the *Act*, includes the negotiating for the settlement of disputes and grievances. The Union also referred to the definition of "labour-management dispute" in s. 2(i) of the *Act* as a dispute or difference between the parties that triggers the application to bargain in good faith under s. 11(1)(c) of the *Act*. The Union argues that by reason of s. 25 of the *Act* (which requires that all differences between the parties concerning the meaning, application or alleged violation of a collective agreement, including whether a matter is arbitrable, are to be settled by arbitration), the obligation to bargain in good faith arises as soon as the Union notifies the Employer of a dispute/difference/grievance.

[64] More specifically, the Union argued that in relation to the second and third grievances, the Employer was not willing to negotiate a settlement of the grievances and disclose the facts upon which it based its decisions to discipline. In relation to the fourth grievance concerning the denial of vacation leave, after the step 1 meeting it was clear the parties had a difference over the interpretation to be placed on the collective agreement provision in question. In relation to the first grievance, the Union took the position that it had in fact held a step 2 meeting. For all of the grievances, the Employer refused to follow the grievance procedure by failing to name its nominees to the arbitration boards. The Union pointed out that the Employer led no evidence concerning why it could not name its nominees to the arbitration boards or meet further with the Union.

[65] In support of its argument, the Union relied on the Board's decision in *Saskatoon City Police Association v. Saskatoon Board of Police Commissioners*, [2000] Sask. L.R.B.R. 372, LRB File No. 086-99.

[66] The Union argued that if the Employer believes that the Union has not complied with the arbitration procedure, that is a matter for it to raise at an arbitration hearing – *i.e.* - that the arbitrator has no jurisdiction to hear the grievance because the grievance procedure had not been exhausted. The Union identified a potential problem with the grievance procedure outlined in its collective agreement and questioned whether a provision might be void because it is inconsistent with the *Act*. The Union pointed out that article 20.06 which describes step 2 of the procedure, may cause a problem if the Employer refuses to meet in that the Union may never be able to proceed to arbitration because article 20.07 states that a grievance may be referred to arbitration if a satisfactory resolution is not reached under article 20.06. The Union did point out that article 20.07 indicates that if the Employer does not respond in the time limits set out, the employee may proceed to the next step of the grievance procedure, but expressed concern that this may not apply to a failure by the Employer to meet, but only to a failure to respond on time. The Union argued it is the intent of s. 25 of the *Act* to allow the parties to proceed to arbitration with all grievances if they cannot be resolved after meeting with the Employer.

[67] The Union also argued that the Employer is in violation of s. 11(1)(c) of the *Act* by failing to bargaining collectively a renewal agreement at the Howard Johnson in Yorkton. The Union submitted that the only evidence the Board has before it is that of Mr. Hollyoak's – that the Union served a notice to bargain and sent a follow-up letter of August 24, 2006 again requesting dates to bargain and the Employer responded to neither. Only once this unfair labour practice application was filed did the Employer respond with dates and meet with the Union. The Union pointed out that this late response and the fact that two meetings have been held only goes to the issue of a remedy for this breach of the *Act*.

[68] In establishing the Employer's failure to bargain a renewal agreement in relation to the Howard Johnson, the Union also urged the Board to accept the hearsay evidence given by Mr. Hollyoak concerning the information he received from the

members that the Employer would not proceed with bargaining a renewal agreement unless the Union withdrew the grievances, stating that the Employer has a duty in this case to present evidence to the contrary and it did not. The Union argued that the Employer's position is significant in that it clearly tied collective bargaining to the processing of grievances and thus it failed to fulfill its bargaining obligations on both accounts.

[69] The Union asked that the Board take into account the fact that the Employer has committed an unfair labour practice (in LRB File No. 155-06) and that the Employer lacks credibility given its lack of respect for the labour laws in Saskatchewan. In both this case and in LRB File No. 155-06, it is apparent that the Employer will not fulfill its obligations unless the Union files an unfair labour practice application.

[70] The Union seeks as remedies a declaration of a violation of s. 11(1)(c) of the *Act* for both: (i) the failure of the Employer to follow the grievance and arbitration procedures by failing to name its nominees to the arbitration boards or to meet again with the Union; and (ii) the failure to meet to negotiate a renewal collective agreement with the Union in relation to the Howard Johnson Inn. The Union also seeks an order that the Employer comply with s. 11(1)(c) of the *Act* and process the grievance properly. Specifically, the Union proposed that the Board order the Employer to provide the names of its nominees in relation to all four grievances within fifteen days, failing which, the Board would name the nominees and the chairpersons of those arbitration boards.

[71] Although the Union alleged that the Employer violated s. 11(1)(a) of the Act in its application, the Union did not make argument in relation to that allegation. The Board will therefore proceed to decide the matter on the basis of s. 11(1)(c) alone.

[72] The Employer argued that it did not refuse to meet with the Union to resolve the grievances and it was the Union that has failed to follow the grievance procedure by not holding a step 2 meeting in relation to three of the grievances. In defence of its failure to meet with the Union concerning the grievances, the Employer pointed to the six dates it offered in its letter of September 29, 2005.

[73] The Employer stated that the fact that the Union took five months to begin negotiations for a renewal agreement (at the Howard Johnson in 2003) provided a guideline for Mr. Nurmohamed to respond to the grievances and bargaining dates and suggested there was no urgency to going to arbitration with the grievances.

[74] The Employer took issue with the Union's statement that it does not comply with the laws of Saskatchewan stating that it always tries to do so and that its problem in complying with the law is not knowing the proper procedures and not being well-prepared.

Relevant Statutory Provisions:

[75] Relevant statutory provisions include ss. 2(b), 5(d) and (e), 11(1)(c) and 25 of the Act, which provide as follows:

> *2 In this Act:*
>
> *(b) "bargaining collectively" means negotiating in good faith with a view to the conclusion of a collective bargaining agreement, or a renewal or revision of a bargaining agreement, the embodiment in writing or writings of the terms of agreement arrived at in negotiations or required to be inserted in a collective bargaining agreement by this Act, the execution by or on behalf of the parties of such agreement, and the negotiating from time to time for the settlement of disputes and grievances of employees covered by the agreement or represented by a trade union representing the majority of employees in an appropriate unit;*
>
> *. . .*
>
> *5 The board may make orders:*
> *. . .*
>
> *(d) determining whether an unfair labour practice or a violation of this Act is being or has been engaged in;*
>
> *(e) requiring any person to do any of the following:*
> *(i) to refrain from violations of this Act or from engaging in any unfair labour practice;*
> *(ii) subject to section 5.1, to do any thing for the purpose of rectifying a violation of this Act, the regulations or a decision of the board;*
>
> *. . .*

> *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:*
>
> *. . .*
>
> *(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;*
>
> *. . .*
>
> *25(1) All differences between the parties to a collective bargaining agreement or persons bound by the collective bargaining agreement or on whose behalf the collective bargaining agreement was entered into respecting its meaning, application or alleged violation, including a question as to whether a matter is arbitrable, are to be settled by arbitration after exhausting any grievance procedure established by the collective bargaining agreement.*

Analysis and Decision:

[76] There are two distinct allegations of a violation of s. 11(1)(c) of the *Act* before us: (i) the failure of the Employer to comply with the grievance and arbitration provisions with respect to four grievances by failing to name nominees to the arbitration boards or to set further meetings with the Union; and (ii) the failure of the Employer to meet to bargain a renewal collective agreement for the Howard Johnson Inn.

[77] With respect to the first allegation, we find that the Employer has refused to follow the grievance and arbitration procedure by failing to name its nominees to the arbitration boards or to meet further with the Union, in violation of s. 11(1)(c) of the *Act*. The duty to "bargain collectively" required by s. 11(1)(c) requires the Union and Employer to negotiate from time to time the settlement of disputes and grievances (s. 2(b)). The evidence led by the Union was unopposed – clearly, four grievances were filed, and while there was a dispute over whether the Union had taken all the steps necessary to proceed to arbitration with the grievances, the Employer did not name its nominees to the arbitration boards. We accept Mr. Hollyoak's evidence that he requested further dates for a step 2 grievance meeting in response to the Employer's September 29, 2005 letter. The Union also gave the Employer several more

opportunities over several months to name its nominees to the arbitration boards when it wrote to the Employer advising it would go to the Minster of Labour for assistance or file an application with this Board if the Employer would not name its nominees. The Employer appears to have simply ignored the Union's requests and at no time did it respond with the name of its nominees or suggest further dates for step 2 meetings. As such, we find that the Employer has refused to process the grievances filed by the Union by meeting further with the Union or by naming its nominees to the arbitration boards in order to proceed to arbitration.

[78] In *Saskatoon Board of Police Commissioners, supra*, the Board dealt with a situation where the Union had filed grievances over the dismissals of two of its members. While the parties agreed to move the grievances to the second step of the grievance procedure, once they were at that meeting, the Employer took the position that it was without jurisdiction to hear and determine the grievance under the collective agreement on the theory that the Chief of Police had sole discretion under *The Police Act*, 1990, S.S. 1990-91, c. P-42.1 to do so. In finding the Employer in breach of s. 11(1)(c) of the *Act*, the Board stated at 376:

> *[11] This Board will not explore the legal issues raised by the Employer with respect to the authority of the Chief of Police to dismiss the probationary constables without reference to the provisions of the collective agreement.*
>
> *[12] For our purposes, it is sufficient to note that there is a dispute between the Union and the Employer over the "meaning, application or alleged violation [of provisions contained in the collective agreement], including a question as to whether the matter is arbitrable." It may be that an arbitration board will agree with the Employer's position. However, the Act requires the Employer to refer the dispute to arbitration and to have it settled in that forum. A failure to do so constitutes a violation of s. 25(1) and s. 11(1)(c) - the latter provision requiring the Employer to "bargaining collectively" with the Union, which is defined in s. 2(b) as including "the negotiation from time to time for the settlement of disputes and grievances of employees covered by the agreement or represented by a trade union."*
>
> *[13] In this case, the Employer's refusal to refer the dispute to arbitration constitutes an unfair labour practice and an Order will issue directing the Employer to refer the two grievances to*

> *arbitration in accordance with the provisions contained in its collective agreement with the Union and s. 25(1) of the Act.*

[79] Similarily, in *International Brotherhood of Painters and Allied Trades, Local 739 v. Marchuk Decorating Ltd.*, [1998] Sask. L.R.B.R. 63, LRB File No. 009-97, the Board found that the employer had violated s. 11(1)(c) of the *Act* by refusing to bargain in good faith with the union with respect to the grievance filed by the union in circumstances where: (i) the employer's response to a grievance was to suggest that the certification order applying to it was invalid; and (ii) it had not previously sought to rescind or set aside that order. In *University of Saskatchewan v. University of Saskatchewan Faculty Association*, [1990] Spring Sask. Labour Rep. 30, LRB File No. 280-88, the Board held that the union's "obstructive approach" to the negotiations of grievances had demonstrated no real intent on its part to resolve the grievances and therefore its conduct amounted to a failure to bargain in good faith.

[80] In the case before us, we also find it unnecessary to examine the matters in dispute between the parties in relation to the four grievances filed by the Union. It is sufficient for us to find, as we have, that there is a dispute between the Union and the Employer over the *"meaning, application or alleged violation [of provisions contained in the collective agreement], including a question as to whether the matter is arbitrable."* As in the *Saskatoon Board of Police Commissioners* case, *supra*, it may well be that an arbitrator will side with the Employer that the Union has not completed all steps necessary under the grievance procedure as a pre-condition of proceeding to arbitration, but that is a matter for the arbitrator to decide, not this Board. It certainly is not a matter for unilateral determination by the Employer. The failure of the Employer to participate in the arbitration procedures to have the matter determined by an arbitrator is a violation of ss. 25(1) and 11(1)(c) of the *Act*.

[81] In addition to failing to name its nominees to the arbitration boards, the Employer also refused to respond to the Union with further dates for a step 2 meeting. The Employer cannot maintain a defence that the Union has refused to proceed to step 2 (so that the Employer does not have to name its nominees to arbitration boards), yet at the same time, refuse to hold step 2 meetings in relation to those grievances.

[82] It is for these reasons that we find the Employer in violation of s. 11(1)(c) and 25 of the *Act* for refusing and/or failing to process the grievances in question by naming its nominees to the arbitration boards or, alternatively, offering dates to further meet with the Union about the grievances. We do not find it appropriate to order that the Employer meet with the Union on each of the three grievances, as a "step 2" grievance meeting or otherwise, on the following basis: (i) the grievances have been outstanding for a significant period of time; (ii) the Union has taken the position that it may properly proceed to arbitration without any further meetings with the Employer under the grievance procedure and that any question of whether the grievance procedure had been exhausted is a matter for determination by the arbitrator; (iii) the Union did not request such relief; and (iv) the Employer has repeatedly failed/refused to meet further with the Union or provide dates for such meetings. Instead, under the Board's authority in s. 5(e)(ii) of the *Act* "*to do any thing for the purpose of rectifying a violation of this Act*," we will direct that the Employer to forthwith (and in any event, no later than ten days from the date of the Board's order) name its nominees to the arbitration boards for each of the four grievances in question. Thereafter, the parties must continue to follow the arbitration provisions contained in article 21 of the collective agreement, specifically, articles 21.04 and 21.05, which provide as follows:

> *21.04 The two (2) nominees shall, within then (10) days of the appointment of the second of them, select and appoint a third member for the Board who shall be the chairman of the Board of Arbitration. No person shall serve as a member of a Board of Arbitration where that person is directly involved in the issue in dispute.*
>
> *21.05 If agreement cannot be reached within seven (7) days of the appointment of the second member of the Board, then Wil Olive shall be requested to appoint a chairman.*

[83] We caution the Employer that if it chooses to ignore the Board's order to name its nominees to the arbitration boards, the Union has several avenues available to it to pursue compliance. A decision and order of the Board filed in the Court of Queen's Bench becomes "*enforceable as a judgment or order of the court, and in the same manner as any other judgment or order of the court ...*" (see s. 13 of the *Act*). The Union might be entitled to bring an application to the Court of Queen's Bench or to the Board to

have the Employer found in contempt of the Board's order or, it may seek to have the Employer tried for an offence under s. 15(2) of the *Act*. In any event, harsher penalties may be visited upon the Employer if it fails to comply with the Board's order.

[84] Nothing in the Board's determination or order directing the Employer the name its nominees to the arbitration boards and to proceed to arbitration in accordance with article 21 of the collective agreement should be read as prohibiting the parties from voluntarily meeting to discuss and attempt to resolve the four grievances in question.

[85] With respect to the Union's second allegation concerning the failure to meet to bargain a renewal agreement at the Howard Johnson Inn, we accept the evidence of Mr. Hollyoak that the Union served a notice to bargain and requested dates to bargain on two occasions and that the Employer has failed to respond to either. There was no contrary evidence led by the Employer. While the lack of a response to only two requests for meetings dates, presumably over a three – four month time period, might often be insufficient to find a violation of s. 11(1)(c) of the *Act*, in this case, we find that it is sufficient. It is apparent to the Board upon hearing these applications that the Employer has engaged in a pattern of ignoring the Union's requests to meet or to respond in a timely fashion. There is no indication that if the Union would have made numerous requests of the Employer to provide dates for bargaining that the Employer would have done so. We agree with the assertion of the Union that it appears necessary for the Union to file unfair labour practice applications in order to get the Employer to comply with its duties and obligations under the *Act* and the collective agreement. Such behaviour cannot be condoned either generally or in the specific circumstances of this case. We view the Employer's conduct and refusal to meet and as conduct designed to Impede the collective bargaining process or otherwise violate the requirements of the *Act* (see: *Canadian Union of Public Employees v. Last Mountain School Division No. 29*, [1990] Fall Sask. Labour Rep. 91, LRB File No. 094-90 and *Canadian Union of Public Employees v. Cheshire Homes of Regina Society*, [1988] Fall Sask. Labour Rep. 91, LRB File No. 051-88).

[86] Furthermore, while we might have had some hesitation in accepting the hearsay evidence of Mr. Hollyoak that the members reported that the hotel manager stated that Mr. Nurmohamed would not meet to bargain a renewal agreement unless the

Union dropped the grievances, as the sole basis for a finding of an unfair labour practice, we are prepared to consider that evidence in support of our decision that the Employer's failure to respond with bargaining dates amounts to a violation of s. 11(1)(c) of the *Act*. The Employer heard this evidence at the hearing yet it specifically chose not to lead any evidence to dispute these assertions. In addition, this evidence is consistent with other evidence led at the hearing – that the Employer would not respond with bargaining dates or to the grievances (with either the name of its nominees or dates for further meetings) until it was, in essence, "forced" to do so because the Union brought an unfair labour practice application. While acceptance of this hearsay evidence is not necessary to our finding of a violation of the *Act*, it certainly supports that finding.

[87] Lastly, we agree with the Union that the Employer's subsequent compliance with its bargaining obligations by agreeing to meet with the Union and holding two collective bargaining meetings, is not a valid defence to the application as the Employer was in breach of s. 11(1)(c) as of the date of the filing of the application. The Employer's subsequent compliance only goes to the issue of an appropriate remedy. As such, the only orders the Board will make with regard to this finding is declaratory relief that the Employer has violated ss. 11(1)(c) and 25(1) of the *Act* and a cease and desist order.

[88] We will therefore order:

(i) that the Employer has violated ss. 11(1)(c) and 25(1) of the *Act* by its failure and/or refusal to bargain collectively by naming its nominees to the arbitration boards or to meet with the Union in relation to the four grievances filed by the Union;

(ii) that, to rectify this violation, the Employer forthwith or, in any event, within ten days of the date of this order, inform the Union of the nominees it selects for each of the four grievances in question and thereafter proceed through the arbitration procedure as provided for in Article 21 of the collective agreement;

(iii) that the Employer has violated s. 11(1)(c) of the *Act* by its failure and/or refusal to bargain collectively a renewal collective agreement at the Howard Johnson Inn; and

(iv) that the Employer cease and desist from further violations of ss. 11(1)(c) and 25(1) of the *Act*.

LRB File No. 157-06

Evidence:

[89] Mr. Hollyoak again testified on behalf of the Union and Mr. Nurmohamed testified on behalf of the Employer in response.

[90] Mr. Hollyoak stated that around the time that the Employer purchased the Howard Johnson in Yorkton and the Imperial 400 in Swift Current, the Union served its notice to bargain for a renewal/revision of the collective agreements. He stated that the prior owner of the hotels did engage in some joint bargaining for both hotels but that on the request of the Union to do so with the Employer, the Employer rejected the notion of bargaining at a common table and indicated it wished to begin with the Yorkton collective agreement. In his evidence, Mr. Nurmohamed stated that he did not insist that Yorkton proceed first but did insist that the two agreements be negotiated separately. Mr. Hollyoak stated that after the Yorkton collective agreement had been signed, the parties commenced bargaining in Swift Current at which time, Mr. Hollyoak says, the Employer attempted to impose the Yorkton collective agreement. The members rejected the Employer's position in no uncertain terms, indicating they wished to bargain their own collective agreement. Mr. Hollyoak stated that the parties had met on a number of occasions before the Employer served a lock-out notice effective December 3, 2004.

[91] Mr. Nurmohamed stated in his evidence that the negotiations in Swift Current started in May 2004 and that the parties met on four occasions for two days each time. He believed that these meetings went on until November 29 or 30, 2004, however, it had become apparent to him after these eight meetings that the parties were not progressing. He stated that he felt the Union was using delay tactics and he therefore typed up and served a lock-out notice.

[92] After the lock-out began, the parties used the assistance of a mediator to negotiate a resolution and were successful in doing so by late June or early July, 2006. On July 5, 2006, the Employer forwarded three agreements to the Union for ratification by its members, including a three-year collective agreement expiring June 30, 2006, a second two-year collective agreement expiring June 30, 2008 (which is identical to the first agreement except for the duration and wage rates), and a "Return to Work Agreement" which governed the terms and conditions of the return to work by the Union's members following the lock-out and subsequent interim closure of the hotel during that lock-out. The terms of the "Return to Work Agreement" read as follows:

> 1. *The motel will open to full service within 10 days of the ratification of the agreement by both parties subject to:*
>
>   - *Enough employees returning to open the hotel in the ten day period*
>   - *Employees return to work as required for staffing purposes.*
>   - *Maintenance and safety issues to be approved by management.*
>
> 2. *The lock out will be lifted and employees will return to work.*
>
> 3. *Employees will be scheduled to work in compliance with the collective agreement.*
>
> 4. *Retroactive pay will be paid out to employees in the first pay period following the opening of the motel.*
>
> 5. *The employer agrees to review the benefits as a part of the second agreement.*

[93] All three agreements were immediately ratified by the Union's members. Following ratification, the Union signed all three agreements and mailed them to the Employer on July 10, 2006.

[94] In its application, the Union complains that the Employer has failed to sign and execute the three agreements and has failed to implement some of the terms in those three agreements. Mr. Hollyoak testified that he repeatedly asked Mr. Nurmohamed for signed copies of the agreements. In cross-examination, Mr. Hollyoak

stated that he believed he communicated this by email to Mr. Nurmohamed, although there was no such email message available to be produced at the hearing. Mr. Hollyoak entered into evidence an email message he received from Mr. Nurmohamed July 17, 2006 where Mr. Nurmohamed stated that he was aware the employees ratified the collective agreement but that he had not yet received a signed copy of the contract. He requested that the Union "send the signed documents (the appropriate number of copies) to me by courier asap," indicating he would get them approved, signed and returned after his review of the agreements. Mr. Hollyoak testified that prior to the Union filing this unfair labour practice application, he had not received any indication from the Employer that there was a problem with any of the agreements; he simply received no response from the Employer and no signed copy of the agreements.

[95] In its reply, the Employer denied that it has refused to sign and execute the agreements, stating that the Union did not send the appropriate copies for signing. Mr. Hollyoak stated at the hearing that this was the first time he had heard about this problem. In cross-examination, Mr. Hollyoak stated that he thought he had mailed two copies of each agreement to the Employer – one to keep and one to return – but acknowledged in cross-examination that it appeared that only one copy of each agreement would fit inside the envelope that was produced in evidence. Mr. Hollyoak acknowledged that Mr. Nurmohamed's email message of July 17, 2006 (received subsequent to the Union mailing him the agreements for signature) clearly asked for three copies to be sent. He also acknowledged that when the parties signed the Yorkton collective agreement, in person, that six to eight copies were available for signing. Mr. Hollyoak explained that when the Union meets face-to-face with an employer for signing, it usually brings six copies to be signed.

[96] Mr. Hollyoak was cross-examined at length concerning any communications he had with Mr. Nurmohamed in relation to signing the agreements. Mr. Nurmohamed questioned whether the Union sent any instructions with the agreements and Mr. Hollyoak replied that instructions were not necessary, particularly in light of Mr. Nurmohamed's July 17, 2006 email message where he stated he will sign and return copies to the Union. Mr. Hollyoak also stated that the Union's subsequent email inquiries about signing of the documents went unanswered by Mr. Nurmohamed. Specifically, no mention was made that the Union sent him an insufficient number of

copies for signing. Mr. Hollyoak stated that he communicated with both Mr. Nurmohamed and with the mediator asking that the agreements be signed and returned to the Union. In cross-examination, Mr. Nurmohamed asked that Mr. Hollyoak prove that he communicated this request by email specifically to Mr. Nurmohamed himself, but Mr. Hollyoak did not have copies of such email messages at the hearing. At the hearing, the Board denied Mr. Nurmohamed's request that the hearing be adjourned and the Union directed to produce such email messages, on the basis that it would not be fair and expeditious to do so and it would unduly delay the conclusion of the hearing in circumstances where the evidence is only of minor or no significance to the Board's inquiry into whether the Employer has violated s. 11(1)(c) of the *Act*. As such, the Board stated that it sees little purpose to be served by adjourning the hearing for this reason. The evidence, if produced, would only serve to better prove the Union's case that it made such inquiries in circumstances where, at the hearing, the Union chose to rely only on Mr. Hollyoak's evidence on this point. On the other hand, the inability of the Union to locate such an email message(s) could only be evidence that: (i) the Union could not find the email message; or (ii) Mr. Hollyoak's testimony that he made inquiries of Mr. Nurmohamed about the signing of these documents is inaccurate. We will further consider this evidence in our analysis and decision below.

[97] Mr. Hollyoak testified that during negotiations with another employer in the hotel industry around the time of the hearing of this application, the other employer was using various collective agreements as comparison agreements, one of which was the Union's agreement with the Employer expiring June 30, 2008, although this other employer's copy was missing the last page of the agreement (before the appendices), which happened to be the signing page. A copy of this agreement was entered into evidence and although the signing page is missing, on the first page it indicates that the agreement was made and entered into on July 10, 2006.

[98] Mr. Hollyoak testified that at the hearing of LRB File No. 155-06 on the day before the hearing of the present application, Mr. Nurmohamed had entered into evidence a signed copy of the return to work agreement. This was the first time that Mr. Hollyoak saw an executed agreement from the Employer. The date inserted on that agreement was July 24, 2006. Mr. Hollyoak also stated that at the mid-day break in the hearing of the present application, Mr. Nurmohamed gave him copies of the signing

pages for the two collective agreements in question, along with a signed copy of a letter of understanding in relation to the second collective agreement, with the latter document bearing the date July 10, 2006 but with an indication that Mr. Nurmohamed signed it on July 24, 2006. This was the first time that Mr. Hollyoak saw executed collective agreements from the Employer. Mr. Nurmohamed confirmed in cross-examination that he had signed the collective agreements in July, 2006.

[99] In addition to its allegation that the Employer has failed to execute the three agreements in question, the Union also alleges that the Employer has failed to implement the terms of the three agreements. Specifically, Mr. Hollyoak testified that, in violation of the return to work agreement, the hotel did not open in the ten days allotted even though the stated conditions to opening had been met. Mr. Hollyoak stated that aside from the Employer having a number of the employees there in August 2006 to clean the hotel, it was his understanding that the hotel had partially opened from September 1 to 15, 2006 using only seven of the employees. It was also his understanding that twenty one employees have returned to work for brief periods of time and that these employees remain available to return to work. The hotel closed again on September 15, 2006 and had not re-opened as of the date of this hearing.

[100] Mr. Hollyoak testified that in addition to not opening the hotel on time and calling back the employees, only seven employees received appropriate retroactive pay under the collective agreements. In addition, he stated that the employees had not been returned to work in accordance with their seniority and that when some further clean-up work was done in November 2006, the employees were not contacted. In cross-examination, Mr. Hollyoak disagreed with Mr. Nurmohamed's statement that all of the employees were contacted to return to work before the hotel had opened, but acknowledged that he did not know for certain how many were called, adding that a larger number of employees worked in August cleaning rooms but only seven employees were kept in September when the hotel had partially opened. Mr. Hollyoak also stated that it would not surprise him if the employees did not return to work when contacted by Mr. Nurmohamed because they likely had other jobs by then or were not interested in the cleaning work that was available.

[101] Mr. Hollyoak testified that he had been advised by Mr. Nurmohamed in September 2006 that he had to close September 15, 2006 due to a "provincial health problem." Mr. Hollyoak believes that the problem should have been fixed by now and the hotel re-opened and that the Employer is therefore not complying with the spirit of the return to work agreement which was to get the hotel open as soon as possible.

[102] Mr. Nurmohamed testified that he had hoped to open the hotel within the ten day period (an estimate based on the time he believed it would take to clean each room), but he was unable to do so because he could not get enough of the employees to help, despite contacting every employee to determine if they wished to help the Employer get the hotel ready to open. The rooms therefore took longer to clean than he thought they would. He also stated that there were repeated visits by the regional health authority to inspect the rooms before the hotel re-opened and he was advised by the health authority that several areas/rooms had not been cleaned properly and these had to be re-done. He testified that by September 1, 2006, they had approximately 15-20 rooms available to be opened to the public while the remaining rooms continued to be cleaned. However, around September 5 to 8, 2006, the health authority discovered mold in one of the rooms. He said they were instructed to board off the room while further testing was conducted, which testing revealed a more serious problem with the mold that ultimately required the Employer to shut down the entire hotel on September 15, 2006.

[103] Mr. Nurmohamed stated that upon discovery of the mold problem, he contacted the employees to assist in cleaning and removing the mold. Initially the employees had refused, and although at some later point in time, some of the employees showed an interest in doing so (there have been just three to four employees inquiring about work at the hotel), it had then become evident that the Employer and employees did not have the specialized knowledge and equipment to remove the mold. As such, the Employer had had found it necessary to hire a mold-removal company to perform the work. Mr. Nurmohamed stated that he was aware that the mold removal work would take some time but he thought the hotel would be ready by late December, 2006. Unfortunately, upon further inspection by a consultant, additional problems were identified. He stated that at the time of the hearing of this application, the work was almost complete and he would be checking the hotel the next day.

[104] With respect to the Union's concern that employees who did return to work were not given the proper wage rate, Mr. Nurmohamed stated that he has attempted to talk to the manager of the hotel about the issue and while he does not know the precise nature of the problem, he assured the Board that if employees have been paid an incorrect wage rate, the employees will be given what is due to them.

Arguments:

[105] The Union argued that the Employer violated s. 11(1)(c) of the *Act* by failing to sign and return the two collective agreements and the return to work agreement and to abide by the terms of those agreements. The Union submitted that as with the two other applications heard just prior to this application, it seems the Employer will simply not fulfill its obligations under the *Act* until the Union files an application with the Board. With respect to the present application, the Employer would not sign and return the agreements to the Union until the Union brought this application.

[106] The Union pointed out that the Employer's defence to the allegations changed from that stated in its reply to that stated throughout the course of the hearing. In its reply, the Employer asserted that it did not sign the agreements in question because it did not have the "appropriate documents," yet, the Union argued, it is apparent that the Employer did have the correct documents because it gave a copy of the most recent collective agreement (but for the signing page) to another employer in the hotel industry. At the hearing, it appeared that what the Employer meant in its reply was that the Union did not provide enough copies of the documents for it to sign and return. However, throughout the course of the hearing of this application, the Employer provided the Union with a copy of the signing page for each of the collective agreements (dated July 24, 2006), and in the course of hearing LRB File No. 155-06, he testified that he signed the return to work agreement on July 24, 2006, producing a copy of the same. The Union suggests that the Employer's response in the reply filed is likely closer to the truth of the Employer's position in this matter.

[107] The Union also argued that the Employer violated s. 11(1)(c) of the *Act* by having entered into an agreement that it did not reasonably think it could implement, specifically, the return to work agreement and the provision therein that states that the

hotel would be opened in ten days. The Union argued that in order to meet the standard of bargaining in good faith, particularly in circumstances where the Employer has locked out its employees for nearly two years, it must have some expectation of being able to fulfill the agreements it has entered into.

[108] In relation to remedies, the Union asked that the Board make a declaration that the three agreements in question were in full force and effect as of July 10, 2006. The Union also requested that the Board direct the Employer to implement the terms of those agreements.

[109] The Union also asked that the hearing be bifurcated and that the Board remain seized to hear evidence and argument with respect to any appropriate remedies arising out of any findings of violations of the *Act*, with the hope that the parties could work out a resolution to their issues without the necessity of a further hearing. In response to this request, the Board asked that the Union make argument in relation to the types of remedies requested as the Board questioned the ability of the parties to resolve their own issues, given the nature of the problems raised in the three applications heard by the Board. The Union then submitted that it seeks damages (which are not yet quantifiable) as follows:

> (i) Payment of lost wages to those employees who worked but did not receive their proper rates of pay for those hours worked;
>
> (ii) Payment of monetary loss to employees who did not receive retroactive pay owing under the agreement(s);
>
> (iii) Payment of monetary loss to all employees in the bargaining unit as a result of the Employer not operating the hotel at full service within ten days, as required by the return to work agreement; and
>
> (iv) Pre-judgment interest on all monies ordered to be paid to the employees.

[110] In argument, counsel for the Union pointed out that during the lock-out, the Union had paid strike-pay to the employees. He explained that the Union had intended to discontinue those payments once a settlement was reached with the Employer but when it became clear that the Employer was not honouring the return to work agreement by opening the hotel within the ten day period, the Union continued to pay strike pay to the employees. The Union therefore asked that should the Board order any payment of monetary loss to the employees for the Employer not having re-opened the hotel within the ten day period, the Union be compensated first for those amounts that it had paid to the employees.

[111] The Union asked that in fashioning appropriate remedies on this application, the Board take into consideration the circumstances of the other two applications heard with the present application (LRB File No. 155-06 and 156-06) where a pattern of Employer misconduct has been established that warrants "dramatic and effective" remedies. The Union suggested that the Employer needs some incentive to abide by the laws of this province and properly recognize the Union in the workplace.

[112] The Employer argued that it used its best efforts to get the hotel up and running within the ten day period provided for in the return to work agreement and that when the hotel was completely closed down because of the mold problem, the Employer used a number of employees but determined it had to hire expert assistance to remove the mold. The Employer pointed out that it still has not received approval from the health authorities to re-open the hotel. The Employer noted that it continues to suffer ongoing monetary loss because of the hotel being closed and as such, is trying ot get the hotel open as soon as possible.

[113] The Employer advised that if the Board orders significant damages, it has concerns about meeting its obligations given that the hotel has now been closed for two years.

[114] Although the Union alleged that the Employer violated s. 11(1)(a) of the *Act* in its application, the Union did not make argument in relation to that allegation. The Board will therefore proceed to decide the matter on the basis of s. 11(1)(c) alone.

Relevant Statutory Provisions:

[115] Relevant statutory provisions include ss. 2(b) and (d), 5(d) and (e), 11(1)(c), 18(l) and 25(1) of the *Act*, which provide as follows:

> *2 In this Act:*
>
> *(b) "bargaining collectively" means negotiating in good faith with a view to the conclusion of a collective bargaining agreement, or a renewal or revision of a bargaining agreement, the embodiment in writing or writings of the terms of agreement arrived at in negotiations or required to be inserted in a collective bargaining agreement by this Act, the execution by or on behalf of the parties of such agreement, and the negotiating from time to time for the settlement of disputes and grievances of employees covered by the agreement or represented by a trade union representing the majority of employees in an appropriate unit;*
>
> *(d) "collective bargaining agreement" means an agreement in writing or writings between an employer and a trade union setting forth the terms and conditions of employment or containing provisions in regard to rates of pay, hours of work or other working conditions of employees;*
>
> *5 The board may make orders:*
> *. . .*
>
> *(d) determining whether an unfair labour practice or a violation of this Act is being or has been engaged in;*
>
> *(e) requiring any person to do any of the following:*
> *(i) to refrain from violations of this Act or from engaging in any unfair labour practice;*
> *(ii) subject to section 5.1, to do any thing for the purpose of rectifying a violation of this Act, the regulations or a decision of the board;*
>
> *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:*
>
> *. . .*
>
> *(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;*
>
> *18 The board has, for any matter before it, the power:*
>
> . . .
>
> *(l) to defer deciding any matter if the board considers that the matter could be resolved by arbitration or an alternative method of resolution;*
>
> *25(1) All differences between the parties to a collective bargaining agreement or persons bound by the collective bargaining agreement or on whose behalf the collective bargaining agreement was entered into respecting its meaning, application or alleged violation, including a question as to whether a matter is arbitrable, are to be settled by arbitration after exhausting any grievance procedure established by the collective bargaining agreement.*

Analysis and Decision:

[116] The issues raised by the Union in this application include: (i) whether the Employer violated s. 11(1)(c) of the *Act* by failing/refusing to execute and return the collective agreements and return to work agreement to the Union; (ii) whether the Employer has failed/refused to implement the terms of those agreements in violation of s. 11(1)(c); and (iii) if the Employer has failed/refused to implement those terms in violation of the *Act*, the appropriate remedial relief available.

[117] In *Canadian Union of Public Employees v. Potashville School Division #80*, [2000] Sask. L.R.B.R. 231, LRB File No. 206-98, the Board considered a situation where an employer failed to execute a collective agreement in circumstances where there was no evidence led by the employer that its failure was due to something such as the negotiating committee exceeding its mandate or a mistake having been made in that the document did not reflect the understanding of the negotiating committee. The Board stated at 240:

[29] As a general rule of law, there cannot be a contract between parties who do not intend to be bound and are not in genuine agreement (this is referred to in legal texts as the parties being ad idem). However, the intentions of the parties may be inferred from their words and conduct reasonably interpreted: that is, whatever a party's real intention may be, if they so conduct themselves that a reasonable person would believe that they are agreeing to the terms proposed, they will be bound as if they had intended to agree to those terms.

[30] In determining that in the present case the parties had a mutual intention to enter into a collective bargaining agreement, we have examined their words and conduct. The evidence was that at the conclusion of the negotiations on August 17, the bargaining committees for each party agreed to reduce their agreement to writing and submit it to their respective principals for ratification prior to signing the agreement. ***The definition of "collective bargaining agreement" in s. 2(d) of the Act does not require that it be "ratified" (or, indeed, executed) to be valid****; however, ratification is common, because it ensures that the negotiating agents have in fact secured the agreement of their principals. Generally, ratification is widely required by unions in order to insure that what may be a large and diverse membership supports execution of the agreement; an employer's negotiating committee is usually better able to obtain timely instructions during bargaining as may be necessary.*

[31] The term "ratification" connotes that the party whom it is sought to bind to a contract has, with the full knowledge of the terms of the agreement, assented to the same and agreed to abide by and be bound by the contract undertaken on their behalf. However, as a general proposition, while execution of an agreement may be contingent upon ratification by one or both of the parties' principals, ***unless some indication is given during the negotiating process that a party's negotiator or negotiating committee lacks the ability to conclude an agreement that its principals will ratify, except for good and sufficient reason, the other party has the right to expect that ratification (and execution) will follow without delay.***

[32] In the context of bargaining for a first or renewal collective agreement, ***section 2(b) of the Act requires each party to fulfill at least three obligations****:*

1) to negotiate in good faith with a view to concluding an agreement;

2) to embody the terms of that agreement in writing; and,

3) ***to execute the agreement****.*

[**emphasis added**]

[118] In conclusion, the Board in *Potashville School Division #80*, *supra*, stated that there was "no evidence that the failure of the Employer to ratify the agreement was for good and sufficient reason" and that the Employer's failure to fulfill the obligation to execute the collective agreement was in violation of s. 11(1)(c) of the *Act*. The Board went on to say that while the Board exercises caution in making a decision to impose a collective agreement, because the parties did in fact achieve a collective agreement by agreeing on all of its terms and conditions., the Board would issue an order directing that the Employer to execute and implement the collective agreement.

[119] In *Pat Lee and Carpenters Provincial Council of Saskatchewan v. Wm. C. Interiors Ltd.*, [1990] Spring Sask. Labour Rep. 41, LRB File No. 092-88, the Board stated at 49:

> *The actual execution of the writing or writings constituting a collective bargaining agreement is, by virtue of the definition set forth in Section 2(b) of The Trade Union Act, part of the collective bargaining process.* ***The failure or refusal to execute a collective bargaining agreement constitutes a failure to bargain collectively, and is therefore an unfair labour practice under Section 11(1)(c) of The Trade Union Act*** *(see Armadale Publishers Limited [The Star Phoenix], June 1978 Sask. Labour Rep., p. 46; Cook v. I.W.A. Local 1-184 - and - Shelter Industries Limited, Feb. 1981 Sask. Labour Rep., p. 51).* ***It follows that although the execution of a collective agreement is required by the Act, execution is not a condition precedent to the validity of the agreement.***
>
> [**emphasis added**]

[120] In the present case, on the most logical view of the evidence, as of the date of the application, the Employer had failed to execute the two collective agreements and the return to work agreement. There is no dispute that at least one copy of these agreements was forwarded to the Employer for signing around July 10, 2006. At the time the agreements were so forwarded, the Employer knew its obligation was to execute the collective agreements and provide the Union with copies, as evidenced by Mr. Nurmohamed's email of July 17, 2006 (sent after the Union had mailed the agreements to be signed) where he states that he was aware the agreements had been

ratified by the members and that he awaits their receipt at which time he will attend to the approval of the agreements, sign them and return them to the Union. Mr. Nurmohamed admits receiving the agreements but implied that only one copy of each agreement was sent to him. The Employer's reply to the application, that it has not refused to sign the agreements and that the Union "did not send the appropriate copies for signing," can only be reasonably read as meaning that because the Union did not send multiple copies of each agreement, the Employer had refused to sign them and return a copy to the Union. During the course of the hearing, the Employer raised a somewhat alternative defence - that the agreements were, in fact, signed in July 2006 but none returned to the Union because the Union had only sent one copy of each agreement to the Employer. In either event, there was no suggestion that the parties were not *ad idem* on the terms of the collective agreements or the return to work agreement. By an examination of the Employer's words and conduct, including the fact that during the course of the hearing, signed copies of all three agreements (or copies of their executed signing pages) were given to the Union, as well as the fact that the Employer gave a copy to another employer in the hotel industry for use as a comparator (evidence led by the Union and not contradicted by the Employer), it is clear that the Employer intended to by bound by the three agreements in question.

[121] Although Mr. Nurmohamed stated in his July 17, 2006 email that he would attend to "approving" the agreements before signing and returning the same, we do not interpret that to mean that the agreements were subject to some sort of ratification process by the Employer. There was no suggestion made at the hearing that ratification was a condition precedent to the execution or, that there was a problem with obtaining ratification. Mr. Nurmohamed, the principle of the Employer, was directly involved in the negotiations and the words and conduct referred to above leads us to infer that the Employer accepted the terms and conditions of the agreements and intended to be bound by them. At no time did the Employer raise with the Union that it had a problem with the content of the agreements as sent to it – it only refused to return the signed agreements or communicate with the Union about the status of the agreements.

[122] On the basis of the principles in *Potashville School Division* case, *supra*, and *Wm. C. Interiors, supra*, as referred to above, it is clear in this case that the

Employer has violated s. 11(1)(c) of the *Act* by refusing and/or failing to execute the two collective agreements, as required by the provisions of s. 2(b) of the *Act*.

[123] The issue of the refusal/failure to execute the return to work agreement must be considered separately. Section 2(b) of the *Act* refers only to the requirement of execution of a "collective agreement," and therefore, a violation of s. 11(1)(c) for its refusal/failure to execute the return to work agreement must be found on another basis. In our view, although the return to work agreement is unlikely to be considered part of the "collective agreement," we still find that the Employer has failed to meet the duty to bargain in good faith required by s. 11(1)(c) in relation to the execution of that agreement. In *Saskatchewan Government Employees' Union v. Government of Saskatchewan*, [1993] 1st Quarter Sask. Labour Rep. 281, LRB File No. 103-93, the Board considered an application by a union for an interim order that the employer execute a letter of understanding which the union alleged had been agreed to by the employer during the course of negotiating a renewal collective agreement. The Board examined the parties' obligations to negotiate and execute ancillary agreements in the context of the test used to assess the appropriateness of an interim order. In that case, the Board stated at 283:

> *The Trade Union Act, however, makes it clear in a number of respects that the primary obligation of the parties in collective bargaining is to make efforts to conclude a collective agreement.* ***We do not find that there is any independent obligation upon either party to conclude separate agreements which may modify the collective agreement or speak to issues which have not been addressed in its provisions. Nor is there an obligation to participate in such ancillary agreements in the course of bargaining towards a collective agreement****, though that form is commonly regarded by participants in bargaining as a convenient method of signalling that certain items are no longer on the table.*
>
> *The question of whether an employer would be committing an unfair labour practice by refusing to sign a particular agreement of this type cannot be answered satisfactorily on the basis of the inquiry as to whether there is a clear right to relief.* ***Under appropriate circumstances, such a refusal might well constitute a failure to bargain collectively****, and we cannot thus dismiss the application of the Union on this basis alone.*

[124] We agree with the Board's statement in *Government of Saskatchewan, supra*, that there is no independent obligation on a party to negotiate and conclude ancillary agreements during the course of bargaining a collective agreement, however, the Board clearly contemplated that in certain circumstances, a failure to conclude such an agreement might be a violation of s. 11(1)(c) of the *Act*. The conclusion of the Board in that case was simply that the union had not established a "clear right to relief" entitling it to an interim order on that basis. However, the Board also determined that the union's application could not be dismissed and required a full hearing to determine if s. 11(1)(c) of the *Act* had been violated. In the present case, the Employer proceeded to negotiate an ancillary agreement and, as inferred from its words and conduct, we find that it in fact reached agreement on the terms embodied in the return to work agreement. Even though the Employer was not obligated to negotiate such an agreement, once it has done so, it must comply with the duty to bargain in good faith which, in this case, means following through with the execution of that agreement. As such, a failure/refusal to execute such an ancillary agreement after agreeing to the same also amounts to a violation of s. 11(1)(c) of the *Act*.

[125] At the hearing, the Employer had asked the Board to adjourn the hearing in order for the Union to search for and produce a copy of written communication the Union says it had with Mr. Nurmohamed inquiring about why the agreements had not been signed and returned and asking that the Employer do so. As previously stated, the Board declined to grant that request for the reasons stated herein. Whether or not we accept the Union's evidence on this point, we reach the same conclusion. The Employer clearly knew its obligation was to execute the agreements and return a copy of each to the Union. While it would have been ideal for the Union to have sent multiple copies of each of the agreements, equally, the Employer could have made additional copies of the agreements, before or after signing. In any event, if this is the Employer's basis for refusing to sign the agreements and/or return a copy of each to the Union, it should have communicated the same to the Union, advising of the reason for its refusal to sign and return a copy of each agreement, or indicating that the documents had been signed but no copies returned because the Union had sent an insufficient number of copies. However, the Employer failed to communicate its position at all and it matters not to our conclusion how many times the Union requested the Employer to advise as to the status of the signing of the agreements.

[126] The Union asked that the Board order that the agreements were in full force and effect as of July 10, 2006. Our determination on this point is assisted by an examination of the Board's decision in *Wm. C. Interiors Ltd., supra*, where the Board found that the effective date of the collective agreement in question was May 28, 1996. Even though the agreement was not signed, the Board concluded, on the basis of an objective test, that this was its effective date, reasoning as follows at 50:

> *Applying the above criteria to the facts of the present case, the Board finds that although the Acoustic/Drywall Agreement dated May 27, 1986 was never actually signed by the parties, it is apparent that both sides knew they had a deal on May 28, 1986 and from that date onward ceased their negotiations and treated the agreement as binding upon them. The employer, the union and the employees all received and accepted the benefits accruing to them under the agreement, and indeed the union's letter dated November 5, 1986 confirmed an agreement by both parties to revise the new agreement by decreasing wage rates and increasing contributions to the Apprenticeship and Training Fund effective November 1, 1986. In all of the circumstances, the Board finds that both parties waived the conditions precedent of ratification and notification to the other side and both are now estopped from raising the conditions precedent in an attempt to invalidate the agreement.*

[127] The effective dates of the collective agreements in question are contained in the duration clauses of those agreements and the parties will be guided by that provision with regard to the effective implementation dates. However, because the Employer provided the Union with copies of executed signing pages of the collective agreements at the hearing, it is not necessary for us to order that the Employer execute the collective agreements in question. They have been executed. As the Employer was in violation of s. 11(1)(c) as of the date of filing of the application for its failure to execute and return the collective agreements to the Union, our order will simply be a declaration of a violation of the *Act* and a cease and desist order.

[128] With regard to the return to work agreement, the agreement states at the top of the page that it was made the 10th day of July 2006, however, the agreement provides that it will be effective from "the date of ratification" by both parties. The document does not indicate the date upon which the Union signed the agreement,

whereas the Employer signed the agreement and indicated in handwriting that it did so on July 24, 2006. While we have some doubt about whether Mr. Nurmohamed actually signed the agreement on July 24, 2006, it seems reasonable to conclude that July 24, 2006 should be treated as the effective date of the return to work agreement, knowing that the Employer did not have copies of the agreements at the time Mr. Nurmohamed sent his July 17th email message to the Union, but that he likely received them shortly after that date. Even though the Employer provided the Union with the signed agreement on the date of the hearing, as of the date of the filing of the application, the Employer had not given the Union a signed copy of the document nor had it indicated that such a document had been signed. As such, the Employer is in violation of s. 11(1)(c) of the *Act*. Had the Employer not provided the Union with a signed copy of the return to work agreement by the date of the hearing, we would have ordered that the Employer forthwith execute and implement the return to work agreement dated July 10, 2006, effective July 24, 2006. However, because the Union was provided with a signed copy, our order will be limited to a declaration of a violation of the *Act* and a cease and desist order.

[129] The Union also alleged that the Employer has failed to implement the collective agreements and the return to work agreement in violation of s. 11(1)(c) and that the Board should order that that be remedied. In making this decision, the Board must be mindful of an arbitrator's jurisdiction to decide such matters under the grievance-arbitration provisions of the collective agreement. The Board has a long-standing practice of deferring to the grievance and arbitration process contained in a collective agreement where the issues raised involve the interpretation or application of the terms of the collective agreement and where complete relief can be obtained through the arbitration process. In *United Food and Commercial Workers, Local 1400 v. Saskatchewan (Labour Relations Board)* (1992), 95 D.L.R. (4th) 541, [1992] S. J. No. 425 (Sask. C.A.) the Saskatchewan Court of Appeal enunciated a three-part test to determine whether a dispute between the parties should be deferred by the Board to the grievance arbitration process:

> *(i) the dispute put before the Board in an application for an unfair labour practice order and the dispute intended to be resolved by the grievance-arbitration procedure provided for in the collective agreement must be the same dispute;*

> *(ii) the collective agreement must make possible (i.e. empower) the resolution of the dispute by means of the grievance arbitration procedure; and*
>
> *(iii) the remedy sought under the collective agreement must be a suitable alternative to the remedy sought in the application before the Board.*

[130] In the Board's decision in *International Brotherhood of Electrical Workers, Local 2067 v. Saskatchewan Power Corporation*, [2000] Sask. L.R.B.R. 17, LRB File No. 162-99, the Board considered the issue of deferral to grievance arbitration in circumstances where the union alleged that the employer was in violation of ss. 11(1)(a) and (c) of the *Act* because the employer had hired individuals as "project employees" and failed to comply with the terms of the collective agreement in relation to those employees. The union argued that the employer was failing to bargain in good faith and was undermining the role of the union as the exclusive bargaining representative of employees. The Board decided that it was appropriate to defer to arbitration, and stated at 20 and 21:

> *[18] Before the Board could find that the Employer was subject to a contractual obligation to bargain collectively with the trade union, it would first need to find that Article 3.04 had been violated by the Employer. In our view, this is a matter required to be determined by the grievance and arbitration provisions set out in the collective agreement or by arbitration which is mandated by s. 25(1) of the Act which requires "[a]ll differences between the parties to a collective agreement . . . to be settled by arbitration".*
>
> *[19] There is no allegation contained in the materials that the Employer has failed with respect to its duty to negotiate with respect to the settlement of a grievance, as no grievance has been filed by the Union. The bargaining obligation which the Union asks the Board in this instance to enforce arises solely from the agreement itself and depends on a finding by the Board of a breach of a provision contained in the collective agreement.*
>
> *[20] An arbitration board appointed by the parties is better equipped than the Board to hear and determine the dispute in question, being comprised of a chairperson agreed to by the parties, along with two nominees each familiar with the collective agreement between the parties. In addition, it can provide full relief to the Union should its grievance be upheld.*

[131] In the present case, we have determined that any disputes that arise out of the collective agreement between the parties should be deferred to the grievance arbitration process under the parties' collective agreement. These disputes include: (i) any dispute over the retroactive pay owed to employees under the collective agreement; (ii) any dispute over whether the employees were scheduled to work in compliance with the collective agreement; and (iii) any dispute over whether employees who worked were paid proper wage rates. All three of these disputes are, in their essential nature, allegations of a breach of the collective agreement, despite the fact that they are contained in the return to work agreement. In other words, reference must be made to the terms of the collective agreement in order to determine whether the Employer has acted improperly and/or the employee is entitled to something other than what he or she was provided. We cannot determine if the Employer has failed to "bargain collectively" under s. 11(1)(c) of the *Act* without first determining whether the Employer has breached the collective agreement. The essential issues in dispute are the same whether before the Board or an arbitrator, an arbitration board is empowered to decide the matters in issue, and it appears that full remedial relief can be obtained through arbitration.

[132] Given our ruling on the issue of deferral as well as our finding that the Employer violated s. 11(1)(c) for its failure/refusal to execute the agreements, and our conclusion that the collective agreements are now considered in full force and effect for their stated duration periods, the Union may file grievances concerning these outstanding issues, which grievances may proceed to arbitration, if necessary, without the Employer raising the issue of timeliness as a defence.

[133] As we believe that the above issues can be fully dealt with through the grievance arbitration process under the collective agreement, we do not intend to adjourn *sine die* any portion of this application to be brought back to the Board upion conclusion of those proceedings. In this regard, we refer to and adopt the following statement in the Board's decision in *Administrative and Supervisory Personnel Association v. University of Saskatchewan*, [2005] Sask. L.R.B.R. 541, LRB File No. 070-05, where the Board stated at 560:

> *[44] On occasion, the Board has issued an order adjourning a party's application sine die to be brought back to the Board at the conclusion of the grievance and arbitration process by either party on notice to the other party if there are any issues remaining that were not dealt with by the arbitration board which heard and decided the grievance. However, in this case for the administrative convenience of the Board we are dismissing the application with the understanding that the Union can re-file the application if the grievance and arbitration process does not completely resolve the matter. The Union has not yet filed a grievance and it could take some time before the parties need to return to the Board, if they need to return to the Board at all. In addition, should the parties return to the Board, the unfair labour practice application and the reply would likely require amendments in any event.*

[134] We are therefore left with the Union's claims that the Employer violated s. 11(1)(c) of the *Act* by failing to negotiate the return to work agreement in good faith and failing to implement that return to work agreement, including the provision that requires that the hotel open within ten days of ratification of the agreement.

[135] We find that any disputes concerning the negotiation of the return to work agreement are a matter within the Board's jurisdiction to decide. An ancillary agreement such as this, while often essential to the conclusion of a collective agreement, particularly where there has been a strike or lock-out, does not typically form part of the collective agreement. There is no indication that this return to work agreement has been incorporated by reference into the collective agreement. As such, we will exercise our discretion to decide these remaining issues and not defer them to grievance-arbitration.

[136] The Union alleged that the Employer failed to bargain in good faith as required by s. 11(1)(c) by reason that it entered into an agreement to open the hotel in days when it obviously did not believe that it could. While we think it irresponsible for the Employer to have agreed to open the hotel in ten days not knowing if it could meet that timeline, for the Employer to have so agreed was not a violation of s. 11(1)(c) of the *Act*. Arguably, the parties should have explored the issue of the number of employees able to return to work, as well as potential safety and maintenance issues, before reaching such an agreement. However, it is understandable that they did not do so in the circumstances of this case - reaching terms of agreement for two successive collective agreements appeared to have been no small feat. What is of importance to our determination is that at the time of entering into the return to work agreement, the

Employer thought this term/condition could be met. Based on the evidence led at the hearing, we find, on a balance of probabilities, that the Employer did believe this term could be met. It appears that neither the Employer, nor the Union, foresaw difficulties getting the employees to return to work to clean the hotel. Similarly, the discovery of the mold was obviously not a matter contemplated by the parties at the time the return to work agreement was entered into.

[137] Similarly, we do not find that the Employer violated s. 11(1)(c) by failing to open the hotel within the ten day period provided in the return to work agreement so as to entitle payment of monetary loss to all employees in the bargaining unit as a result of the hotel not opening on time. We are not satisfied, on the basis of the evidence led at the hearing, that the pre-conditions to opening the hotel were met such that the hotel should have been open in that ten day period. Specifically, we find that the Union has not established that the pre-conditions of "[e]nough employees returning to open the hotel in the ten day period" and "[e]mployees return to work as required for staffing purposes" have been met.

[138] Although we have found Mr. Nurmohamed's evidence lacking in credibility on a number of occasions in relation to the three applications that are the subject of these Reasons, the Union led no sufficiently specific evidence to contradict the Mr. Nurmohamed's evidence that he called all of the employees to attempt to have them return to work and clean the hotel, or to operate it for the period it was open (September 1 to 15, 2006), until it was closed down due to the discovery of the mold. The Union did not identify any employees, or even numbers of employees, who had not been contacted to work, nor did it identify any employees, or even numbers of employees, who would have worked had they been called by the Employer. In fact, Mr. Hollyoak acknowledged that it was a distinct possibility that employees did not return because they did not want to perform cleaning work or they had found other jobs.

[139] In addition, we find that it is highly questionable whether the pre-condition to opening the hotel in the ten day period that "[m]aintenance and safety issues to be approved by management," had been met, given the problems presented by the discovery of the mold in the hotel and the subsequent closing of the hotel. While it is difficult to determine exactly what the parties' meant by the words they used in that pre-

condition, the discovery of the mold clearly presented a problem with the maintenance of the hotel as well as presenting a safety issue for both customers and employees.

[140] In all of the circumstances, we simply cannot conclude on the evidence presented that the Employer has violated s. 11(1)(c) for its failure to open the hotel within the ten day period. Although the Union requested that the Board bifurcate the hearing to allow it to lead evidence and argument on the issue of remedies, we find that the Union has failed to establish the breach of s. 11(1)(c) which could possibly have entitled it to another hearing on the issue of remedies.

[141] The Board therefore orders:

1) THAT the Employer has violated s. 11(1)(c) of the *Act* by failing to execute the collective agreement for the period July 1, 2003 to June 30, 2006 and the collective agreement for the period July 1, 2006 to June 30, 2008;

2) THAT the Employer has violated s. 11(1)(c) of the *Act* by failing to execute the return to work agreement dated July 10, 2006;

3) THAT the Board defer the following issues to the grievance arbitration procedure under the terms of the parties' collective agreement, without the ability of the Employer to raise the issue of timeliness in defence to such grievances:

   i) any dispute over the retroactive pay owed to employees under the collective agreement;
   ii) any dispute over whether the employees were scheduled to work in compliance with the collective agreement; and
   iii) any dispute over whether employees who worked were paid proper wage rates

4) THAT the applicant may re-file an application in so far as it relates to those matters deferred in (3) above, if the grievance and arbitration procedure does not completely resolve those matters.

DATED at Regina, Saskatchewan, this **20th** day of **November, 2008**

LABOUR RELATIONS BOARD

Angela Zborosky,
Vice-Chairperson