The Labour Relations Board
Saskatchewan

BARRICH FARMS (1994) LTD. and TRUE NORTH SEED POTATO CO. LTD., Applicants v. UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Respondent

AND

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant v. BARRICH FARMS (1994) LTD. and TRUE NORTH SEED POTATO CO. LTD., Respondents

LRB File No. 051-09 & 072-09; November 19, 2009
Vice-Chairperson, Steven Schiefner; Members: Marshall Hamilton and Hugh Wagner

For Barrich Farms Ltd: Ms. Meghan McCreary
For UFCW, Local 1400: Ms. Heather Jensen

Unfair Labour Practice – Duty to Bargain in Good Faith – During collective bargaining, Union declines to present is monetary proposals seeking to discuss non-monetary issues first – Union not satisfied it has sufficient information to present monetary proposals when requested by Employer – Employer alleges Union's conduct intended to frustrate collective bargaining - Board not satisfied Union's failure to present its monetary proposals was intended to frustrate collective bargaining.

Unfair Labour Practice – Duty to Bargain in Good Faith – During collective bargaining, Union sought information from Employer as to its system of classification of employees, its wage schedule and its system of wage progressions – Union alleged Employer failed to provide adequate or appropriate information – Board not satisfied that Employer failed to provide relevant information to Union.

The Trade Union Act, ss. 2(b), 11(1)(c), 11(2)(c)

REASONS FOR DECISION

Background:

[1] **Steven D. Schiefner, Vice-Chairperson**: By Order of the Saskatchewan Labour Relations Board (the "Board") dated October 24, 2008[1], the United Food and Commercial Workers, Local 1400 (the "Union") was certified to represent the employees of Barrich Farms (1994) Ltd. and True North Potato Co. Ltd. (collectively the "Employer") at or in connection with its potato farming and related operations located near Outlook, Saskatchewan, subject to named

[1] LRB File No. 043-07.

exclusions. Subsequent to certification, the parties entered into negotiations for a first collective agreement.

[2] On May 26, 2009, the Employer filed an application with the Board[2] seeking a declaration that the Union had engaged in an unfair labour practice pursuant to s. 11(2)(c) of *The Trade Union Act*, R.S.S. 1978, c.T-17 (the "*Act*") by failing to bargain in good faith. Specifically, the Employer alleged that the Union refused to produce its wage proposal when requested by the Employer, thereby frustrating bargaining between the parties and preventing the Employer from examining and evaluate all of the Union's collective bargaining proposals in a rational and comprehensive way. On June 5, 2009, the Union filed a Reply with the Board denying the Employer's allegations.

[3] On June 25, 2009, the Union filed an application with the Board[3] seeking a declaration that the Employer had engaged in one (1) or more unfair labour practices pursuant to s. 11(1)(c) of the *Act* by failing to bargain in good faith. Specifically, the Union alleged that the Employer refused to include a maintenance of membership clause in a proposed collective agreement between the parties; that the Employer failed to provide necessary and relevant information to the Union when requested; and that the Employer unilaterally changed rates of pay or other conditions of employment without bargaining. On July 9, 2009, the Employer filed a Reply with the Board denying each of the Union's allegations.

[4] The two (2) applications were heard jointly on September 23, 2009, in Regina, Saskatchewan, with the parties agreeing that evidence respecting the two (2) applications would be heard concurrently, and argument applied to both applications.

[5] The Employer called Mr. Mohamed Doma, their lead negotiator, and the Union called Mr. Darren Kurmey, their lead negotiator.

Facts:

[6] Much of the evidence relevant to these proceedings was not in dispute.

---

2 LRB File No. 051-09.
3 LRB File No. 072-09.

[7] As indicated, the Union was certified to represent the employees of the Employer on October 24, 2008. Concerned about the process that had been utilized by the Board in granting the certification Order, the Employer commenced proceedings in the Court of Queen's Bench seeking judicial review of the Board's decision. Notwithstanding the commencement of these proceedings, the parties began collective bargaining with a view toward achieving a first collective agreement.

[8] Originally, the Employer intended that Mr. Harry Meyers, a principal of the Employer, would represent it in collective bargaining, with bargaining scheduled to take place in early February, 2009. However, in late January, 2009, the Employer decided that it required professional assistance and retained Mr. Doma, who became the Employer's lead negotiator.

[9] Mr. Doma testified that he was a representative of Canadian Professional Management Services, a management consulting firm based out of Vancouver, British Columbia. Mr. Doma testified that he met Mr. Meyers at a labour relations seminar. After Mr. Meyers' attendance at this seminar and after meeting and discussing the Employer's situation with Mr. Doma, the Employer decided that Mr. Doma's services could be of assistance. The Employer retained Mr. Doma in January of 2009 and advised the Union on or about January 30, 2009 that Mr. Doma would be representing the Employer in collective bargaining. Unfortunately, Mr. Doma was not available for the dates that had already been set and new dates were established.

[10] The parties met for collective bargaining for the first time on March 24, 2009. Prior to this meeting, at the Union's request, the Employer provided basic information with respect to the names of its employees, their home address, phone numbers, hourly wage and date of hire. In addition, both parties prepared proposals to be exchanged on this date.

[11] Mr. Doma testified that, as the Employer was one of only a few agricultural (farming) operations that had been certified, very few precedents for a potential collective agreement were available to assist the Employer in preparing for collective bargaining. Mr. Doma was aware that a collective agreement had been signed at Mayfair Farms (Portage) Ltd. in Manitoba with a local of the United Food and Commercial Workers Union; he sought out and obtained a copy of this document. The Employer studied the Mayfair agreement and used it to prepare a draft collective agreement containing all of its proposals and presented this document to the Union during their March 24, 2000 meeting. Mr. Doma testified that, because of the lack

of relevant and useful precedents, considerable effort was required for the Employer to prepare its bargaining proposals, but that it wanted to present a comprehensive set of proposals to the Union.

[12] Mr. Doma testified that the Employer's bargaining team consisted of himself, Mr. Barry Akins (a principal of the Employer) and Ms. Heather Larson (the Employer's Office Administrator).

[13] Mr. Kurmey testified that he was the Secretary/Treasurer of the Union and that he, Mr. Norm Neault (President of the Union), and Ms. Brandi Tracksell Sampson (a Service Representative) had represented the Union during collective bargaining with the Employer.

[14] Although Mr. Kurmey was not present during the March 24, 2009 meeting with the Employer, he was aware that the Union had presented a basic first collective agreement to the Employer at this meeting and that the Union had received the Employer's draft collective agreement. Both parties left this meeting agreeing to review the other's proposals in preparation for their next bargaining session.

[15] Mr. Kurmey testified that he took over responsibilities for collective bargaining in April of 2009, at which time the Union was struggling to understand the information they had received from the Employer, including the classifications of, and work performed by employees in the bargaining unit; the Employer's system of wages and progressions (including the differences in wages paid to different employees); the changes in wages that had occurred since certification; and the benefits, if any, provided to employees. Simply put, the Union was trying to understand the Employer's system of classification of employees and/or its wage schedule for members of the bargaining unit. The Union made various requests of the Employer for more information. The Employer responded to each request and provided essentially the same information each time, modifying or adding to it as requested by the Union.

[16] The problem from the Employer's perspective was that it did not have job descriptions or a system of classification of employees or even wage schedules or any formal system of progression for its employees. Mr. Doma testified that the Employer's practice was to start new employees at whatever salary the Employer deemed appropriate based on that person's experience and the work to be performed, and/or equipment to be operated. Mr. Doma

testified that the Employer adjusted wages at its discretion without reference to a wage scale or system of progressions for employee. Simply put, Mr. Doma testified that the Employer did not have the information that the Union was seeking but had responded to every request for information that had been made by the Union to the best of its ability.

[17] Collective bargaining resumed between the parties on April 14, 2009. Mr. Doma testified that the Employer had reviewed the basic collective agreement which had been provided by the Union and saw two (2) problems; first, the Union's draft agreement appeared to be intended for an industrial, as opposed to agricultural, context; and second, the Union had not included its monetary proposals in the package it had provided the Employer. Mr. Kurmey testified that a significant portion of this day was taken up with a discussion of the "uniqueness" of collective bargaining in the agricultural sector. Mr. Doma testified that the Employer clearly indicated that it wanted to see the Union's monetary proposals so that they could understand the whole package being proposed by the Union.

[18] On April 15, 2009, the parties reviewed a document that had been prepared by the Union which attempted to merge the Union's basic first collective agreement and the Employer's proposed collective agreement (based on the Mayfair agreement). The Union's goal in preparing this document was to allow the parties to compare their respective proposals and to provide a vehicle for the parties to review and potentially agree on individual proposals or clauses. On April 15, 2009, the parties went through the Union's merged document, with both the Union and the Employer indicating their respective positions on the various proposals set forth therein.

[19] Mr. Doma testified that the Employer was frustrated by the Union's unwillingness to present and discuss its monetary proposals and its desire to obtain approval from the Employer on various bargaining proposals without presenting its full package; the Employer expressed the concern that, because of the small margins in the agricultural sector and the seasonal nature of its planting operation, it needed to understand all of the Union's proposals, and in detail, before it could agree to anything. Mr. Kurmey testified that the Union was frustrated by the Employer's unwillingness to agree to any proposals or collective bargaining language, even the most basic provisions (such as Union security clauses, etc.) without first seeing the Union's monetary proposals.

[20] The parties agreed to resume collective bargaining on May 25, 2009. In addition, the Union sought additional information from the Employer regarding the hourly wages, date of hire and classification of employees in the bargaining unit. In reviewing the salary information which had been provided by the Employer, the Union noted that the wages of one (1) or more employees appeared to have changed. For example, in the Employer's December 8, 2008 report, Mr. Ken Drevik's wage was reported as "$9.50" per hour; however, in the Employer's April 2, 2009 report, his wage had increased to "$10.25".

[21] Mr. Kurmey testified that the Union went into the May 25, 2009 meeting seeking more information about the duties performed by employees in the Unit in an effort to understand the wages paid by the Employer. Mr. Kurmey indicated that the Union did not yet feel comfortable providing a wage proposal at this point in time but wanted to continue discussing non-monetary proposals and language issues in the collective agreement. Contrary to the Employer's stated desire (*i.e.* to see all of the Union's proposals at same time), the Union felt that it was important to obtain agreement on as many of the non-monetary issues as possible before discussion monetary issues. Mr. Kurmey testified that the Union did not want to be drawn into negotiations that only dealt with wage proposals without agreement on a number of equally important but non-monetary issues. Finally, Mr. Kurmey testified that the Union was not aware that, if it did not provide its monetary proposals to the Employer on May 25, 2009, the Employer intended to make application to the Board.

[22] Mr. Doma testified that the Employer went into the May 25, 2009 meeting expecting to see the Union's monetary proposals and was both disappointed and frustrated by the Union's expectation to continue collective bargaining without presenting their wage proposals. The Employer wanted the Union to do as it had done; to put all it proposals on the table so that the Employer could evaluate and cost them all. Mr. Doma testified that, during their discussions on that date, the Union advised the Employer that there was "*first collective agreement*" legislation in Saskatchewan and that, if the parties could not come to an agreement, the Union could make application to the Board under that legislation. Mr. Doma testified that the Employer saw this statement as a not-insignificant threat by the Union, which the Employer interpreted to mean that, if the Union did not get what it wanted at the bargaining table, it could get it through the Board.

[23] With the Union unwilling to provide its monetary proposals at that time, the Employer concluded that there was no point in further collective bargaining if the Union was not prepared to provide a complete package of proposals. The May 25, 2009 meeting ended and on May 26, 2009 the Employer filed its application, LRB File No. 051-09 with the Board alleging the Union had committed an unfair labour practice. Specifically, the Employer alleged that, in refusing present its wage proposals when requested by the Employer, the Union frustrated collective bargaining by preventing the Employer from seeing and evaluating all of the Union's proposals in a rational and comprehensive way.

[24] On June 25, 2009, the Union filed its application, LRB File No. 072-09 with the Board alleging the Employer had committed an unfair labour practice; by providing incomplete and/or inconsistent information to the Union with respect to its classification system and wage and progression schedules; by unilaterally changing rates of pay or other conditions of employment without bargaining with respect of those changes; and by refusing to agree to the Union's maintenance of membership clause.

Relevant statutory provision:

[25] The relevant provisions of *The Trade Union Act* are 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;*
>
> . . .
>
> *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;*
>
> *11(2) It shall be an unfair labour practice for any employee, trade union or any other person:*

> *(c) to fail or refuse to bargain collectively with the employer in respect of employees in an appropriate unit where a majority of the employees have selected or designated the trade union as their representative for the purpose of bargaining collectively;*

Argument of the Parties:

[26] The Employer took the position that, in first collective bargaining, **both** the Union and the Employer are under a statutory obligation to make every reasonable effort to conclude a collective agreement, to engage in rational and informed discussions, and to be ready and willing to explain and explore their proposals. Although the parties only bargained for four (4) days, the Employer argued that the Union's conduct, in refusing to provide its monetary proposals when requested by the Employer, prevented the Employer from engaging in meaningful bargaining with the Union, thereby frustrating collective bargaining between the parties. Simply put, the Employer took the position that the Union's monetary position was an essential component for collective bargaining between the parties. The Employer asked the Board to direct the Union to provide its monetary proposal. In taking this position, the Employer relied upon a number of cases, including *Canadian Union of Public Employees v. Cheshire Homes of Regina Society*, [1988] Fall Sask. Labour Rep. 91, LRB File No. 051-88; *Saskatchewan Joint Board, Retail, Wholesale and Department Union v. Westfair Foods Ltd., [1993] 3rd Quarter Sask. Labour Rep. 162, LRB File No. 157-93; and United Group – Taxi Division (Re)*, LRB File Nos. 052-07, 053-07 and 117-07.

[27] In response to the Union's allegations, the Employer argued that it had provided all the information that had been requested by the Union and that there was no evidence to suggest that it has failed or refuse to provide any information to the Union. The Employer took the position that, if the Union believes that it needs a system of classification and/or a wage schedule and/or a system of wage progressions to prepare its monetary proposal, it will have to make this information up on its own because the Employer did have this type of information. The Employer argued that it was not an unfair labour practice for it to not have a system of classification and/or a wage schedule and/or a system of wage progressions and that it could not be expected to create such systems and schedules to assist the Union in preparing its package of proposals. Simply put, the Employer's position was that it did not have the information that the Union was seeking and that, if the Union need such systems and schedules, it should create them. Finally, the Employer argued that it never refused to adopt the requirements of s. 36 of the *Act* in bargaining with the Union.

[28] In support of its position, the Employer filed a written argument and a book of authorities, which we have reviewed and for which we are thankful.

[29] The Union argued that it was willing to continue collective bargaining with the Employer and that it had a valid reason for the strategy that it took at the bargaining table. Furthermore, the Union argued that, even if it wanted to, it wasn't able to present a monetary proposal to the Employer on May 25, 2009 because it was still attempting to understand the Employer's system of classification of employees and/or its wage schedule for members of the bargaining unit. The Union argued that the Employer's information regarding wages and benefits was confusing, inconsistent and difficult to understand. Finally, the Union argued that, while its bargaining team was aware that the Employer was anxious to see all its proposals including monetary proposals, the Union was not aware that the Employer intended to make application to the Board if the Union failed to do so on May 25, 2009.

[30] With respect to its application against the Employer, the Union indicated that it would not be pressing its argument with respect to "unilateral change in working conditions." Simply put, the Union's position was that the Employer was trying to control the course of events at the bargaining table. The Union argued that the Employer's failure to continue bargaining was evidence of its bad faith and, that unilaterally insisting upon the terms of collective bargaining neither advanced the process nor satisfied its obligations to bargain in good faith. The Union argued that the Board must be sensitive to the vulnerable status of the Union at this stage (i.e. prior to obtaining its first collective agreement). The Union believed that it needed more information from the Employer to enable it to prepare and present its monetary proposal. Further, the Union sought an Order of the Board to direct the parties back to the bargaining table.

[31] In support of its position, the Union filed a book of authorities, which we have reviewed.

Analysis:

[32] We are of the opinion that both the Employer's application and the Union's application ought to be dismissed. In both cases, we were not satisfied that there was sufficient evidence to establish a violation against the *Act*.

[33] This Board has previously articulated the somewhat enigmatic duty upon parties to bargain in good faith and to make every reasonable effort to reach a collective agreement. In its simplest form, the duty requires the parties to meet and engage in rational and reasonable discussions respecting the issues in dispute between the parties.

[34] Although the Board has held that there are no particular set of rules for the process that must be followed by the parties, the Board expects the parties to have at least one (1) common objective; that being to achieve a collective agreement. Both the substance of that agreement and the process utilized by the parties to conduct their negotiations are in the hands of the parties and will vary with the uniqueness of the particular circumstances. This Board has repeatedly stated its restraint in intervening in negotiations between parties. The legislative mandate to bargain in good faith is predicated on the assumption that the parties are best able to define the terms of their relationship and the rules that will govern the workplace.

[35] The Board recognizes that the essence of bargaining is that each party is attempting to achieve an agreement on terms that it considers advantageous and will adopt strategies at the bargaining table intended to advance its objectives. Although the parties may have expectations that issues will be discussed in a particular order, the parties have the right to combine their proposals and put them forward to the other party in the formula which they believe will lead to a desirable agreement.

[36] Furthermore, and as has commonly been observed, collective bargaining is not a process carried out in accordance with the “Marquess of Queensbury” rules. The comments of the Board in *Westfair Foods, supra,* at page 173 and 174 are instructive:

> *In the more recent decision in Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers v. Canada Trustco Mortgage Company [1984] O.L.R.B. Rep. Oct. 1356, at 1364, the Ontario Board returned to this theme:*
>
> > *One cannot quarrel with the proposition that the "duty to bargain in good faith" must encompass an obligation to engage in informed and rational discussion, and in exceptional circumstances an employer's position at the bargaining table may be so patently unreasonable or devoid of apparent business justification as to evidence a desire to avoid any collective agreement altogether. So may an unexplained retreat from a previous agreed position, or the untimely insertion of new issues into the bargaining process. However, the Board must be careful that in adjudicating disputes and giving a reasoned elaboration for its decisions, it does not impose its own model of decision making as the normative standard for the collective*

> *bargaining process. Collective bargaining is not simply a matter of presenting proofs and reasoned arguments in an effort to achieve a favourable outcome, nor is that outcome necessarily arrived at, or explained, by a logical development from given and accepted premises. It is a process in which reason plays a part - but not the only part. There may be a range of potential outcomes or solutions and the ultimate result may have more to do with economic strength than abstract logic. In particular collective bargaining situations there simply may not be any commonly accepted principles or criteria and, in consequence, no objective basis for distinguishing a "claim of right" from a "naked demand". Reason and self-interest are inextricably intertwined. Ultimately the parties may reach agreement only because of a realistic appraisal of the value of their objectives in relation to their ability to obtain them, including the costs they are able to inflict on one another. It may have little to do with what some outsider might consider a "fair" settlement, or a just allocation of rewards to capital and labour.*

Numerous further illustrations might be given of labour relations boards attempting to come to terms with what seems to be a task riddled with anomalies. Labour relations boards are to try to discern procedural niceties, but not to attack the substantive content of the bargaining process. They are to examine proposals for what they might reveal about the motivation of the parties, but not to second guess the priorities or objectives evidenced by those proposals. They are to encourage rational discussion and to prevent the illicit use of power, but not to stand in the way of a free exercise by the parties of their bargaining strength. As the Ontario Board described it in their decision in Sumner Press v. Windsor Printing Pressman and Assistants' Union (1991), 13 C.L.R.B.R. (2d) 293, at 295:

> *Collective bargaining law involves an important balance: legal pressure to engage in negotiations and conclude agreements determining the terms of employment, but freedom from legal prescription as to what those terms will be.*

*In an earlier decision of this Board concerning the same parties, LRB Files No. 007-93 and 011-93, we made the point that the regime of collective bargaining described in these quotations is not the only model which might be conceived of. Indeed, as we pointed out there, there has been extensive questioning of the fairness and effectiveness of this version of bargaining. It is, however, the model whi*ch exists under *The Trade Union Act as it currently stands, and the characteristics we have referred to render the task of the Board in determining an application under Section 11(1)(c) a difficult and delicate one.*

. . .

There are, as we have intimated earlier, no rules for the bargaining process as such. Though the parties may have expectations, based on their past experience, that issues will be discussed in a particular sequence, or that there will be a particular proportionality between proposal and counterproposal, or that one party or the other can always expect to achieve improvements in its favour, there are no sanctions attached to deviations from the anticipated course. The parties may be required to adjust their expectations according to changed conditions or changes in their relative bargaining strength. They may apply any combination of rational persuasion, deployment of economic power, or other inducements which is sanctioned by the law. Each of the parties may combine and recombine their own proposals and those put forward by the other party in an attempt to find the formula which will lead to an agreement. This process may be messy, it may be

> *unscientific, it may be unpredictable, it may on occasion be brutal, but it is bargaining.*
>
> *The essence of bargaining is that each party is trying to achieve an agreement on terms which are advantageous, and may adopt whatever strategy it considers likely to bring about this result. If one party makes an error in assessing relative bargaining strength, choosing economic weapons, selecting appropriate timing or deciding which combination of proposals might bring about movement in the direction it desires, this in itself is not suggestive that the other party has committed an unfair labour practice. If positions are changed, or proposals withdrawn, or uncompromising resistance adopted, there is not necessarily any infraction of The Trade Union Act. It is only if these clues suggest to the Board an attempt by an employer to avoid reaching an agreement or an actual refusal to recognize the trade union as a bargaining agent that the Board may draw the conclusion that an employer is guilty of failing or refusing to bargain collectively.*

[37] In the Board's opinion, the parties left the bargaining table too soon. The Employer demonstrated a considerable degree of good faith in retaining professional assistance, conducting research into potential precedents of an appropriate collective agreement, and in providing a comprehensive set of collective bargaining proposals to the Union. The Employer saw the Union's repeated requests for more information and a lack of a monetary proposal as indicative that the Union was either unprepared for collective bargaining or strategically attempting to frustrate the Employer. With all due respect, the Board did not see it this way. Neither party is bound by the process desired by the other, except by their mutual interest in obtaining a collective agreement. The Employer is under no obligations to agree to any particular proposal or package of proposals advanced by the Union. Similarly, the Union is under no obligations to table its monetary proposals until it is satisfied that it has sufficient information to do so.

[38] The evidence establishes that the Union was struggling to understand the Employer's system of classification, its wage schedule, and its system of wage progressions. The Employer's position was that, if the Union needed such system and/or schedules for it to prepare its package of proposals, it should create them. It follows then that the Union would require time to do so, maybe even the Employer's assistance. Certainly, the Board was not satisfied that the Union's delay or failure to table its monetary proposals was for the purpose of frustrating collective bargaining.

[39] With respect to the Union's allegations, the Board is not satisfied that the Employer failed to provide relevant information to the Union. In some work places, such as the

agricultural sector, there may well be no job descriptions, no system of classification, no wage schedule and no system of wage progressions. The challenge for the parties, in this particular case, may simply be to bring order from disorder; to introduce standards common in other industries but not necessarily common in this particular work place, and to attempt to define the previously undefined working conditions for employees. Substantive bargaining may well be required over such issues such as how much order, how many standards and the degree of definition that is desirable and/or appropriate for this workplace.

[40] Similarly, the Board was not satisfied that the Employer was refusing to include the requirements of s. 36 in its collective agreement with the Union. Nor was there evidence that the Employer failed to comply with the requirements of s. 36 of the *Act*.

[41] For the foregoing reasons, the within applications are dismissed. The Board encourages the parties to return to the bargaining table. There appear to be many things the parties need to discuss.

DATED at Regina, Saskatchewan, this **19th** day of **November, 2009.**

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson