The Labour Relations Board
Saskatchewan

CANADIAN UNION OF PUBLIC EMPLOYEES, Applicant v. SASKATCHEWAN ASSOCIATION OF HEALTH ORGANIZATIONS, REGINA QU'APPELLE REGIONAL HEALTH AUTHORITY, SUN COUNTRY REGIONAL HEALTH AUTHORITY, PRAIRIE NORTH REGIONAL HEALTH AUTHORITY, SUNRISE REGIONAL HEALTH AUTHORITY and PRINCE ALBERT PARKLAND REGIONAL HEALTH AUTHORITY, Respondents

LRB File No. 029-09; August 25, 2009
Chairperson, Kenneth G. Love, Q.C.; Members: Donna Ottenson and Marshall Hamilton

For the Applicant: Jodi Manastyrski
For the Respondent: Michael J. Phillips

Duty to Bargain in Good Faith - Employer files proposal well into bargaining process that contains proposed amendments to articles of collective agreement not dealt with in initial proposals - Union alleges bad faith bargaining, receding horizon bargaining by Employer.

Clause 11(1)(c) of *Trade Union Act*

REASONS FOR DECISION

Background:

[1] The Canadian Union of Public Employees, (the "Union") brought an application against the Employer, Saskatchewan Association of Health Organizations ("SAHO") and some of the health authorities for whom it bargains, alleging that SAHO committed an unfair labour practice within the meaning of clause 11(1)(c) of *The Trade Union Act*, R.S.S. 1978, c.T-17 (the "*Act*"). The application specifically alleges that SAHO's bargaining representatives "have refused to bargain collectively in good faith by tabling new proposals" concerning Articles 27.21 and 27.22 of the collective agreement on March 26, 2009.

[2] The Union is the certified bargaining representative for a number of employees within the various health care authorities named as respondents in the application. SAHO bargains collectively on behalf of all of the other named Respondents.

[3] The Board has determined, for the reasons that follow, that the complaint is not well founded.

Facts:

[4] The collective agreement between the parties expired on March 31, 2008. Following delivery of a Notice to Bargain from the Union, the parties exchanged initial bargaining proposals on September 9, 2008.

[5] It was acknowledged by both parties, through their witnesses, that Article 27, which deals with conditions of employment and benefits, including some monetary benefits was a "big ticket item." For this reason, the parties agreed that discussions concerning Article 27 would be set aside and dealt with at separate bargaining sessions.

[6] SAHO's initial proposal contained no reference to any changes to Articles 27.21 or 27.22 of the collective agreement. The Union's initial proposal contained proposals with respect to both Articles.

[7] From the date that the initial proposals were exchanged to the date that the unfair labour practice application was filed (March 26, 2009), the parties met for the purpose of bargaining collectively over a total of twenty seven (27) days.

[8] In addition to the initial proposals exchanged on September 9. 2008 SAHO made revised proposals on October 1, 2008. Again, these proposals made no reference to Articles 27.21 and 27.22 of the collective agreement.

[9] The Union also revised its proposals on October 3, 2008. That proposal contained a proposal in regards to Article 27.21, but withdrew the Union's previous proposal with respect to Article 27.22.

[10] On October 30, 2008, the parties agreed to begin discussions concerning Article 27. On that date, SAHO tabled a set of proposals dealing exclusively with Article 27. The proposal contained references to Articles 27.21 and 27.22, but the language proposed was unchanged from the current contract language.

[11] There was a disagreement in the testimony of the witnesses concerning the October 30, 2008 proposal. Michael Keith, National Representative of CUPE testified on behalf of the Applicant. Mr. Keith stated that the proposed package of amendments was presented at

the bargaining table as an “all or nothing” package. Allan Parenteau, Senior Consultant, Labour Relations and the lead negotiator for SAHO, who was not present at the bargaining table on October 30, 2008, testified that the SAHO negotiators discussions prior to the tabling of the proposal package was that it was not to be presented as an “all or nothing” package. However, they also did not want the package to be “cherry picked”, that is that certain of the provisions would get accepted without agreement on the whole Article. Mr. Parenteau’s testimony was supported by the testimony of Garth Robson, one of the other SAHO negotiators who was present at the bargaining table on October 30, 2008.

[12] There was no agreement regarding any of the provisions of Article 27 on October 30, 2009. Mr. Keith testified that the Union believed the October 30, 2009 proposals were withdrawn by SAHO.

[13] The parties continued to bargain with respect to other aspects of the collective agreement. The Union put forward a revised set of proposals on January 19, 2009. That proposal contained a reference to Article 27.21 which was as proposed in its initial proposal. Again, the proposal in respect of Article 27.22 was noted as having been withdrawn on October 3, 2008.

[14] The Employer put forward a new set of proposals with regard to Articles 1 through 26 of the collective agreement on January 21, 2009. No reference was made to Article 27 because the parties were still trying to bargain other issues outside of Article 27.

[15] The parties got back to discussions concerning Article 27 in March of 2009. At the opening of bargaining regarding Article 27, the Union and SAHO were not on the same page concerning SAHO’s October 30, 2008 proposal concerning Article 27. The Union felt the proposal had been withdrawn, but SAHO was prepared to bargain based on that proposal. This caused some concern at the bargaining table, and SAHO apologized to the Union concerning the misunderstanding and tabled a revised proposal concerning Article 27 on March 26, 2009.

[16] That April 26, 2009 proposal contained a proposed revision to both Article 27.21 and Article 27.22. It is this proposal which the Union alleges constitutes bad faith bargaining. When the proposal was tabled, the Union demanded, at the bargaining table, that it be

withdrawn. SAHO refused. As a result, the Union refused to continue bargaining that day and filed this application.

[17] Since March 26, 2009 the parties have continued to bargain, but as at the date of this hearing, there had been no resolution of Article 27.21 or 27.22.

Relevant Statutory Provision:

[18] Relevant statutory provisions of the *Act* provide as follows:

> *11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*
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> *…..*
>
> > *(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:*

Union's arguments:

[19] The Union's position was that the revised proposal tabled by SAHO on March 26, 2009 represented a major change in the Employer's position, insofar as prior to the tabling of this proposal the Employer's proposals made no mention of any proposed changes to Articles 27.21 and 27.22. The Union claimed to have been surprised by what they argued was a new proposal, which, in their estimation represented major changes to the Articles. The Union argued that the proposal amounted to receding horizons bargaining. The Union further argued that the proposals should have been made at the outset of bargaining and that the Employer was acting in bad faith by introducing a proposal with respect to these articles well into the negotiation process and without prior disclosure of that position.

SAHO's arguments:

[20] SAHO argued that the proposal was merely a counterproposal to the proposals contained within the Union's proposal documents. They argued that the union proposal failed to add any clarity to the Articles in question and that they sought to clarify the language. The clarification, they argued, was necessary because they had had grievances filed with respect to the language in these articles. Therefore, when putting together their proposals regarding Article

27, they argue that this was an opportunity to clarify the language in those articles and to counter the proposal put forward by the union.

Analysis & Decision:

[21] The Board will not normally become engaged in the collective bargaining process between the parties.[1] The purpose for clause 11(1)(c) is to ensure that parties to the collective bargaining process engage fully in such process, in good faith, in an attempt to reach a collective agreement.

[22] The Board has held [2] that there "are no rules for the bargaining process." While the parties to the process may have some expectations based on their past bargaining experiences "that issues will be discussed in a particular sequence, or that there will be particular proportionality between proposal and counterproposal or the other can always expect to achieve improvements in its favour, the Board will not impose sanctions if there are deviations from the anticipated course of bargaining or proposals."

[23] The Board has also held that notwithstanding its reluctance to become involved in the reasonableness or otherwise of the bargaining positions taken by either party, the Board may find that a specific proposal does constitute bad faith bargaining if:

> *1. the proposal contains some illegality; or*
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> *2. the proposal in itself or in conjunction with other conduct indicates a subjective unwillingness to conclude a collective bargaining agreement; or*
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> *3. the proposal is or should be know to go against bargaining standards in the industry and to be generally unacceptable to either include or refuse to include in a collective agreement, i.e. it has the effect of blocking the negotiations of a collective agreement.*[3]

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[1] See *International Brotherhood of Electrical Workers, Local 2067 v. SaskPower and Government of Saskatchewan* [1993] 1st Quarter Sask. Labour Rep. 268, LRB File No. 256-92 at 292-293

[2] *Retail, Wholesale and Department Store Union v. Westfair Foods Ltd.,* [1993] 1st Quarter Sask. Labour Rep. 57, LRB File No. 007-93

[3] *Saskatchewan Government Employees' Union v. Government of Saskatchewan, Saskatchewan Association of Health Organizations, Mamawetan Churchill River District Health Board, Keewatin Yathé District Health Board and North East District Health Board*, [1999] Sask. L.R.B.R. 307, LRB File No. 109-98

[24] Canadian Labour Relations Boards have also found that in certain circumstances, a sudden change of position may constitute a violation of the duty to bargain in good faith.[4] However, Adams says that, "[I]n general, there is no presumption that reneging on an offer or tabling new demands is bad faith. Each situation depends on the particular state of relations between the parties at the time the change in position occurs."[5]

[25] In *CUPE v. Indian Head School Division #19* [6], the Board says at p. 2 of that decision:

> *If a party introduces new proposals after having indicated that it has none, that might be evidence of bargaining in bad faith. However, even then, a finding of bad faith would not be automatic as the Board must have regard to all the circumstances. Secondly, in this case, it is just as likely that the employer made its position perfectly clear at the first meeting and the union somehow misunderstood. The employer cannot be responsible in those circumstances. Thirdly, the union does not even suggest that the employer's proposals were a tactic designed to impede collective bargaining. Finally, the Board does not think it would be in the interests of unions or employers to draw the procedural rules of bargaining as tightly and rigidly as the union suggests. The parties must be left some margin because the Board does not wish to turn bargaining into a procedural exercise that diverts the parties from their real task. Furthermore the Board does not think it would be advisable to lay down a rule that prevents a party from tendering its proposal during such an early stage of bargaining simply because the other side was under the impression that they would not be tendering proposals. One can easily imagine the reverse of the present situation where an employer tendered its proposals first and the union found itself prevented from raising any proposals because the employer testified that the union had not made it crystal clear at the first meeting that it would be coming forth with proposals.*

[26] The factual situation here does not support the Union's allegations. While SAHO's initial proposals had no reference to any proposed changes to Articles 27.21 and 27.22, the Union's initial proposals did put these provisions in play. Secondly, the parties agreed that they would not consider Article 27 in any detail. The first consideration of Article 27 was at the bargaining session on October 30, 2008. Notwithstanding the conflicting evidence as to what occurred on that date, the misunderstandings were resolved and a fresh proposal, which is the subject of this application, was put forward by SAHO on March 26, 2009. This was only the second time that Article 27 was being dealt with by the parties in their negotiations. It would not,

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[4] See Adams, George, *Canadian Labour Law* 2nd ed., Canada Law Book, at 10.15400 and cases referenced therein.
[5] Adams, supra

I think, be surprising that some change might occur, since the parties were only now turning their minds to the impact of this "big ticket" item. Other than wage proposals, this was probably the most significant article in the collective agreement to be negotiated.

[27] There was nothing in the proposal which was illegal. There was nothing in the proposal which "indicated a subjective unwillingness to conclude a collective bargaining agreement." Nor was there anything in the proposal which went "against bargaining standards in the industry and to be generally unacceptable to either include or refuse to include in a collective agreement." Nor, did the union argue such.

[28] As noted in the *CUPE v. Indian Head School Division case,*[7] the Board must, in cases such as this, have regard to all of the circumstances surrounding this issue. Here, we have a mature bargaining relationship, with very experienced people conducting the bargaining. Article 27 had not been dealt with in great detail, and both parties acknowledged its importance in bargaining. This was only the second time it had been dealt with. The proposal put forward by SAHO was not designed to frustrate collective bargaining, which is the key component in the cases cited by the Union in its argument.

[29] Nor does the Board take the view that SAHO was engaged in receding horizon bargaining, bargaining in which new issues or proposals are unjustifiably introduced late in the bargaining[8]. While the progress of the bargaining was slow, the SAHO proposal did not interrupt the discussions, save for the day on which the proposal was tabled. The parties continued to meet to bargain other issues after March 26, 2009. As of the date of the hearing, a contract agreement had not been reached and monetary proposals had not been exchanged.

[30] At para. 57 of *Public Service Alliance of Canada v. Senate of Canada*[9] the Canada Public Service Labour Relations Board had the following comments concerning receding horizon bargaining:

> *Although the revised proposal was substantively different from the initial proposal, the change of position, in the context, was not of such a magnitude to allow me to conclude that receding-horizon bargaining took place. The revised proposal did not involve adding or removing a new subject matter to or from the*

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[6] [1990] Winter Sask. Labour Rep. 68, LRB File No. 089-90
[7] Supra
[8] *Southam Inc.,* [2000] Alta. L.R.B.R. 177, Board File: GE-03216;
[9] [2008] C.P.L.R.B. No. 100, PSLRB File No. 448-SC-10

table. The revised proposal, although more restrictive than the initial was tabled in a continuum

[31] Throughout the cases which the Board has reviewed, including those which have been cited by the parties or referred to herein, the determination of bad faith bargaining is determined by the context in which the proposal is made, and the underlying objective for which the proposal was introduced.

[32] While the Union was surprised that SAHO brought forward its proposal when discussions regarding Article 27 commenced on March 26, 2009, the Board cannot find, in the context of the parties collective bargaining that the proposal was motivated by bad faith on the part of SAHO or that it was in any way an attempt to derail or lengthen the negotiation process. As explained by SAHO, the proposal was an attempt to introduce a counter-proposal to proposals made by the Union in its initial proposals, which proposals had been modified over the course of negotiations.

[33] This proposal, along with numerous other unresolved proposals are, we think, best dealt with by the parties in the course of their negotiations. The Board does not intend to become embroiled in the process of negotiations between the parties. The parties are represented by sophisticated and knowledgeable negotiators who are much better able than the board to resolve issues as they arise at the bargaining table.

[34] The application is hereby dismissed.

DATED at Regina, Saskatchewan, this 25th day of August, 2009.

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson