The Labour Relations Board
Saskatchewan

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA), Applicant v. THE UNITED GROUP — TAXI DIVISION, Respondent

LRB File Nos. 052-07, 053-07 & 117-07, April 20, 2009
Chairperson, Kenneth G. Love, Q.C.; Members: Joan White and Duane Siemens

For the Applicant: Gwen Gray, Q.C.
For the Respondent: Larry Seiferling, Q.C.

Taxi Industry Bargaining Group — Unfair Labour Practice — Sections 11(1)(a) and (c) — Duty to Bargain in Good Faith — Section 11(1)(m) — Employer Discussions with bargaining members — Installation of Interac Machines and Cameras in Taxis — Board discusses changes to The Trade Union Act respecting communication with employees — Lock out of Employees — Effect on Collective Agreement — Board finds violation of Duty to Bargain in Good Faith — Orders parties to resume bargaining.

REASONS FOR DECISION

Background:

[1] The National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), (the "Union") is certified as the bargaining agent for a unit of employees of The United Group — Taxi Division carrying on business as United and Blue Line Cabs (the "Employer"), by Order of the Board dated February 28, 2001.

[2] The bargaining unit consists of individuals who hold taxi licenses ("single car franchise owners") issued by the City of Saskatoon, individuals who lease single cars ("single car lease operators") from single car franchise owners or from persons who hold multiple taxi licenses issued ("multiple car franchise owners") by the City of Saskatoon, and individuals who drive taxis in the City of Saskatoon ("drivers") As of August 1. 2007. the Employer reported that there were twelve (12) single car franchise owners, 57 single car lease operators and 122 drivers in the bargaining unit.

[3] The unit as defined by the Board has inherent conflicts insofar as both single car franchise owners and single car lease operators utilize drivers to drive their vehicles when they are unable to do so themselves. As vehicles are meant to be deployed as much as possible. a

iver would routinely be utilized to allow the vehicle to remain in service for a longer period of time. There are eight (8) persons excluded from the bargaining unit because, although they drive themselves, they own or control two (2) or more cabs.

[4] The system of payment by the various owners, lease operators and drivers is relatively complex. The City of Saskatoon, in its function as the regulator of the taxi industry. prescribes the fares that may be charged by taxis. A driver of the taxi will collect the fare from the passenger. Drivers pay a shift rental to the license holder of that vehicle (who may be the actual taxi license holder or a person who has leased that license from a license holder). Rentals per shift, as at March 2007 amounted to $50.00 - $55.00 per shift. A driver's income is determined by the fare revenue he or she received during a shift, less the shift rental and any gas consumed during the shift.

[5] Single car lease operators' income is determined by the fares earned while they may have been driving, plus any shift rental received from a driver who drives the vehicle, less lease payments made to the owner of the taxi license, any gas. repair, upkeep and other business expenses, including fees charged by the Employer for office fees, computer fees and insurance premiums.

[6] Single car franchise owners' income is determined by the fares earned while they may have been driving, plus any shift rental received from a driver who drives the vehicle less any gas, repair, upkeep and other business expenses, including fees charged by the Employer for office fees, computer fees and insurance premiums

[7] Multiple car franchise owners' income is determined by the fares earned while they may have been driving, plus any shift rental received from drivers who drove the vehicles less any gas, repair, upkeep and other business expenses, including fees charged by the Employer for office fees, computer fees and insurance premiums.

[8] The Employer charges fees to single car franchise owners, multiple car franchise owners and single car lease operators. Office fees pay for basic taxi services such as radio and computer dispatch, processing of charge slips, credit card payments and other non cash fare transactions. Those fees amounted to $129.00 per week at the expiry of the collective

agreement. The Employer also charged fees for computer equipment in the amount of $42 00 per month and for insurance premiums in the amount of $9.00 per week.

[9] Unlike normal collective bargaining situations, the Union negotiates on behalf of its members with the Employer as to the amount of these fees that will be charged to its members. The fees represent income to the Employer, who is in receipt of the payments from Union members rather than the usual situation where the Employer pays wages to the members of the bargaining unit.

[10] Following issuance of the certification Order, the parties negotiated a first collective agreement that expired in April of 2007. The collective agreement was concluded on the evening before a hearing was to be held by the Board to impose a first collective agreement pursuant to Section 26.5 of *The Trade Union Act,* R.S.S. 1978, c.T-17 (the *"Act),*

[11] On March 7. 2007, the Union served notice to bargain on the Employer. Bargaining occurred on March 27 and 28, May 7, 8 and 9, June 18 and 19 and July 23 and 24, 2007. On August 20, 2007, the Employer served a lock-out notice to the Union and purported to lock-out its employees effective August 22, 2007.

[12] Following the lock-out, the Employer effected changes in the fees charged to the single car lease operators, the single car franchise owners and the multiple car franchise owners.

[13] Except for one half (1/2) day of conciliation, the parties have not met to bargain collectively since the imposition of the lock-out by the Employer.

[14] The Union filed an application with the Board alleging violation of s. 11(1)(a) and (c) of the Act on May 15, 2007 (LRB File No. 052-07). The Union also filed a further application on May 15, 2007 alleging violation the technological change provisions of s. 43 of the *Act* (LRB File No. 053-07). On September 21, 2007, the Union filed a further unfair labour practice application (LRB File No. 117-07) alleging breaches of s. 11(1)(a), (c), (e), (j) and (m) of the *Act.*

[15] During negotiations between the parties, there were two primary issues. On the Union side there was an issue with respect to payment and collection of union dues. On the

tinployer side was an issue concerning the amount of fees that could be charged to the Union members for office, computer equipment and insurance premiums.

[16] The initial collective agreement contained the following provisions with respect to payment of union dues:

> *6.01 Every employee who is now or hereafter becomes a member of the Union shall maintain his membership in the union as a condition of employment and every new employee whose employment commences hereafter shall, within 30 days after the commencement of employment apply for and maintain membership in the union as a condition of his employment, provided that any employee in the appropriate bargaining unit who is not required to maintain his membership or apply for and maintain his membership in the union shall. as a condition of his employment, tender to the union the penodic dues uniformly required to be paid by the members of the union.*
>
> *6 02 The bargaining unit members shall pay to the Employer each month all dues, initiation fees and/or assessments as the Union shall affix and the Employer shall submit a cheque to the Union no later than the 15th of the following month Witt the cheque the Employer will provide a list of those bargaining unit employees who have paid dues in the month*
>
> *6.03 The Company shall submit to the Union a list of names in alphabetical order or car number showing all persons who operated a taxi in the previous month. Such list shall include taxi unit number, driver PIN number and last known employees' address and phone number The company shall include a separate sheet showing all new hires for that month.*
>
> *6.04 The union agrees to give the Company one (1) month's notice. in writing, of any changes to the prevailing Union dues, initiation fees and/or assessments.*
>
> 6.05 *The Company shall supply to each member, no later than the* 25?) *day of February of each year a receipt for moneys collected on behalf of the Union in the previous calendar year*
>
> *6.06 The Union agrees to hold the Company harmless and indemnify the Company for all claims, demands and expenses should any bargaining unit driver at any time contend or claim that the Company has acted wrongfully or illegally in collecting or paying monies for dues to the Union provided the Company has acted in accordance with this Collective Agreement*

t fl The Union claimed that those provisions were inadequate and wanted to amend those provisions to more closely follow the provisions the Union had negotiated with other taxi operators in Ontario, which made the Employer responsible to collect and remit union dues. The Employer resisted any change to such provision and initially proposed that paragraphs 6 02 and 6.05 be deleted from the collective agreement. The Employer's position was that it did not wish to be involved in the collection of union dues and the Union should undertake that itself.

[18] The Union. on the other hand wanted to strengthen the collection provisions because the voluntary payment system under the collective agreement had not been successful and payment of Union dues was sporadic at best. The Union also wanted the Employer to use its power to "de-authorize", *(i. e.:* disallow cabs from being assigned calls and utilize the dispatch system), any persons who did not pay union dues. The Employer, citing a shortage of taxis in the City of Saskatoon was reluctant to do so as that would mean the number of taxis on the streets would be reduced.

[19] The initial collective agreement also froze the fees that could be charged by the Employer for its services to the owners or leasees. The Employer. citing economic hardship. wished to pursue an increase in these fees

[20] These two issues were the major sticking points in the negotiations. Neither side was prepared to move from their positions. However, at one point, the chief union negotiator advised a principal of the Employer that the "Union would sell the requested fee increase to its members" if the Employer would agree to be responsible for collection of union dues. The Employer did not agree to this compromise.

[21] A good deal of evidence was lead by both parties concerning the negotiations between the parties. Written proposals were exchanged between the parties during the course of negotiations. The Employer backed off of their initial position with respect to the deletion of clauses 6.02 and 6.05, and agreed that it would be prepared to allow the original language to stay in the revised agreement. However, as of July 24, 2007, the last date when proposals were exchanged, the Union's position with respect to collection of Union dues remained as follows:

> *6 02 Union proposal remains*
>
> *Effective date of ratification. the Company will implement a mandatory dues check off and collect from all members the required Union dues Car owners will*

> *be responsible for the Union dues of their drivers and failure to remit Union dues will result in de-authorization of the car*
>
> *(Union prepared to agree in Letter of Understanding for the term of this Agreement only that the Union dues for full time employees (36 hours per week or more) will be 37 00 per week and part time employees (less than 36 hours per week) will be $4.00 per week.)*
>
> *The Employer shall submit a cheque to the Union no later than the 15th of the following month. With the cheque the Employer will provide a list of those bargaining unit employees who have paid dues in the month and a listing of the number of hours worked by said employees.*

[22] There was a difference of opinion between the parties as to the bargaining process following the presentation of the Union's last offer on July 24, 2007 The Union was of the view that it had made considerable compromise in its proposal towards achieving an agreement The Employer. however, felt that it was nowhere near obtaining the economic adjustment it felt it needed. Furthermore. the Employer saw the revised proposals by the union regarding making "car owner responsible for the Union dues of their drivers" as being unworkable as would the request to de-authorize cars for failure to remit union dues. The Employer viewed that proposal as one which would require that a whole car be de-authorized if one driver failed to remit his/her union dues. Given the shortage of vehicles on the road, this proposal was seen by the Employer as a step back rather than a step forward.

[23] During the time that the Union and the Employer were engaged in collective bargaining, the Union became aware that the Employer was conducting meetings with small groups of car owners (consisting of single car lease operators, single car franchise owners and multiple car franchise owners) concerning the introduction of an interac payment system in cars, the installation of cameras in the cars, changes to the shift rental fees for drivers, and mandatory agreements between drivers and car owners.

[24] The Union contacted the Employer to discuss the purpose of the meetings. The Union was advised that the only purpose for the meetings was to obtain feedback and comments from the car owners on the various issues The Union's evidence was that it was assured by the Employer that the Employer wouldn't be talking about money at all. Based on that assurance. the Union agreed to allow the meetings to continue. but only so long as they didn't discuss financial matters.

[‘6] At the meetings, the Employer provided a presentation which outlined the safety benefits of cameras being installed in vehicles, the benefits of a debit payment system (interac) for payment of fares, a discussion on customer service and an outline of the costs of operation of a taxi and the increase in income which would accrue if shift rentals were increased to $75/shift from $50/shift.

[26] The Employer's evidence was that no decision was asked for or reached at these meetings. However, it was noted in Issue #46 of *"United Blueline Taxi News"* as follows:

> *The car owners recognized and discussed the need to increase their shift leases. The consensus was to increase to $65.00 now with a further $10 00 increase when the next meter rate increase takes effect. It was felt that it would not be a hardship on drivers given the fact that it has been more than 8 years that the rate has been static and the level of income has increased substantially*

[27] About that same time, the Employer circulated a Memorandum to all owners and lease operators which stated that.

> *Mjs of July 1 s' 2007. all owners and lessees are required to have signed lease agreements with their current drivers and any drivers they hire in the future*

[28] Attached to that Memorandum was a draft agreement which provided that the shift rental amount would be $65.00 per shift. The Employer's evidence was that this was merely a template and the amount of the actual shift rental was up to each owner and the driver

[29] Included within the car owner's group that were permitted to attend these meetings were 69 bargaining unit members and approximately 45 to 46 non-members The 122 drivers were not included in these meetings.

[30] Following the exchange of the Union's proposals on July 24, 2007, the Union attempted to arrange further bargaining dates, but was put off by the Employer. Various excuses were given. but no further dates could be arranged. On August 22, 2007, the Employer served a lock-out notice on the Union. Shortly after serving the lock-out notice. the Employer unilaterally imposed a revision to the office and insurance fees payable by car owners effective September 4, 2007. Interac machines were installed in cabs however, security cameras were not installed due to technical issues with the equipment. Cameras were being tested in some vehicles as at the date of the hearing in December of 2008.

[31] The Union's unfair labour practice application (LRB File No. 052-07) alleges that the Employer's meetings with the car owner's group constituted direct bargaining with the Union's members in violation of s. 11(1)(a) of the *Act* and a refusal to bargain with the Union in violation of s. 11(1)(c) of the *Act.*

[32] The Union's unfair labour practice application (LRB File No. 053-07) alleges that the proposed introduction of the interac machines and cameras into its members' cabs constituted a violation of s. 43 of the *Act.* The Union's unfair labour practice application (LRB File No. 117-07) also alleges that the Employer "did not bargain in good faith" contrary to s. 11(1)(c) of the *Act* and also alleges violations of s. 11(1)(a), (e), (j) and (m). The Union alleges that the Employer:

> *Unilaterally implemented new terms and conditions of employment notwithstanding that it did not bargain to an impasse nor had the bargaining process reached an intractable and fruitless stage.*

Further, it alleges that "[T]he Employer bargained directly with the Union members and through threats and intimidation unilaterally implemented new terms and conditions of employment."

[33] The Employer filed a Reply to the Union's application in LRB File No. 052-07 In that Reply, the Employer responded that 'the parties have bargained collectively and reached a Collective Agreement and that the changes made were within the management rights of the Employer under the provisions of the collective bargaining agreement." The Employer also responded that the "issue of negotiations under the collective bargaining agreement and what rights exist under the collective bargaining agreement should be left to a board of arbitration to interpret." In the alternative, the Employer responded that "[I]f the matter will not be deferred to arbitration. the changes made were within its rights under the collective bargaining agreement."

[34] In its Reply to LRB File No. 053-07, the Employer denied "that the introduction of the interac direct payment machines and the Driver Camera System was a technological change" under the *Act,* "and no employee had their terms. conditions or tenure of employment changed as a result of the equipment installation."

[35] Also. in its Reply to LRB File No. 053-07, the Employer argued that the application "did not ask the Board to stop the technological change from proceeding, but simply

asKed for the negotiation of a workplace adjustment plan.' The Employer also stated that the parties have been in bargaining since the introduction and the Union has had an opportunity to negotiate with the Employer." The reply suggested that the issue was "moot" at the present time.

[36] No formal Reply was filed by the Employer with respect to LRB File No. 117-07, However, in correspondence to the Union. counsel on behalf of the Employer by letter dated October 4. 2007 made the following comments:

> *We should also make it clear that at this point that the Company has locked out the drivers by proper notice under The Trade Union Act. Their purpose is to achieve a Collective Bargaining Agreement on the terms and conditions that they are prepared to agree to They have made it clear that they will not expand your check-off system beyond what was agreed to in the first agreement. That is their right in bargaining. If you withdraw your request for a check-off beyond what is in the Collective Bargaining Agreement at this point or set up an internal system to collect it, removing the employer in any allegation of* coercion or *intimidation by having them pay the money directly to the employer, the* parties *could get back together and negotiate. It is our understanding that the impasse is reached because the Union will not agree to any agreement without change to this clause. something which the Company is not prepared to do*

Relevant statutory provision:

[37] Relevant statutory provisions provide as follows :

> *3. Employees have the right to organize in and to form. join or assist trade unions and to bargain collectively through a trade union of their own choosing: and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively*
>
> *11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*
>
> > (a) *to interfere with, restrain. intimidate. threaten or coerce an employee in the exercise of any right conferred by this Act, but nothing in this Act precludes an employer from communicating with his employees;*
> >
> > *(c) to fail or refuse to bargain collectively with representatives elected or appointed. not necessarily being the employees of the employer, by a trade union representing the majority of the employees in an appropriate unit.*

(m) where no collective bargaining is in force. to unilaterally change rates of pay. hours of work or other conditions of employment of employees in an appropriate unit without bargaining collectively respecting the change with the trade union representing the majority of employees in the appropriate unit:

34(1) Notwithstanding anything contained in any collective bargaining agreement heretofore entered into or, except as otherwise specifically provided therein. hereafter entered into, where either party to such agreement gives or has given notice in writing pursuant to subsection 33(4) to negotiate a revision of the agreement. the employees in respect of whom the agreement applies and the employer of such employees may after this section comes into force and after the expiry of the term of operations provided in the agreement commence to strike or commence a lock-out, as the case may require.

43(1) In this section technological change means:

(a) the introduction by an employer into the employer's work. undertaking or business of equipment or material of a different nature or kind than previously utilized by the employer in the operation of the work. undertaking or business;

(b) a change in the manner in which the employer carries on the work, undertaking or business that is directly related to the introduction of that equipment or matenal, or

(c) the removal or relocation outside of the appropriate unit by an employer of any part of the employer's work undertaking or business

(1 1) Nothing in this section limits the application of clause 2(f) and sections 37 37.1, 37.2 and 37.3 or the scope of the obligations imposed by those provisions.

(2) An employer whose employees are represented by a trade union and who proposes to effect a technological change that is likely to affect the terms, conditions or tenure of employment of a significant number of such employees shall give notice of the technological change to the trade union and to the minister at least ninety days prior to the date on which the technological change is to be effected

(3) The notice mentioned in subsection (2) shall be in writing and snall state:

(a) the nature of the technological change

(b) the date upon which the employer proposes to effect the technological change.

(c) the number and type of employees likely to be affected by the technological change;

(d) the effect that the technological change is likely to have on the terms and conditions or tenure of employment of the employees affected. and

(e) *such other information as the minister may by regulation require*

(4) The *minister may by regulation specify the number of employees or the method of determining the number of employees that shall be deemed to be "significant" for the purpose of subsection (2).*

(5) Where a trade union alleges that an employer has failed to comply with subsection (2), and the allegation is made not later than thirty days after the trade union knew, or in the opinion of the board ought to have known, of the failure of the employer to comply with that subsection the board may after affording an opportunity to the parties to be heard, by order

(a) direct the employer not to proceed with the technological change for such period not exceeding ninety days as the board considers appropriate;

(b) require the reinstatement of any employee displaced by the employer as a result of the technological change; and

(c) where an employee is reinstated pursuant to clause (b), require the employer to reimburse the employee for any loss of pay suffered by the employee as a result of his displacement

(6) Where *a trade union makes an allegation pursuant to subsection* (5), *the board may, after consultation with the employer and the trade union, make such interim orders under subsection (5) as the board considers appropriate.*

(7) An order of the board made under clause (a) of subsection (5) is deemed to be a notice of technological change given pursuant to subsection (2)

(8) Where a trade union receives notice of a technological change given. or *deemed to have been given, by an employer pursuant to subsection (2), the trade union may. within thirty days from the date on which the trade union received the notice.* serve *notice on the employer in writing to commence collective bargaining for the purpose of developing a workplace adjustment plan.*

(8.1) On receipt of a notice pursuant to subsection (8), the employer and the trade union shall meet for the purpose of bargaining collectively with respect to a workplace adjustment plan.

(8.2) A workplace adjustment plan may include provisions with respect to any of the following:

(a) consideration of alternatives to the proposed technological change, including amendment of provisions in the collective bargaining agreement:

(b) human resource planning and employee counselling and retraining:

(c) notice of termination.

(d) severance *pay;*

(e) entitlement to pension and other benefits. including early retirement benefits:

> *a bipartite process for overseeing the implementation of the workplace adjustment plan.*
>
> *(8 3) Not later than 45 days after receipt by the trade union of a notice pursuant to subsection (2). the employer or the trade union may request the minister to appoint a conciliator to assist the parties in bargaining collectively with respect to a workplace adjustment plan*
>
> *(10) Where a trade union has* served *notice to* commence *collective bargaining under subsection (8). the employer shall not effect the technological change in respect of which the notice has been served unless:*
>
> *(a) a workplace adjustment plan has been developed as a result of bargaining collectively: or*
>
> *(6) the minister has been served with a notice in writing informing the minister that the parties have bargained collectively and have failed to develop a workplace adjustment plant*
>
> *(11) This section does not apply* where *a collective bargaining agreement contains provisions that specify procedures by which any matter with respect to the terms and conditions or tenure of employment that are likely to be affected by a technological change may be negotiated and settled during the term of the agreement.*
>
> *(12) On application by an employer the board may make an order relieving the* employer *from complying with this section if the board is satisfied that the technological change must be Implemented promptly to prevent permanent damage to the employer's operations*
>
> *44(1) No employer shall cause a lock-out during the term of a collective bargaining agreement*

[38] The Board wishes to thank both counsel for providing written arguments and case authorities upon which their arguments relied. The Board has attempted to summarize those arguments below.

Union's arguments:

LRB File No. 052-07

[39] The Union argued that the Canadian System of Labour Relations is centered on the principles of majority rule and exclusivity as set out in s. 3 of the *Act.* It argued that these principles required the Employer to deal exclusively with the Union with regard to matters which are subject to the duty to bargain in good faith.

[40] The Union argued that the matters raised by the Employer at the car owners meetings, insofar as they apply to or concern car owners and drivers who fall within the bargaining unit. must be negotiated between the Union and the Employer. In their view, they were not matters that could be negotiated through direct negotiation with the bargaining unit members. This was, in their view what the Employer was doing in those meetings, in violation of s. 11(1)(a) of the *Act*

[41] The Union also argued that the Employer failed to bargain in good faith by not disclosing to the Union its decisions regarding the installation of interac machines and cameras into the cabs because. the Union argued, those decisions would significantly impact on the bargaining unit. They argued that the cost of installation of the interac machines and cameras in the cabs, although initially paid for by the cab owners, would trickle down to the drivers.

LRB File No. 053-07

[42] The Union also argued that even though it was not necessary for the Board to determine if the obligation to bargain the technological change with respect to the introduction of the interac machines and the cameras under s. 43 of the *Act,* the Employer was neverthless required to bargain in good faith with respect to the introduction of the interac machines and the cameras in the cabs. Section 43, they say, is designed to allow mid-contract bargaining where technological change is introduced to the workplace Notwithstanding that the decision was made during an open period, as distinct from mid-contract, the Union argues that the Employer was required to bargain with the union, under its general duty to bargain in good faith with respect to the proposed changes and that such proposed changes should have been disclosed to the union during the course of bargaining.

LRB File No. 117-07

[43] The Union's main argument in respect of this application was that the Employer failed to bargain in good faith over the dues collection issue. The Union argued that the dues deduction issue was being used by the Employer as a mechanism for continuing to challenge the representative status of the Union and make it difficult for the Union to effectively represent employees in the workplace

Foe] The Union argued that in accordance with the principles enunciated by the Ontario High Court in *Tandy Electronics Ltd.* [1980], 30 O.R. (2nd) 29 where at p. 14 (QL), the court says:

> *The Company's positron on union security clearly constituted one of the significant elements of bad faith in the bargaining conduct of Radio Shack. This is underscored by the company's attitude before the Board that it had no objections to union dues check-off on the basis of economic grounds. Rather, the company's position was based solely on its opinion of the relatively weak position of the union among the employees*

that the Employer's rigid position in bargaining concerning the dues check off constituted bargaining in bad faith.

[45] It quoted the Supreme Court of Canada's decision in *Royal Oak Mines Inc v Canada Labour Relations Board and Canadian Association of Smelter and Allied Workers. Local No. 4,* [1996] 1 S C R. 369, which established the parameters for the duty to bargain in good faith In particular, it argued that the Employer's proposals hare so far from the accepted norms of the industry that they must be unreasonable." Those norms. in the taxi industry, were as established by the Union in its evidence concerning collective agreements reached by the union with taxi operators in Ontario which they placed into evidence.

[46] The Union urged the Board to find the Employer in violation of s. 11(1)(c) of the *Act* by bargaining in bad faith due to its rigid stance on dues check-off; by pushing this demand to impasse: by locking out employees and altering their terms and conditions of employment. In that regard, they argued that a lock out predicated on bad faith bargaining is unlawful.

[47] In the alternative, the Union urged the Board to make a finding that the Employer breached s. 11(1)(m) of the *Act* when it unilaterally altered the terms and conditions of employment of the employees following the lock out The Union argued that "the Employer must be able to show that the decision to implement the new terms and conditions of employment occurred when the bargaining process had reached an intractable and fruitless stage They argued that negotiations had not reached that stage. insofar as the Employer did not table a final offer; the Employer had not responded to the Union's latest offer, which the Union says demonstrated significant movement in the Union's bargaining positron

Employer's arguments:

[48] The Employer argues that it did not attempt to bargain directly with the Employees, but was merely communicating with them concerning matters of interest to them. Furthermore, it says that it was entitled to make the changes under the provisions of the management rights contained within the collective agreement.

[49] The Employer also argued that the changes with respect to interac machines and the cameras in cabs were matters which were between the Employer and cab owners. It says that the Union recognized the inherent conflict of interest between drivers and cab owners. and that certain matters could not be bargained, when it sought to include all owners within the bargaining unit by application to the Board in 2001.

[50] The Employer argued that because this matter allegedly fell within the ambit of its management rights under the collective agreement, that the proper jurisdiction to determine this matter is through the grievance procedures in the collective agreement, which would culminate in a grievance arbitration if the parties were unable to resolve the matter without arbitration.

LRB File No. 053-07

[51] The Employer argues that the installation of interac machines and cameras while announced in April of 2007 was not to be implemented until September or October of 2007. These changes were items which the cab owners were required to pay for, the majority of which cab owners were not a part of the bargaining unit.

[52] The Employer argued that the installation of these items was not a matter between bargaining unit members and the Employer, but matters between Employer and the car owners. As noted above, the Employer took the view that this issue had been recognized by the Union when it attempted to include the multiple car franchise owners into the bargaining unit in 2001.

[53] The Employer, in the alternative, argued that notice is only required under s. 43(2) when the technological change "is likely to affect the terms, conditions or tenure of employment of a significant number of such employees." They argued that a significant number of employees were not impacted by the change. The Employer noted that a significant number as outlined in the regulations made under s. 42 of the *Act* would be 20%.

[54] The Employer. in the further alternative, alleges that the application is moot. They say that the Union filed the application on May 16, 2007. When the application was filed, the Employer requested particulars of the technological change referenced in the application. Particulars of the alleged technological change was not provided to the Employer until September 27, 2007. In the interim, the Employer argues that the parties had been in negotiations and did discuss the installation of the *interac* machines and cameras. The Employer argues that this issue can be dealt with after the conclusion of the labour dispute as a part of the collective bargaining process.

LRB File No. 117-07

[55] The Employer argued that the lock-out was not invalid and that it was permitted to re-engage the Employees on different terms and conditions following the service of the lock-out notice on the Union. It characterized its bargaining posture as "hard bargaining " It characterized the Union's last proposal concerning dues check-off was not in accord with the provisions of s. 36 of the *Act.* They argued that payment of union dues is an individual obligation, and having members collect the dues of other members or lose their livelihood is unlawful.

[56] The Employer says that the Union had other alternate methods of collecting union dues. It argued that the Union had utilized such alternative methods following the lock-out when it decided to collect union dues directly and made arrangements to do so.

[57] With respect to the Employers position regarding the increase in office fees. they also characterized this as "hard bargaining" rather than bad faith bargaining It argued that negotiation is a test of the economic strength of the parties and the bargain that results reflects the economic strength of each of the parties

[58] The Employer urged the Board not to become involved in the collective bargaining process. They said that the Board's role was to monitor the process of bargaining and not the content of the proposals advanced. In support of this position, the Employer cited numerous authorities including *CKLW Radio Broadcasting Ltd.* [1977] C.L.L.C. 16,110 at p 16,784. wherein the Canada Labour Relations Board says:

> *Canadian Boards, including our own, have stressed on many occasions that bargaining is not a process conducted according to "the Marquess of Queensbury rules," that they are not there to prevent either party from taking a hard position and insisting on it and that the list of issue which the parties choose to discuss must be formulated between them*

[59] The Employer argued that the provisions of the *Act* were different from those provisions interpreted by the Supreme Court in *Royal Oak. supra.* They also argued that s 32 of the *Act* requires that an employee and the Union must both request deduction of union dues in writing before an Employer has any obligation to deduct and remit those dues to the Union. They argue that the *Act* permits that the Union collect its dues directly without the involvement of the Employer. They argue therefore, that it is reasonable for the Employer to bargain to maintain the previously agreed provision in the collective agreement with respect to collection of union dues.

[60] The Employer argued that the collective agreement remained in force which the parties were bargaining, but it ceased to be in force once the lock-out notice was served. In support of this argument, the Employer cited *Saskatchewan Joint Board, Retail. Wholesale and Department Store Union v. O.K. Economy Stores (a Division of Westfair Foods Ltd.),* [1994] 2nd Quarter Sask. Labour Rep. 131, LRB File No. 039-94 As such. the Employer argued. there were no unilateral changes to conditions of employment while a collective agreement was in force.

Analysis & Decision:

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[61] This application and the facts supporting it arose prior to the amendments to the *Act* which came into force on May 14, 2008. Accordingly, the Board has applied s 11(1)(a) as it existed prior to its amendment.

[62] In support of its application, the Union cited numerous decisions for consideration by the Board Those decisions were:

Saskatchewan Government Employees Union v Government of Saskatchewan [1989] Winter Sask Labour Rep 52. LRB Erie Nos 245-87 & 246-87.

2 *Saskatchewan Government Employees Union v Government of Saskatchewan.* [1989] Fall Sask. Labour Rep 28 LRB File Nos 250-88 & 290-88:

3 *United Nurses of Alberta* [1995] Alta. L.R.B R. 373,

4 *United Steel Workers of America v. Radio Shack* [1979] C L L C para 16.003 (Ont. L.R B.);

5. *Operative Plasterers' and Cement Masons' International Association, Local 172 v A.N. Shaw Restoration Ltd. et at* [1978] CLRBR 214:

6. *RWDSU v Canadian Linen Supply Co. Ltd.,* [1990] Fall Sask Labour Rep. 68, LRB File No 207-89

[63] In response, the Employer cited various provisions of the previous collective agreement between the parties as well as the text G.W. Adams, *Canadian Labour Law,* 2nd Ed. Aurora, Canada Law Book Inc., at 10.1680

[64] The decision in *Re Government of Saskatchewan,* [1989]. (LRB File Nos. 245-87 & 246-87), *supra,* cited by the Union dealt with a situation where the applicant Union (S.G E.0) alleged that the Government of Saskatchewan had failed to provide "adequate information pertaining to plans to reorganize government services." (See para 1). This case deals primarily with the provisions of s. 11(1)(c) of the *Act,* but was cited by the Union as authority for a violation of both s. 11(1)(a) and 11(1)(c). In that case, the union allegation was that s. 11(1)(a) of the *Act* was violated by the Employer because "the failure or refusal to provide such information ... interfered with the employee's right to be properly represented by the Union." (See para. 9)

[65] In this case, the allegation from the Union is. unlike the situation in *Re Government of Saskatchewan.* (1989], (LRB File Nos. 245-87 & 246-87), *supra.* that the Employer, by its meeting with the car owners to discuss, *inter alia* the interac machines and the cameras, was attempting to bargain collectively with the employees represented by the Union There is no allegation that the Employer failed to provide information necessary to the Union for collective bargaining.

[66] Also, unlike the situation in *Re Government of Saskatchewan,* (1989], (LRB File Nos. 245-87 & 246-87), *supra,* the Employer provided information concerning the meetings which were being held to the Union when requested. The Union agreed that the meetings could continue, but only so long as they didn't discuss financial matters.

[67] *Re Government of Saskatchewan,* 0989] (LRB File Nos. 250-88 & 290-88) *supra.* dealt with a situation where the Employer 'sent a letter and brochure to employees in the SGEU

bargaining unit inviting them to become involved in the Respondent's [Employer's] Public Participation Program Also the complaint dealt with "a series of information seminars on public participation...proposed to change working conditions of individual employees without bargaining collectively respecting the changes with the union.. "

[68] At the time the Board was considering *Re Government of Saskatchewan,* [1989] (LRB File Nos. 250-88 & 290-88), s. 11(1)(a) had been amended to read as follows

> *11(1) It shall be an unfair labour practice for an employer employer's agent. or any other person acting on behalf of the employer*
>
> *(a) to interfere with restrain intimidate. threaten or coerce an employee in the exercise of any right conferred by this Act. but nothing in his Act precludes an employee from communicating with hits employees;*

[69] Because of the differences in the wording relied upon in this decision, it is of limited value insofar as this application is concerned. Furthermore, in the case cited, the Board determined that the communications with the employees was not interdicted by the *Act,*

[70] The cases cited by the Union from outside the province are also of limited assistance to the Board because of the differences in legislative schemes and wording in the various statutes considered by the other boards in those cases This Board has considerable Jurisprudence dealing with s. 11(1)(a) which is of more assistance to the Board in considering this case.

[71] The Board recently reviewed its approach to s. 11(1)(a) in its decision in *United Food and Commercial Workers Union, Local 1400 v. Cornerstone Credit Union,* 2008 CanLII 47043 (SK L•R.B.). LRB File No. 024-08. In that decision at para. 36 *et seq,* The Board says

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

[72] The most recent review of the interpretation that the Board has placed on this provision is found in *Saskatchewan Joint Board, Retail. Wholesale and Department Store Union*

v. Temple Gardens Mineral Spa Inc, and Deb Thorn, [2007] Sask. L.R B.R 87. LRB File No 162-05. In that case. at 101 through 105. the Board said:

> *(31] The first decision of the Board which analyzed the test to be applied under s. 11 (1) (a) was the Saskatoon Co-operative Association case [Saskatchewan United Food and Commercial Workers, Local 1400 v Saskatoon Co-operative Association Limited, (19831 Sask. Labour Rep. 29, LRB File Nos. 255-83 and 256-83]. In that case, the Board examined the lawfulness of several employer communications during the course of the parties' negotiations for the renewal of a collective agreement. The Board determined that the examination of the communication is not limited to determining whether the subject matter is prohibited or permitted under the Act, and stated at 37*
>
> > *but that is not to say that any particular subject is invariably prohibited (or permitted) under The Act. The result is that the Board s inquiry does not end once the subject being discussed is identified and categorized as permitted or prohibited. Instead, it concentrates on whether in the particular circumstances a communication has likely interfered with, coerced, intimidated, threatened or restrained an employee in the exercise of any right conferred by The Act.*
>
> *(32] The Board described a two-part test in the following terms at 37:*
>
> > ***The Board's approach is designed to ascertain the likely effect on an employee of average intelligence and fortitude.*** *That kind of* ***objective approach*** *by its very nature eliminates insignificant conduct, since trivialities will not likely influence an average employee s ability to freely express his wishes.* ***It also necessitates an inquiry into the particular circumstances of each case, because it recognizes that the effect of an employer's words and conduct may vary depending upon the situation.***
>
> > *The employers' communications were directed to the employees as a group and made no effort to isolate them from each other or from their union representatives who had ready access to the picket lines*
> >
> > *The Board heard a great deal of evidence regarding alleged inaccuracies in the written communications It finds that the first and second communications were substantially accurate, and that in the circumstances they did not likely interfere with the average employee's ability to form his own opinion or to reach his own conclusions. Nor were they of the kind that could reasonably support an inference of improper employer motive.*
>
> *133] In Canadian Linen, the employer held two meetings with employees to discuss its final offer before the union's meeting to vote on the employer's final offer. With regard to the propriety of employer communications general. the Board stated at 67 and 68.*

It is settled law in this Province that an employer is entitled to communicate with its employees. even with respect to matters that are the subject of collective bargaining negotiations, so long as the communication

a. *does not amount to an attempt to bargain directly with the employees and circumvent the union as the exclusive bargaining agent:*

b *does not amount to an attempt to undermine the union's ability to properly represent the employees: and*

c. *does not interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any rights conferred by the Act.*

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

In assessing whether employer communications during or in relation to collective bargaining go beyond the bounds of permitted speech into the realm of prohibited interference the Board has considered whether they reflect an attempt to explain the position the employer has taken at the bargaining table or rather. an attempt to disparage the union cr *its proposals The Board looks at the context, content, accuracy and timing of employer communications in discerning their purpose and effect. Communications made after good faith bargaining has reached an impasse are less suspect than those made during early stages of bargaining accurate statements are less suspect than Inaccurate ones and in any event. communications of explanations or positions not first fully aired at the bargaining table are highly suspect*

[emphasis added]

[73] The settled law, as noted in the *Rowe v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Canadian Linen and Uniform Service* Co., [2001] Sask. L.R.B.R. 760, LRB File No. 104-01 case, is that communication with members of the bargaining unit is permissible so long as that communication

7. *Does not amount to an attempt to bargain directly with the employees and circumvent the union as the exclusive bargaining agent'*

2 *Does not amount to an attempt to undermine the union s ability to properly represent the employees and*

3 *Does not interfere with restrain Intimidate. or coerce an employee in the exercise of any rights conferred by the Act*

[74] Furthermore, as noted in the *Canadian Linen* case, *supra,* is the Board's emphasis on the objective test, noting that the result might have been different if the test was a subjective one. Specifically with respect to the question of whether the employer was in violation of s. 11(1)(a), the Board in *Canadian Linen, supra.* followed *Saskatoon Co-operative Association, supra,* and stated at 68:

> *The determination of whether in the particular circumstances, a communication has interfered with.* coerced. *intimidates, threatened or restrained an employee in the exercise of a right conferred by the Act is an objective one. The Board's approach in such cases is to ascertain the likely* effect *of the communication on an employee of average intelligence and fortitude*

[75] No direct evidence from any of the members of the bargaining unit was called by the Union with respect to this point. The Board is therefore left with only inference or conjecture as to the impact of the meetings on members of the bargaining unit. From the evidence of Ms Naylor and Mr. Suppes concerning what occurred at the meetings, and the Union's agreement that the meetings could continue after they became aware of them, leads us to the conclusion that the information conveyed at the meeting would not have the likely effect of interfering, coercing, intimidating, or restraining an employee of average intelligence and fortitude. Accordingly, the Board finds no violation of s 11(1)(a) of the *Act* in respect of LRB File No 052-07.

[76] The Union also argued that the Employer failed to disclose its intention to *inter alia* install interac machines and cameras in cabs during collective bargaining. It noted in its brief that these meetings were held during the period when collective bargaining was occurring. Furthermore, the Union argued, the increase in cab leasing rates was an economic issue which was the subject of collective bargaining.

[77] The Employer countered that the first collective agreement expressly recognized the inherent conflict of interest between members of the bargaining unit negotiating with other members of the bargaining unit. in this case, single car franchise owners. single car lease operators, and multiple car franchise owners with drivers. The Employer argued that the installation of cameras and interac machines fell under the provisions of Article 4 of the first collective agreement and that the agreement, in Article *4* 07 expressly excluded from negotiation between the parties any issue dealing with the relationship between drivers (who were within the

bargaining unit) and single car franchise owners, single car lease operators. and multiple car franchise owners who were also within the bargaining unit. Article 4.07 provides as follows'

> *Subject to 4.02,* 4 *03. 4 04. and 4 06 above, it is understood that the owner/operator and tease operators retain the sole authority to determine who they rent their vehicles to and/or who they employ to operate their taxis and the hours of work and other working conditions which may apply.*

[78] The meetings which were of concern occurred during the course of collective bargaining. The evidence was dear that the Union became aware of these meetings and made inquiry concerning them. With the assurance from the Employer that the meetings were informational only and with the restriction that they didn't discuss financial matters the meetings were allowed to proceed.

[79] Ms. Naylor's evidence was that the matters raised at the meetings were discussed at the bargaining meeting held on May 7. 2007. Her evidence was "the first day of bargaining was pretty much taken up with a discussion over that" [what had occurred at the car owners meetings]. She also testified that the Union later asked for a copy of the materials presented at the meetings. She testified:

> *When we returned to bargaining on May 7 after we had found out from some of our car owners as to what was done at the meeting. we spent the entire day actually talking about the meeting and we did ask for a copy of what was presented there because we were told there was I guess a power point presentation and Lori Suppes arranged to bring me a copy, or Tony. Iin not sure which one. got* me *a copy before we left on the 7 and gave me a copy of the presentation.*

[80] In addition, Karen Naylor testified that they also discussed, during bargaining on May 7, 2007 the proposal to increase the shift lease fees charged to drivers as well as the requirement that all owners and drivers would be required to have written agreements in place.

[81] Section 11(1)(c) imposes an obligation on parties engaged in collective bargaining to disclose information relevant to issues under discussion In Re *Government of Saskatchewan* [1989]. (LRB File Nos. 245-87 & 246-87y *supra,* at para 15. the Board says.

> *That duty [to bargain in good faith; is imposed by s. 11(1)(c) of the Trade Union Act and its legislative counterpart in every other jurisdiction. It requires the union and the employer to make every reasonable effort to conclude a collective bargaining agreement, and to that end to engage in rational, informed*

> *discussion to answer honestly and to avoid misreprentation. More specifically. it is generally accepted that when asked an employer is obligated.*
>
> > *(a) to disclose information with respect to existing terms and conditions of employment particularly during negotiations for a first collective bargaining agreement*
> >
> > *(b) to disclose pertinent information needed by a union to adequately comprehend a proposal or employer response at the bargaining table:*
> >
> > *(c) to inform the union during negotiations of decisions already made which will be implemented during the term of a proposed agreement and which may have a significant impact on the bargaining unit: and*
> >
> > *(d) to answer honestly whether it will probably implement changes during the term of a proposed agreement that may significantly impact on the bargaining unit. This obligation is limited to plans likely to be implemented so that the employer maintains a degree of confidentiality in planning, and because premature disclosure of plans that may not materialize could have an adverse effect on the employer, the union and the employees*

[82] Paragraphs (c) and (d) above are relevant in this case The Union argues that the Employer never fully lived up to its obligations and only discussed the matter when pressed to do so by the Union. The Union also argues that the Employer never engaged in good faith bargaining concerning these matters based on the Employer's mistaken belief that it was not required to bargain these issues with the Union.

[83] The Employer's reply was that the matters were within the management rights provisions of the contract and that they were merely attempting to inform the car owners of the impacts of change to lease fees and as to the proposals for installation of cameras and interac machines. The Employer also argued that the Union had recognized. both in the collective agreement provision in clause 4.07 and in an application to the Board in 2001 that there were difficulties representing the various classes of drivers and owners

[84] The Employer also argues that the matter falls within the ambit of the collective agreement and as such, the proper jurisdiction to deal with these matters is a grievance arbitration. As such, it argues that the Board should defer to an arbitrator pursuant to s. 25(1) of the *Act.*

[85] It is not necessary for the Board to deal with the argument concerning s. 25(1) of the *Act* or the applicability of the grievance procedure to the matter in question. It is clear that the Employer, when requested, provided information to the Union concerning the matters which were discussed at the car owner meetings. It provided full information both prior to the collective bargaining meeting on May 7, 2007 as well as spending a whole day of the collective bargaining session on May 7, 2007 reviewing the matters discussed at those meetings. The evidence from Karen Naylor and Scott Suppes was consistent in respect of the provision of the information and the bargaining which occurred.

[86] We can only speculate that had the bargaining continued, the parties might reasonably have bargained these issues. That may still occur once the current labour dispute (lockout) is determined. However, the Board cannot find that the Employer has failed in its obligation to supply relevant information during the course of collective bargaining as alleged by the Union. As a result, the application in LRB File No 052-07 is dismissed.

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[87] This application alleges that the Employer was required to bargain, pursuant to s 43 of the Act with respect to technological change, being the proposal to install interac machines and cameras into the cabs. In its brief, the Union notes that s. 43 is a provision in the *Act* which allows for mid-contract bargaining in the event of a technological change. The Union acknowledges that this was not a mid-contract situation and that the obligation to bargain collectively with respect to the implementation of these changes was subsumed into the general obligation imposed by s. 11(1)(c) to bargain in good faith. In her brief, Ms. Gray says

> *it is not necessary to rely upon a 43 to give rise to the obligation on the Employer's part to bargain in good faith with the Union with respect to the introduction of the cameras or Interac machines as this obligation existed once notice to bargain was served. The Board is not required on these facts to determine if the s 43 obligation to bargain the technological change came into existence*

[88] The Board concurs with Ms Gray's interpretation of s 43 and the obligation of the parties to bargain collectively the issues concerning the cameras and interac machines. Again, presumably these matters will be considered and concluded by the parties when they resume collective bargaining upon resolution of the current labour dispute (lockout)

[89] Based on the Union's submissions respecting this application, it is also dismissed.

LRB File No. 117-07

[90] The unfair labour practice allegation on this file alleges a number of breaches of s. 11 of the *Act.* In addition to repeating the allegations raised in LRB File No. 052-07 dealt with above. the Union raised a new issue in respect of s. 11(1)(c) alleging that the Employer took a rigid stand on the issue of dues collections which amounted to bargaining in bad faith. It referenced s. 11(1)(e) in its application, but provided no evidence or arguments concerning this provision. It also alleged that contrary to s 11(1)0) and (m), that the changes made to the terms and conditions of employment of drivers (office fees and insurance fees) after implementation of the lockout by the Employer were unlawful.

[91] The Employer countered that its negotiation. while constituting hard bargaining, did not constitute bargaining in bad faith. It also took the position that the imposition of the lockout terminated the collective agreement hence there was no breach of s.11(1)(j) and (m) when it imposed new terms and conditions of employment.

[92] As background for its allegations of bad faith bargaining by the Employer, the Union relied upon the history of bargaining between the parties since certification of the bargaining unit in 2000. Negotiations for a first collective agreement were difficult and slow. Ultimately, the Union made application to this Board for first contract assistance A first collective agreement was agreed between the parties the evening prior to the date set by the Board for the hearing of that application.

[93] While the witnesses described the relations during the term of the first collective agreement as cordial, it was clear that the first collective agreement was not effective in respect of the two major areas of concern between the parties, which is the collection of dues and the adjustment of fees paid to the Employer.

[94] The Union took the view that the Employer's insistence that the Union be responsible for collection of its own dues showed that the Employer lacked acceptance that the drivers and some of the car owners who were in the bargaining unit wanted to be represented by the Union. It alleged that the Employer was resistant to unionization and was attempting, by its negotiating stance to undermine support for the Union.

[95] The Union's arguments in this respect have some merit. It was clear from the testimony of Karen Naylor and Scott Suppes that the relationship was not one which could be said to be a mature collective bargaining relationship. On the other hand, however, there were some differences in the legislative framework in Saskatchewan which resulted in the inherent conflict of interest where the Union could not represent some of the multiple car owners (s. 37.3(2))

[96] The Union lead testimony concerning the practice of dues collection in Ontario. With respect, the statutory provisions regarding payment of dues in Ontario and those in Saskatchewan are different, as is the make-up of the bargaining unit. As a result, that practice cannot be directly imported into Saskatchewan as the Union suggests.

[97] However, the crux of this complaint is the nature of the bargaining which occurred between the parties related to the dues collection issue and the amount of fees which would be payable to the Employer by the members of the bargaining unit.

[98] The Union cited the Supreme Court of Canada decision in *Re Royal Oak Mines* Inc. [1996] S.C.J. No 14 wherein the Court set out the parameters of the duty to bargain in good faith. At para 41 et *seq.* the Court says:

> *41._.In the context of the duty to bargain in good faith a commitment is required from each side to honestly strive to find a middle ground between their opposing interests. Both parties must approach the bargaining table with good intentions.*
>
> *42. Section 50(a) of the Canada Labour Code has two facets. Not only must the parties bargain in good faith. but they must also make* every *reasonable effort to enter into a collective agreement. Both components are equally important. and a party will be found in breach of the section if it does not comply with both of them. There may well be exceptions but as a general rule the duty to* enter *into bargaining in good faith must be measured on a subjective standard. while the making of a reasonable effort to bargain should be measured by an objective standard which can be ascertained by a board looking to comparable standards and practices within the particular industry It is this latter part of the duty which prevents a party from hiding behind an assertion that it is sincerely trying to reach an agreement when viewed objectively it can be seen that its proposals are so far from the accepted norms of the industry that they must be unreasonable*

[99] The Union also relied upon the decision of the Ontario High Court in *Tandy Electronics Ltd.* [1980], 30 O.R. (2"[d]) 29, which was reviewing a decision of the Ontario Labour

Relations Board which found the employer had bargained in bad faith, in part, by maintaining a rigid bargaining position on a voluntary dues check-off.

[100] The Employer relied upon various decisions in support of its view that the Employer's negotiations constituted hard bargaining, not bargaining in bad faith. One of those decisions was this Board's decision in *International Brotherhood of Electrical Workers, Local 2067 and SaskPower and Government of Saskatchewan,* [1993] *| st Quarter Sask. Labour Rep 286. LRB File No. 256-92. That case involved negotiations between SaskPower and IBEW over a renewal contract. During negotiations. SaskPower took a position regarding salary increases which the Union felt was so unreasonable that it constituted a refusal by the Employer to bargain in good faith.

[101] In that case, the Board reviewed the obligation to bargain in good faith as set out in s. 11(1)(c) of the *Act* and the Board's role in respect of the supervision of collective bargaining between the parties to a collective agreement. Furthermore, the Board discussed the line between hard bargaining and bad faith bargaining.

[102] At p 5 of the Board's decision, (LRB File No 256-92). the Board provides some background to the issue.

> *The role of labour relations boards in enforcing the duty to bargain has been the subject of considerable controversy as collective bargaining Jurisprudence has evolved. The source of much of this controversy has been the issue of the degree to which the substantive as opposed to the procedural aspects of the bargaining process must be evaluated in order to decide whether the duty to bargain is being observed Since the overall objective of collective bargaining legislation is arguably to construct a healthy bargaining relationship and to prod the parties into carrying out a course of bargaining which will be mutually acceptable. labour relations boards initially conceived the task of enforcing a duty to bargain in a very limited way. Their role as they saw it - and continue to see it to a large extent - was limited to questions of process or tactics, and did not extend to any matter touching the substantive content or outcome of collective bargaining between the parties.*
>
> *It is clearly easier to state this distinction between the procedural and the substantive than to give it practical application in any given set of circumstances Labour relations bodies in the United States long ago came to the conclusion that it was possible for a party to a collective bargaining to preserve a convincing outward shell of bargaining process, while refusing to engage in any substantive exchange which would more towards agreement. While the National Labour Relations Board confirmed its view that the bargaining process and its outcome should remain under the control of the parties as much as possible. they did intervene to the extent of distinguishing between issues which represented the*

> *minimal content of healthy bargaining and other matters which* were *of a more peripheral nature*
>
> *Canadian labour relations boards did not follow American authorities in the direction of adopting this distinction between mandatory and permissive bargaining issues, and continued to view their role as one of supervising the procedural aspects of bargaining. From the many Canadian decisions which have described the role of labour relations boards in this connection. one example which seems to fairly represent the general position is the following statement from the decision of the Canada Labour Relations Board in CKLW Radio Broadcasting Ltd., 77 CLLC 16,110. at 16, 784'*
>
> *The Board is not an instrument for resolving bargaining impasses. Proceedings before the Board are not a substitute for free collective bargaining and its concomitant aspects of economic struggle. Therefore. the Board should not judge the reasonableness of bargaining positions, unless they are clearly illegal contrary to public policy or an indicia, among other things, of bad faith. Because collective bargaining is a give and take determined by threatened or exercised power, the Board must be careful not to interfere in the balance of power and not to restrict the exercise of power by the imposition of rules designed to require the parties to act gentlemanly or in a gentle fashion*
>
> *Canadian Boards including our own,* have *stressed on may occasions that bargaining is not a process conducted according to 'the Marquess of Queensbury rules, that they are not there to prevent either party from taking a hard position and insisting on it. that the list of issues which the parties choose to discuss must be formulated between them*

[103] The Board then considered cases which illustrated how the Board had interpreted its role in enforcing the duty of bargain. It also examined various legal articles written on the duty to bargain in good faith. It concluded on p. 8 as follows:

> *It is our conclusion from reading the academic works referred to us by counsel for the Union that they do not support the conclusion that Canadian labour relations boards have intervened — or even that they should intervene — to Influence the course of negotiations between two parties to collective bargaining with the exception of circumstances where the position taken by one of the participants in illegal. stands in fundamental contravention of the objectives of collective bargaining legislation or arguably. precludes the attainment of essential procedural protections for employees or trade unions They do not seem to us to invite an extension of labour relations board intervention to otherwise modify or manipulate the bargaining positions adopted by the parties*

[104] The Board concluded on p 9 that "Flits our view that the fact that an Employer adheres firmly to a position that no general wage increase will be offered is not in itself a failure to bargain

[105] The Union argued that the Employer's motives were, in effect, to frustrate the Union and its members by its refusal to implement a dues check off and that the underlying

motivation for such refusal was to undermine support for the union and to dissuade membership in and support for the union. We were invited to draw such an inference from a series of events that occurred in respect of the dues collection issue and comments made by the Employer representative at collective bargaining sessions.

[106] However. as noted by the Board in *IBEW and SaskPower, supra,* at p. 9 following the quote referenced above:

> *' The Employer is entitled to adopt the position that a wage increase is not justified under current circumstances. and to take a firm stand on that position. It is not our role, as we see it to intervene to prevent the Employer from taking this position or to suggest that a wage increase is a sine qua non of legitimate bargaining. It is open to the Union to test that position, or to try to persuade the Employer to modify it, by any of the legitimate means at its disposal.*

[107] In our view, that comment is applicable in this case as well. As the proposals went forward in negotiations, the issue of the dues check off changed. The Union made several proposals. as did the Employer. The first Employer proposal was to effect a change in the current wording of the collective agreement. which position was later modified to allow the language which currently existed in the agreement to remain. That was not, in our view unreasonable. Nor was it unreasonable for the Employer to firmly hold to that position notwithstanding the Union's insistence that the provision was unworkable. It was "open to the Union to test that position, or to try to persuade the Employer to modify it, by any legitimate means at its disposal."

[108] The Union did attempt to try to persuade the Employer to modify its position. Karen Naylor testified that she advised the Employer that if it agreed to the Union's dues check off proposal that she could "sell" a fee increase to her members, That attempt to modify the Employer's position was unsuccessful

[109] The *IBEW v. SaskPower* decision, *supra,* predated the decision of the Supreme Court of Canada in *Royal Oak.* The Board had the opportunity to review the *Royal Oak, supra.* decision in the context of its previous decisions in *Saskatchewan Government Employees' Union v. Government of Saskatchewan, Saskatchewan Association of Health Organizations, Mamawetan Churchill River District Health Board. Keewatin Yathe District Health Board and North East District Health Board.* [1999] Sask L R.B R. 307 LRB File No 109-98.

[110] After discussing the *Royal* Oak case, *supra,* and other earlier decisions of the Board, the Board concluded at p. 29 of the Board decision:

> *In summary, the cases demonstrate that while Boards generally will not delve into the reasonableness of the bargaining positions taken by either party during collective bargaining. Boards may find that a specific proposal does constitute had faith bargaining it (1) the proposal contains some illegality: (2) the proposal in itself or in conjunction with other conduct indicates a subjective unwillingness to conclude a collective agreement: and (3) the proposal is or should be known 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 negotiation of a collective agreement.*

[111] If we examine the three (3) criteria outlined above, there has been no suggestion that the Employer's proposal concerning dues check-off was in any way illegal.

[112] The Union argued that the Employer's stubborn insistence that it not be involved in the collection of dues from its members when seen against the background of the relationship between the parties, comments made by Scott Suppes' spouse and chief Employer negotiator that members of the bargaining unit did not want to pay dues. evidence that the Employer in fact collected and remitted union dues on behalf of unionized office employees in his business. and the industry norm from Ontario regarding collection of union dues, go to show, on a subjective standard that the Employer is not bargaining in good faith to conclude a collective agreement.

[113] The Employer, however, points to the fact that the Employer's current proposal for dues collection was what was previously agreed and says that there is nothing inconsistent in the Employer seeking to retain the current contract language.

[114] As for point 3 noted above in *Mamawetan, supra.* the contract language from Ontario showing what is the norm there is not particularly useful due to differences in statutory approach in Ontario and Saskatchewan regarding dues check-off. In addition this Employer is the only taxi company which has been certified by this Board, so there is no norm with respect to the industry. That having been said. however. the norm in most other industries in Saskatchewan is that the employer does collect and remit union dues on behalf of employees in the bargaining unit However, as noted above, the Union did agree that this norm would not apply in the first collective agreement.

[115] The conduct of the Employer (and the Union in appropriate cases) in the conduct of collective bargaining and in the proposals which it adopts must be viewed on a subjective basis. From that view, the Board is of the opinion that the conduct of the Employer was. as suggested by the Union. aimed not at the achievement of a negotiated settlement. but rather towards the frustration of the employees in the exercise of their rights to bargain collectively as provided in s 3 of the *Act*

[116] Accordingly, the Board finds the Employer has violated s 11(1)(c) of the *Act* not as a result of its hard line of bargaining, but rather on the basis that on a subjective view of the conduct of the Employer as required by *Royal Oak, supra.* The Employer's stance with respect to the issue of dues was merely part of an overall effort to frustrate solidarity of the union membership and to undermine the Union's representation of its bargaining unit members which constituted an interference with the rights granted under s. 3 of the *Act.*

[117] That, however. does not end the matter. The Union also alleges that the Employer has violated s. 11(1)(m) of the *Act.* The Union argues that changes in terms and conditions of employment "occurred when the bargaining process had reached an intractable and fruitless stage." (See *Saskatchewan Joint Board. Retail, Wholesale and Department Store Union v. O.K. Economy Stores (a Division of Westfair Foods Ltd.).* [1994] 2r^{d} Quarter Sask. Labour Rep. 131, LRB File No. 039-94) The Union also argues the lock-out imposed by the Employer was unlawful because the lock-out had its foundation in and was imposed in furtherance of unfair labour practice." (See *United Steelworkers of America, Local 5917 v. Jamel Metals Inc. o/a Wheat City Metals,* [2005] Sask. L.R B.R. 189. LRB File No. 060-05.)

[118] The Employer, on the other hand, suggests that the lock-out was lawful, and relies upon a decision of The Saskatchewan Court of Appeal in *Westfair Foods Ltd and United Food and Commercial Workers, Local 1400 and L. Ted Priel* 2004 SKCA 119 as authority for its proposition that the collective bargaining agreement does not remain in effect during the continuance of the lock-out.

[119] While the Board's decision in *United Steelworkers of America, Local 5917 and Wheat City Metals. supra,* was decided subsequent to the Court of Appeal decision in *Westfair Foods, supra.* the Board considered the decision in *Westfair Foods, supra.* in its consideration in *Wheat City Metals. supra.*

[120] At pars 126 of *Wheat City Metals, supra,* the Board states the following conclusion:

> *Accordingly,* we *find that the Employer committed an unfair labour practice in violation of s. 11(1)(c) of the Act in pressing to impasse the issue of a collective agreement term exceeding three years and that the lock-out was predicated upon, had its foundation in. and was imposed in furtherance of the unfair labour practice and is unlawful.*

[121] On review of the decision, and the rational leading up to this statement by the Board, may be supportable based on the facts of that particular case However, it cannot be said that it will be a natural result of a finding of a violation of s 11(1)(c), or indeed any other provision of the *Act,* that any industrial action taken in consequence of collective bargaining by either party will *ipso* facto, be deemed or declared to be unlawful. Strikes and lock-outs are the economic tools used by the parties to attempt to persuade the other to accede to proposals made by the party utilizing the tool.

[122] It was not the firm position taken by the Employer with respect to the dues check-off alone which lead the Board to conclude that it was guilty of an unfair labour practice, but rather was the overall conduct of the Employer in the course of negotiations, the background of the relationship between the parties. Were the mere insistence on a particular proposal of the Employer sufficient, in and of itself, to justify interference by this Board in the collective bargaining relationship, then the Union's intransigent insistence upon a change to the collective bargaining agreement with respect to the collection of dues, would be equally of concern to this Board.

[123] The Board is of the view that the lock-out was not. in and of itself, aimed at compelling or inducing employees to refrain from exercising any rights under the *Act.* The imposition of the lock-out. we are satisfied resulted from a frustration of the Employer that he was not getting the economic adjustment he sought and that on balance, he was prepared to take the risk inherent in imposing a lock-out of his employees. Scott Suppes testified that he had grave misgivings about the implementation of the lock-out, but felt that he was not making progress in negotiations towards the economic adjustment he felt was necessary to insure viability of his business.

[124] If the lock-out was not unlawful. then the changes to the terms and conditions of employment following the commencement of the lock-out are not a violation of s. 11(1)(m) of the *Act. Westfair Foods Inc_ supra,* makes it clear that upon the commencement of a lawful strike (or lockout), that the collective agreement does not continue in force (See para 20 et *seq).* The application under s. 11(1)(m) is dismissed.

[125] As noted by the Board in *Wheat City Metals,* the "issue of the remedy for an unfair labour practice for the failure to bargain collectively is not an easy one to resolve." As in that case, as here. a great deal of time has passed without a revised collective agreement in place This is not, however, a case like *Wheat City Metals. supra.* where there was compensation ordered for employees because this situation is unique insofar as the members of the bargaining unit pay the Employer for its services. Furthermore, the Employer has unilaterally imposed a fee increase which does not seem to have met with strong resistance.

[126] It is unlikely that the parties, absent outside help, will be able to return to the collective bargaining table and resolve the two major outstanding issues. The Board recommends that the parties seek the assistance of a special mediator under the provisions of s. 23.1 of the *Act.*

[127] The Board hereby orders that the parties shall resume collective bargaining forthwith and shall exchange dates on which they are prepared to resume collective bargaining within ten (10) days of the date of this Reasons for Decision.

[128] The Board further orders that the Employer shall forthwith furnish to the Union, the names. addresses, telephone numbers. and any other information the Union shall reasonably require to permit it to know who the members of the bargaining unit are at the present time in order that it may properly represent those members of the bargaining unit.

[129] In addition, the Board wishes to remind the parties of the provisions of s. 15 of the *Act* regarding Offences and Penalties under the *Act.*

[130] In the event that the parties are unable to bargain a collective agreement upon resumption of collective bargaining. and a special mediator is not appointed pursuant to s. 23.1 of the *Act,* then the Board recommends that the assistance of a mediator be requested to assist them in the conclusion of a collective agreement

DATED at Regina. Saskatchewan, this **20th** day of **April, 2009.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q C
Chairperson