The Labour Relations Board
Saskatchewan

THE CITY OF SASKATOON, Applicant v. THE CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 59, Respondent

LRB File No. 186-08; November 30, 2009
Chairperson, Kenneth G. Love, Q.C.; Members: Clare Gitzel and Bruce McDonald

For the Applicant: Patricia Warwick and Christine Bogad
For the Respondent: Peter Barnacle

Deferral to Arbitration – Board confirms principles upon which it will determine if the Board should defer to a grievance arbitration process as provided for in s. 18(l) of the *Act.*

Non-suit – Board reviews previous jurisprudence regarding the requirement for an election not to call evidence – Board confirms its previous jurisprudence which provides that the Board has the discretion to require an election to be made – Board outlines factors to be considered as to when an election will be required.

Unfair Labour Practice – Board determines conduct of Union constitutes unfair labour practice. Refusal to execute Memorandum of Agreement also constitutes unfair labour practice.

Remedy – Board seeks remedy which places the parties into the position they would have been, but for the unfair labour practice – Board orders Union to execute and deliver Memorandum of Agreement.

REASONS FOR DECISION

Background:

[1] The City of Saskatoon (the "City") brought this application alleging an unfair labour practice had been committed by the Canadian Union of Public Employees, Local 59, (the "Union"). The City alleges that the Union did not bargain in good faith with respect to certain aspects of a Job Evaluation Plan that were agreed to be implemented by the parties on January 1, 2008.

[2] The Union denies that it did not bargain in good faith with respect to those aspects of the Job Evaluation Plan and says that it continues to act in accordance with the collective agreement between the parties.

[3] The City alleges that the Union reneged upon the agreements reached between the parties with respect to the implementation of the Job Evaluation Plan. The Union argues that the terms of the agreement are clear and any disagreement concerning the terms of the agreement with respect to the Job Evaluation Plan should be settled by arbitration in accordance with the terms of the collective agreement.

[4] The Union filed a grievance under the collective agreement concerning aspects of the implementation of the Job Evaluation Plan, specifically with respect to retroactive pay paid when the Job Evaluation Plan was implemented. That grievance has been referred by the parties to arbitration. The Union made a preliminary application that this matter should be deferred by the Board pursuant to Section 18(l) of *The Trade Union Act*, R.S.S. 1978, c.T-17 (the "*Act*") since, in the submission of the Union, the matter could be resolved by arbitration. That application, for the reasons which follow, was denied.

[5] This matter was heard by the Board in Saskatoon on May 12, 13 and 14, 2009 and on September 24 and 25, 2009.

Facts:

[6] The facts in this case are not generally in dispute. The Board heard from the following witnesses called by the City: Melville Grosse, Bob McNaughton, Judy Schlechte and Marlys Bilanski. The Union called Lois Lamon as its only witness. As there was no conflict in the testimony of the witnesses whose evidence related to matters known to them personally, the Board will not generally distinguished between who said what in the recitation of the facts found in relation to this matter.

[7] During negotiations for a new collective agreement between the City and the Union in 2001, it was proposed that the parties establish a Joint Job Evaluation Plan (the "Job Evaluation Plan"). The purpose of the Job Evaluation Plan was to undertake a reclassification review of the job descriptions for all positions within the scope of the collective agreement and determine revised pay bands for such positions.

[8] The negotiations resulted in an agreement to commence the Job Evaluation Plan. To that purpose, amendments were made to the collective agreement to provide for implementation of the proposals. Those amendments, in summary, provided:

> *1. The general terms of the Job Evaluation Plan, including:*
>
> *(a) that the Employer provide a consultant for the program at its cost;*
>
> *(b) that the parties jointly develop terms of reference for the plan;*
>
> *(c) provision for union members to participate in development and implementation of the plan at the employer's expense;*
>
> *2. Development and Implementation of the plan was to be completed by December 31, 2003.*
>
> *3. When the evaluation plan was completed, salary adjustments "will be implemented as per the Union Committee's instructions".*
>
> *4. All existing and new positions were to be processed through the plan.*

[9] Prior to the collective agreement being amended, the Union took two proposals concerning the plan to its membership for consideration. In a Memorandum of Agreement dated July 10, 2001 the Union presented the following options:

> *20.4 The union shall have the choice of either of the following processes (20.4.1 or 20.4.2):*
>
> *20.4.1 Article 20.1, 20.2, and 20.3 shall remain in force and effect for the period of January 1, 2001 through to December 31, 2001. Classification reviews and appeals currently not concluded shall be handled through the existing system, or alternatively they may be negotiated to settlement, but in any event they will be dealt with prior to December 31, 2001. No new classification review requests (PAQ) will be considered after the date of signing of this Memorandum of Agreement.*
>
> *and*
>
> *Effective January 1, 2002, the Employer shall provide into a reserve account the sum of $150,000 per year, for a maximum of ten consecutive years. This fund will be used to implement a new job evaluation plan. Any employees in a classification which decreases in pay grade as a result of job evaluation will continue to receive general economic increases negotiated, for as long as they continue to hold that position, or for the first three years after the implementation of the job evaluation plan, whichever is greater. After three years, no general economic increases are to be applied to downward classification decisions.*

> *20.4.2 Articles 20.1, 20.2, and 20.3 shall be suspended effective the date of signing of this Agreement. Effective August 1, 2001, the Employer shall provide into a reserve account the sum of $150,000 for the 2001 calendar year, and an additional $150,000 per year on January 2 each year, for a maximum of nine consecutive years. This fund will be used to implement a new job evaluation plan. In addition, any employees in a classification which decreases in pay grade as a result of job evaluation will continue to receive general economic increases negotiated, for as long as they continue to hold that position, or for the first three years after the implementation of the job evaluation plan, whichever occurs first. After three years, no general economic increases are to be applied to downward classification decisions.*
>
> *and*
>
> *No reviews or appeals shall be dealt with during the period of 2001 through to the implementation date of the new plan; no new classification review requests (PAQ) will be considered after the date of signing of this Memorandum of Agreement.*

[10] The membership of the Union chose the option identified in Article 20.4.2 above, which option was inserted into the language in the final collective agreement as Article 20.4. The effect of Article 20.4 was to suspend the operation of the previous classification system (the "Old System") as of the date of the signing of the Memorandum of Agreement (July 10, 2001) rather than having the Old System continue through the year 2001. It also advanced the funding of the monies to be paid into the reserve account by the City.

[11] How retroactive payments were made to successful applicants for reclassification under the Old System versus how retroactive payments were made under the Job Evaluation Plan is at the heart of the dispute between the City and the Union.

[12] Mr. Melville Grosse, who, at the time these matters were being discussed, was the Employment Compensation Manager for the City, testified that, as a result of the choice the Union had made regarding the language to be inserted in the collective agreement, only employees who had made application under the Old System prior to July 10, 2001, would be eligible for retroactive pay.

[13] The Job Evaluation Committee which was established pursuant to the provisions of the collective agreement developed Terms of Reference for the Job Evaluation Plan as directed. Those Terms of Reference specified, among other things, an appeal process for persons dissatisfied with the results of the Job Evaluation Plan. One of the provisions of that

appeal process was that the grievance procedure under the collective agreement did not apply to the Job Evaluation process[1]. The Terms of Reference were agreed to and executed by the parties on December 17, 2002.

[14] Mr. Grosse also testified that the issue of who would be eligible for retroactive pay was also discussed by the parties when the Terms of Reference were executed on December 17, 2002. His evidence was that the parties were clear; only those who had made application under the Old System as at July 10, 2001 would be eligible for retroactive pay under the new deal.

[15] The work on the Job Evaluation Plan continued towards the proposed implementation of the Job Evaluation Plan. In December 2005, the parties were looking towards implementation of the Job Evaluation Plan and wanted to determine who might be eligible for retroactive pay based upon their having had an application in process as of July 10, 2001. Mr. Bob McNaughton, a Human Resources Consultant, and a member of the steering committee for the Job Evaluation Plan prepared a list (the "Retroactivity List") which set out the names of those persons who as of July 10, 2001:

> *1. had made application under the Old System;*
> *2. were in the same positions as the applicant on the date the application was made under the Old System;*
> *3. who had an outstanding appeal regarding an application under the Old System; and*
> *4. were in the same position as the person who had an outstanding appeal regarding an application under the Old System.*

[16] The Retroactivity List was reviewed by the steering committee for the Job Evaluation Plan and was executed by them on December 7, 2005 to verify their concurrence with the Retroactivity List as presented.

[17] The Retroactivity List was prepared by Mr. McNaughton because he was the person in the Human Resources Department that had control of the files related to classification appeals under the Old System. He prepared the list and forwarded it by email to Mr. Grosse and

[1] See Article 12 h. of the Terms of Reference, being Exhibit E-2 in these proceedings.

members of the steering committee and union executive on November 10, 2005. In Mr. McNaughton's email[2] he says, "[I] will share this list with Dave Ford, on Monday, and as [sic] him to calculate the cost of the "retro pay. (I'll also ask for an estimate of the length of time that will take.)"

[18] The list attached to Mr. McNaughton's email was discussed by the steering committee at its December 7, 2005 meeting. At that meeting, it was agreed that persons who occupied the same position as applicants under the Old System should be added to the list. Those names were added to the list, which was then accepted by the parties as complete. It was then executed by the members of the Steering Committee[3].

[19] At the time the Retroactivity List was being completed, the parties were anticipating that implementation of the Job Evaluation Plan would occur in January of 2006. Unfortunately, when the parties reviewed various scenarios regarding how to implement the Job Evaluation Plan, it was determined that the funds contributed by the City to date, which funds would be used to make payments to those employees entitled to receive the retroactive payments, would be insufficient to allow implementation to occur. The implementation of the Job Evaluation Plan was deferred.

[20] Saskatoon City Council approved additional funds for the plan in early 2007 to allow the plan to move forward in January of 2008. On May 23, 2007, Matt Baraniecki, the President of Local 59, sent an email to Mel Grosse, Bob McNaughton and Marlys Bilanski, as follows:

> *Subject: Job Evaluation*
>
> *1. As per our meeting with our Executive and the Job Evaluation Steering Committee held May 23, 2007, we discussed the question that you have asked.: "do we have to take any of the results from the J.E. process decisions to the membership to ratify for their approval?" (We have also discussed this matter with our legal counsel), and it is our opinion that we do not.*
>
> *We do have bylaws that allow any member to obtain 50 signatures to hold a special meeting to challenge anything they wish.*
>
> *In closing you know that we would encourage our membership to do the right thing.*

[2] See Exhibit E-4 in these proceedings.
[3] The additional names were added as page 1 to Exhibit E-3 in these proceedings.

> *2. The CUPE 59 J.E. Steering Committee would like to meet with the Employer's group and Marlys to discuss direction of "implementation" be it the challenges at payroll (possible additional staff that can be hired or any other concerns that may arise). Please confirm a meeting date through Jim Loucks.*

[21] Mr. Grosse testified that the email from Mr. Baraniecki was in response to a question he had posed to the Union, concerning the ability to move forward to implement the Job Evaluation Plan. He testified that "[W]e (the City) wanted to be sure that we could implement the Joint Job Evaluation."

[22] Even though the City had the comfort of Mr. Baraniecki's Memo of May 23, 2007, Mr. Grosse asked Ms. Judy Schlechte, the City's Director of Human Resources, to prepare a Memorandum of Agreement (the "MOA") between the parties related to the implementation of the Job Evaluation Plan. That MOA would have modified the collective agreement provisions to:

> *1. Specify January 1, 2008 as the implementation date;*
>
> *2. Amend Article 2.04 of the collective agreement to move the date for funding of the City's contributions from January 2 of each year to January 1 of each year; and*
>
> *3. To specify that retroactive pay would only be paid 'to individuals who submitted classification review requests (PAQ) or appealed the results of the classification review prior to July 11, 2001, and which have been identified as requiring upward adjustments..*

[23] In December of 2007, the Union sent its members an update with respect to the implementation of the Job Evaluation Program. Under the heading "Retroactive Pay"[4] in that document, the Union advised its members as follows:

> ***Work Completed in 2007***
>
> *The JE Steering Committee immediately met to resume the process which was halted in December 2005. There was still a lot of work to be done before the JE project could be implemented.*
>
> *We immediately identified the need for staff to do the necessary wage calculations and update the Human Resources/Payroll database, and the Employer hired additional staff in Payroll and Human Resources to do this work. The next decision we made was to create an Implementation Team which includes the Steering Committee members, three members of the CUPE L59 Executive and the staff from Human Resources and Payroll who had been assigned to the*

[4] Exhibit E-8 in these proceedings

project. This allowed us to streamline the decision making process, and at numerous regular meetings we were able to more effectively deal with issues and/or problems as they arose.

When the evaluations were done, we found that many jobs previously grouped together in the collective agreement were evaluated at different levels. Many of the job titles that were very generic are being changed to a job title that is more specific to the actual duties of that job. This will mean that many of the members will see the title for their job change.

Retroactive Pay

The Terms of Reference for the Job Evaluation project state that all wage adjustments that result from JE will be effective on the Date of Implementation and no members will be eligible for retroactive pay, with one exception.
When the Job Evaluation agreement was negotiated in 2001, there were a number of outstanding Reclassification Requests and Appeals that were waiting to be resolved. At that time the membership was presented with two options. Option #1 was to resolve all outstanding Reclassification Requests before starting into the JE project. This would have presented an unpredictable and costly outcome as each request that went to arbitration cost the Local thousands of dollars regardless of the arbitrator's decision, and the results had historically been unacceptable to both the Employer and Local 59. Option #2 was to `table' the outstanding Reclassification Requests and have them dealt with through the JE process with both parties being bound by the results of the Job Evaluation. This meant that the JE Program could be started sooner, the Local would not incur the cost of the appeal process, and the results would not be as 'arbitrary' as they had historically been. The membership voted to accept Option #2.

Under the terms of the Agreement that dealt with the outstanding reclassification, if the wage for a job changed as a result of JE, employees who were named on the original PAQ (position analysis questionnaire) were entitled to retroactive pay, back to the first pay period following the date the PAQ was originally submitted to Human Resources. It was agreed to by the membership at the July 9, 2001 ratification meeting, that to be fair to those members who had these ***outstanding Reclassification Requests tabled, they would continue to be entitled to any retroactive pay that they would have received had their reclassification request not been tabled in favour of the new Job Evaluation Program.***

Some of these PAQs were originally filed a number of years ago, and these members have waited a very long time for this pay. The Employer has agreed to cover the cost of this retroactive pay, over and above the cost of implementing the JE project.

Background

This background is intended to reacquaint existing members with, and introduce new members to the Job Evaluation Agreement between the City of Saskatoon and CUPE Local 59.

Prior to the contract between the City of Saskatoon and CUPE Local 59 that was ratified on July 9, 2001, classification of new positions and reclassification of existing positions were governed by Article 20 of the contract. The July 2001 contract agreement included a commitment by both parties to enter into the Joint Job Evaluation project and Articles 20.4 and 20.5 were added to the contract:

> ***Article 20. Classification Review***
>
> *20.1 All reclassifications, or the creation of new positions of a nature not already classified in this Agreement, shall be the subject of prior negotiation and agreement by the parties hereto.*
>
> *20.2 If agreement cannot be reached on the wage, the dispute shall be submitted to arbitration in accordance with the arbitration procedure as outlined in Article 12 of this Agreement.*
>
> *20.3 For the term of this Agreement, and subject to mutual agreement thereafter, the Letter of Understanding regarding new or reclassified positions shall apply.*
>
> *20.4 Articles 20.1, 20.2, and 20.3 shall be suspended effective* ***July 10, 2001.*** *Effective August 1, 2001, the Employer shall provide into a reserve account the sum of $150,000 for the 2001 calendar year, and an additional $150,000 per year on January 2 each year, for a maximum of ten (10) consecutive years. This fund will be used to implement a new job evaluation plan. In addition, any employees in a classification which decreases in pay grade as a result of job evaluation will continue to receive general economic increases negotiated, for as long as they continue to hold that position, or for the first three (3) years after the implementation of the job evaluation plan, whichever occurs first. After three (3) years, no general economic increases are to be applied to downward classifications decisions.*

[24] The City's view of the Union's position with respect to the payment of retroactive pay was also supported by numerous exchanges of emails between Union members and members of the steering committee and Mr. McNaughton, which were placed in evidence through Mr. McNaughton's testimony. The responses made by the Union to inquiries by its members were consistent with the outline of the way retroactive pay would be paid as set out in the Union update in December, 2007.

[25] As late as January 29, 2008, the Union was circulating information to its members explaining how retroactive payments were calculated[5]. In an email from Ms. Stacy Sokalofsky to the Union office, she attached a copy of a draft of "Information for CUPE Local 59 Members Receiving Retroactive Pay upon Completion of Job Evaluation." That document read, in part, as follows:

> *Who is entitled to receive retro pay:*
>
> - *Those members who had completed a PAQ and were waiting for results from JE.*

[5] See Exhibit E-27 in these proceedings

- *Amounts were given for the time worked in the evaluated position. If there was a temporary reassignment, the retro pay stopped while that assignment occurred and continued once the person returned to the position.*
- *If the employee bid out of the reclassified position, the retro pay stopped, even if that position was also reclassified.*
- *Only employees currently employed by the City of Saskatoon were calculated unless a written request was provided by the former employee.*
- *If the position was reclassified at a lower rate than what was earned, the amount was not deducted, but that position was red circled.*

[26] This summary of the way in which retroactive pay would be paid, the City's witnesses testified, was in accord with its understanding concerning that issue. It was also in accord with the MOA drafted by Ms. Schlechte. That MOA was forwarded to Mr. Baraniecki by Ms. Schlechte on December 18, 2007.

[27] The City proceeded with the implementation of the Job Evaluation Plan on January 1, 2008. Payments for retroactive pay were made by the City in accordance with the draft MOA and based on the Retroactivity List approved by the parties. The City acknowledged in its testimony, that there were some employees (principally those who had left the City's employment during the Job Evaluation Plan process) who had not been paid in accordance with the MOA and, based upon the principles upon which the Retroactivity List had been developed, but that they were working with the Union to identify such persons to make the necessary adjustments.

[28] By January 17, 2008, after the City had implemented the Job Evaluation Plan, Ms. Schlechte, who had been on vacation, contacted Mr. Baraniecki to follow up on the execution of the MOA. On January 18, 2008, The Union advised Ms. Schlechte that they would not agree to execute the MOA saying, "[T}his has been addressed with our Executive and our past presidents including our servicing rep and legal counsel. All matters around J.E. language necessary to implement the plan are stated in Article 20."[6]

[29] Ms. Schlechte testified when she discussed the Union's refusal to execute the MOA with Mr. Baraniecki, that Mr. Baraniecki advised her that the Union didn't want to take an unnecessary document to the membership. They (the Union) were going to implement the MOA. She testified that Mr. Baraniecki did not express concern about any of the terms of the MOA, that his tone of voice on the telephone was normal and not agitated. She testified that his approach

to her "did not raise any red flags." She was of the view that the Union felt there was nothing wrong with the MOA, but simply didn't want to take it back to the membership.

[30] On April 16, 2009, the Union filed a policy grievance related to "Reclassification Issues." The grievance reads in part:

> *The employer has not been consistent in the manner that it has dealt with outstanding reclassifications. "No new reclassification requests were to be considered pending the Joint Job Evaluation results and implementation." There were a number of reclassifications requests [sic] that remained outstanding until the implementation date of January 1, 2008. Any back pay owed to individuals as a result of the JJE was to be paid retroactively to the date of the request. There have been a number of individuals that have approached the union indicating that* ***this was not done consistent to the prior method of dealing with reclassifications.*** *[emphasis added]*

Summary of the Parties Positions:

[31] This claim by the Union, that the City had not made retroactive payments "consistent to the prior method of dealing with reclassifications", is at the heart of the dispute. The City claims that this amounts to a repudiation of the Union's agreement as to how and to whom retroactive payments would be made. The City views the Union's demand as contained within the grievance as a reversal of the Union's position which it espoused to the City throughout the process as evidenced by the Union signing the Retroactivity List and how the issue was dealt with in its update publication in December of 2007. They maintain that after they have, in good faith, paid large sums of money to individuals they believe to be entitled to receive those monies (in accordance with the draft MOA and the Retroactivity List), that the Union has now recanted their position which gives rise to their allegation that the Union has not bargained in good faith.

[32] The Union denies that they have recanted their position. The Union claims that they are now simply attempting to assert the provisions of the collective agreement as they were written and want that matter referred to an arbitrator for an interpretation of the wording of the collective agreement.

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[6] See Exhibit E-28 in these proceedings

Relevant statutory provision:

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

> *2. In this Act:*
>
> *(b) "bargaining collectively" means negotiating in good faith with a view to the conclusion of a collective bargaining agreement, or a renewal or revision of a bargaining agreement, the embodiment in writing or writings of the terms of agreement arrived at in negotiations or required to be inserted in a collective bargaining agreement by this Act, the execution by or on behalf of the parties of such agreement, and the negotiating from time to time for the settlement of disputes and grievances of employees covered by the agreement or represented by a trade union representing the majority of employees in an appropriate unit;*
>
> *. . .*
>
> *(d) "collective bargaining agreement" means an agreement in writing or writings between an employer and a trade union setting forth the terms and conditions of employment or containing provisions in regard to rates of pay, hours of work or other working conditions of employees;*
>
> *. . .*
>
> *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;*
>
> *. . .*
>
> *18. The board has, for any matter before it, the power:*
>
> *. . .*
>
> *(l) to defer deciding any matter if the board considers that the matter could be resolved by arbitration or an alternative method of resolution;*

Preliminary Application for Deferral to Arbitration:

[34] The Union made an application at the outset of the hearing to have the Board defer to the arbitrator who had been appointed to hear this matter in accordance with s. 18(i) of

the *Act*. In their submission, the Union argued that deferral to arbitration in this case would be consistent with the Board's usual practices. They argued that the pleadings (the application and the reply) set out all of the facts, none of which were in dispute, necessary for the Board to make a determination that the matter should be deferred. The Union also argued that it was not repudiating the agreement, merely seeking an interpretation of the agreement.

[35] In reply to the Union's application, the City acknowledged that the complaint against the Union crystallized with the filing of the grievance by the Union. However, the City denied that it was the filing of the grievance that was the basis for the unfair labour practice application, but rather, the filing of the grievance by the Union was symptomatic of the repudiation of the agreement by the Union. The City argued that the Board was being asked not to interpret the agreement between the parties, but rather to determine if the parties had reached an agreement, and if that agreement had been repudiated by the Union, did that conduct contravene the provisions of the *Act*.

[36] The City argued that the matter to be considered by the Board and the arbitrator were separate and distinct matters. They argued that the Board should not attempt to determine the "essential character" of the dispute without hearing evidence regarding the issues in dispute. They argued that the City and the Union had reached an agreement as to the treatment of retroactive pay, but that the Union had repudiated that agreement. Therefore, the issue was not the interpretation of the collective agreement, but if, the Union by its action in repudiating the agreement, was not acting in good faith.

[37] The City also argued that the matter of how retroactive payments were to be made was settled by the parties. It was only after the City had, in good faith, made the payments in accordance with that agreement, that anomalies began to appear and unhappy Union members, impacted by the agreement, began to make their discontent known to the Union. In the face of that discontent, the Union chose to repudiate its earlier agreement concerning retroactive payments.

[38] In the City's submission the issue was not how the agreement between the parties should be interpreted, but rather was there an agreement between the parties that the Union is either refusing to honour, or has, by its conduct, repudiated.

Preliminary Decision on Deferral to Arbitration:

[39] The Board considered the materials filed with respect to the application, the arguments of the parties and the written briefs filed by the counsel for the parties, for which the Board was appreciative. As the Board had not, at the time the application was being considered, heard any of the evidence referenced above, that evidence was not, of course, considered in reaching a decision of the preliminary motion.

[40] For the reasons which follow, which reasons were given orally at the hearing, the application for deferral of the matter to arbitration pursuant to s. 18(l) of the *Act* was denied.

[41] The Board did not feel that it had sufficient information/evidence at this stage of the proceedings to determine with precision the essential character of the dispute.

[42] Based upon the submissions of the parties, the Board could see two (2) distinct issues:

(a) The unfair labour practice as to whether the Union has bargained in bad faith regarding the Job Evaluation and the retroactivity issue. This issue is important as it appears to be impacting on the fundamental labour relations relationship between the parties, which is a mature relationship, one which the Board would seek to restore and preserve; and

(b) The grievance which relates to the interpretation of the agreement. The problem appears to relate to what the agreement is or was and what is to be interpreted.

[43] The Board does not intend to usurp the authority of an arbitrator under s. 25(1) of the *Act*. Care will have to be taken to insure that the Board does not stray into the Arbitrator's jurisdiction under the collective agreement.

[44] The authority granted to the Board under ss. 2(b) & (d) and 11(2)(c) is exclusive to the Board and cannot be exercised by an arbitrator.

[45] The power to defer to an arbitrator contained in ss. 18(l) is one which is exercisable by the Board in its discretion. The Board would not exercise this discretion in this case as it fails to meet the criteria set out in *United Food & Commercial Workers (UFCW), Local 1400 v. Westfair Foods Limited* [7]:

> *(a) the disputes are not the same. They may be locked and interrelated, but in substance they are not the same dispute.*
>
> *(b) an arbitrator cannot deal with the labour relations issues between the parties as exemplified in the unfair labour practice. The Board is very concerned where allegations such as this (reneging on an agreement) are made in the context of a mature labour relations relationship.*
>
> *(c) remedies are different. The Board will not deal with entitlements to retroactive pay. That is, or will be left to arbitrator. He/She will give economic remedies, if appropriate, to affected parties. The Board will deal with the labour relations relationship between parties and the conduct of that relationship pursuant to ss. 2(b) & 11(2)(c) of the Act.*

Application for Non-Suit:

[46] At the close of the City's case, the Union made application to the Board for a non-suit on the basis that the evidence presented did not give rise to a *prima facie* case which the Union could meet. The Board heard argument on this point and also requested the parties to give its thoughts to the Board as to whether or not the Union should be required to elect not to call any evidence in the event its application was unsuccessful. The Board requested these submissions in order that it could, through this decision confirm the Board's practice in respect of applications for non-suit.

[47] The Board discussed the issue of non-suits and the Board's policy concerning whether an election should be required or not in the *Lee Brock v. Retail Wholesale and Department Store Union, Local 539 and Sherwood Co-operative Association* [8]. In that case, the Board considered the rationale for the requirement for an election as well as the distinction between cases where there had been no evidence advanced versus cases where the sufficiency of evidence is at issue. In that decision, the Board clearly distinguished between the two situations.

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[7] [1992] S.J. No 425, 95 D.L.R. (4th) 541, [1992] 6 W.W.R. 481, 105 Sask. R. 17
[8] [1992] S.L.R.B.D. No. 37, 17 C.LR.B.R (2nd) 152, LRB File No. 211-92

[48] The Board in *Brock, supra,* also reviewed the history of the current provision in Rule 278A of *The Queen's Bench Rules of Saskatchewan* which provides for an application for non-suit without an election as to whether or not the applicant will call evidence. That rule, the Board suggested in its decision in *Brock, supra,* arose from the Judgment of the Court of Queen's Bench in *Bank of Nova Scotia v. Omni Construction*[9]*.*

[49] In *Brock*, *supra*, the Board was not sure whether the wording in Rule 278A was intended to cover both of the possible grounds for motions to dismiss. The Board did take the view that the distinction between the two grounds which had been expressed by the BC Industrial Relations Council in *Western Versatile Construction Corp. and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry*[10] had some merit. In that case, the BC Board says, at p. 62

> *In conclusion, therefore, the panel approves of the procedure that is utilized before the civil courts in British Columbia and by both the Canada Labour Relations Board and the English Tribunals; where a motion is brought to the effect that there is no evidence then the panel has a discretion whether or not to put the applicant to his election. Where the motion is one of insufficient evidence the panel would normally put the applicant to an election.*

[50] The determination by the Board in *Brock, supra* was a departure from the Board's former practice as outlined in *Belfour et al* v. *Beaver Foods Limited and CVC Services and Hotel Employees and Restaurant Employees, Local 767*[11] which was that the Board would, in all cases, require an election to be made before considering an application for non-suit.

[51] The Board again canvassed the issue in *Saskatchewan Government and General Employees' Union v Mitchell's Gourmet Foods Inc. et al*[12]. The Board quoted with approval from p. 941 of the Ontario Labour Relations Board decision in *Hurley Corporation*[13] where the Ontario Board says:

> *The Board is satisfied that it has a discretion to decide whether or not to put a party making a motion for non-suit to its election, prior to entertaining the motion itself. Provided its discretion is exercised in a fair manner, consistent with natural justice, the Board is entitled, in given circumstances, to decline to put the party to its election. In this regard, the Board will no doubt consider all of the*

[9] [1981] 10 Sask. R. 79
[10] [1988] 1 C.L.R.B.R. (2nd) 58
[11] [1990] Winter Sask. Labour Rep. 49, LRB File No. 237-89
[12] [1999] Sask. LR.B.R. 577, LRB File Nos. 115-98 & 151-98
[13] [1992] OLRB Rep. August 940

> *circumstances, including the need for fair, efficient and expeditious proceedings before the Board. In our view, fairness and natural justice do not demand that, in every case, the moving party must make its election. To so conclude would be to fetter our discretion…*

[52] At paragraph 16 of the *Mitchell Gourmet Foods* case, *supra,* the Board also considered another Ontario decision which had expended the factors the Board should consider. It says:

> *In Martel v. Labourers' International Union of North America, Local 493, [1996] O.L.R.D. No 1119 (April 4, 1996), the Ontario Board identified several factors that tribunals have considered in determining whether it is fair and reasonable to put a party to its election, including: whether permitting the non-suit without an election will either delay or expedite the proceedings; the impact of any decision in terms of the costs of the proceedings; the policy against requiring a party to respond to allegations of wrongdoing where there is no case for it to meet; whether hearing the non-suit without requiring an election would give either party an unfair or undue advantage; and, the interest in making a decision based on hearing all of the evidence. It described the function of the Board on a non-suit motion as the function of the Board at the non-suit will be to determine whether the applicant has adduced sufficient evidence to sustain any or all of his complaints. Where the Board finds that the applicant has failed to satisfy that test, it would appear to be fair and just to terminate those aspects of the complaint, if any, without putting the respondent to the unnecessary expense of mounting a defence to an unproved allegation.*
>
> *In order not to permit any advantage to the responding party, the Board will confine its ruling to the non-suit to a declaration whether or not there is some evidence upon which the complaint(s) could be sustained. Accordingly, the responding party will not be given any guidance on how to present its case.*

[53] These guiding principles seem to have been forgotten in the ensuing years. In the Board's decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Retail, Wholesale and Department Store Union, Local 568* and *Retail, Wholesale and Department Store Union, Local 558 v. Canadian Linen and Uniform Service Co.* [14] at paragraph [23], the Board says:

> *After the close of the case for the Union, Ms. Torrens, of counsel on behalf of the Employer, **made a motion for non-suit without election, as is the practice before the Board**. The Board heard the arguments of the parties, summarized as follows, and reserved decision on the motion. [Emphasis added]*

[54] Counsel for the Union in his response to the Board regarding the Board's inquiry regarding its policy concerning whether an election should be required, appeared to be of the view that the Board's policy was to permit an application for non-suit to be made in all cases

[14] [2004] CanLII 65625, [2004] Sask. L.R.B.R. 69, LRB File Nos. 062-02 & 090-02

without any requirement to make an election regarding the calling of evidence. There does, however, seem to be no support in the jurisprudence of the Board for this conclusion nor for the comment, albeit, in the circumstances of the *Canadian Linen c*ase, *supra*, that determination may have been justified.

[55] The Board wants to restate and emphasize the Board's policy as stated in *Mitchell's Gourmet Foods*,[15] that the Board has a discretion as to whether or not it will allow an application for non-suit to proceed without election. In so doing, it will consider, *inter alia*, the factors referenced by the Board therein.

[56] In the present case, the Board allowed the Union to bring its application for non-suit without requiring it to make an election. This was based primarily upon counsel's advice that he may not, in any event, call any evidence. In the final result, as noted above, only one brief witness was called by the Union, Ms. Lamon.

[57] In making its application for non-suit, the Union argued that the City had failed to bring forward any evidence to prove its allegations of an unfair labour practice. Counsel also repeated the arguments made with respect to its motion for deferral of the matter to arbitration arguing that the evidence showed that the matter belonged before an arbitrator, not before the Board.

[58] The Board dismissed the Union's application for a non-suit without the necessity of hearing from counsel for the City. The Board was satisfied based upon the test set out in *Mitchell's Gourmet Foods*, that the City had made out a *prima facie* case. As noted in that case, a "motion for non-suit cannot succeed if there is some evidence upon which the Board could return a finding" that the alleged unfair labour practice has occurred. In keeping with the admonition in *Mitchell's Gourmet Foods, supra*, the ruling by the Board was restricted to a declaration whether or not there is some evidence upon which the complaint(s) could be sustained, in order to permit no advantage to be gained by the applicant.

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[15] *Supra,* at footnote 12

Analysis and Decision:

[59] The Board was aware, as noted in its decision concerning the application from the Union for deferral of the application to arbitration, that the issue raised in these proceedings was having an impact on effective labour relations between the parties. One of the primary purposes for the Board's existence is the promotion of harmonious labour relations. The Board, in formulating this decision has taken care, by its decision, to attempt to minimize the impact on the state of labour relations between the parties. As noted in our preliminary ruling, the relationship between the parties is "a mature relationship" one which the Board would seek to restore and preserve.

[60] From the evidence which was presented, there are two aspects to the alleged unfair labour practice. One of these is the conduct of the Union with respect to allegedly repudiating the agreement regarding how retroactive payments were to be made. The second is the failure by the Union to ratify the MOA.

Alleged Repudiation by the Union:

[61] The Board has dealt with the duty to bargain and the duty to bargain in good faith in many of its decisions. However, on a review of those decisions, the Board has not discovered any decisions that are directly on point with this factual situation.

[62] The duty to bargain in good faith derives from reading the provisions of ss. 2(b) and 11(2)(c) of the *Act* together. Section 11(2)(c) makes it an unfair labour practice "to fail or refuse to bargain collectively." Section 2(b) defines "bargaining collectively" as meaning to negotiate "in good faith with a view to the conclusion of a collective bargaining agreement." However, s. 2(d) defines a "collective bargaining agreement" as being "an agreement in writing."

[63] The parties did reach a collective bargaining agreement when the Job Evaluation Plan was negotiated in 2001. The plan was incorporated into the collective agreement between the parties. The agreement with respect to the Job Evaluation Plan provided for ongoing consultation and co-operation between the parties related to the formulation of the Job Evaluation Plan, the evaluation of positions in accordance with the plan and the implementation of that plan.

[64] This Board has historically held that the duty to bargain in good faith is not restricted to the conduct of the parties at the bargaining table when a collective agreement is being negotiated, but rather that the duty is not "limited to the negotiation or administration of a collective agreement. It embraces all aspects of the relationship between and employer and employees…"[16] Similarly, the Board extended the duty beyond the mere processing of grievances.

[65] In *Saskatchewan Union of Nurses v. Regina Qu'Appelle Health Region*[17], at paragraph 68, the Board says:

> *The decision in Western Canada Beef Packers[18], supra makes it clear that the obligation to bargain in good faith can be found outside of negotiations for a collective agreement as well as negotiations for the resolution of formal grievances. Although this case involved a finding of a violation of s. 11(1)(d) for the employer's failure to allow a union representative to come to the workplace to discuss grievances, the Board noted that the scope of the obligation to negotiate the settlement of disputes and grievances exists quite apart from the grievance procedure. …*

[66] It is clear from the evidence provided to the Board that the City and the Union proceeded, in good faith, to fulfill their collective commitment to the Job Evaluation Plan. They struck a Employer/Employee committee, formulated and approved terms of reference, developed a plan for implementation, evaluated and discussed all the job descriptions, agreed on the persons who would be entitled to receive retro-active payments related to their job evaluation, and endorsed their approval thereon. And, most importantly, they induced the City to act to implement the plan in accordance with the terms agreed for implementation and to make payments to employees entitled to retroactive payments in accordance with the terms that they had both agreed with the City, as a part of the process and also which they had communicated to their members both in their newsletter and by numerous emails to and from employees that were interested in the outcome of the payments being made for retroactive pay.

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[16] *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Regina Exhibition Association Limited,* [1993] 4th Quarter Sask. Labour Rep. 216, LRB File No. 256-93 to 260-93
[17] [2007] Sask. L.R.B.R. 490, 143 C.L.R.B.R. (2d) 1, LRB File No. 133-05
[18] *United Food and Commercial Workers International Union, Local 226-2 v. Western Canadian Beef Packers Inc.,* [1998] Sask. L.R.B. R. 743, LRB File No. 026-98

[67] It was not until the City had, in good faith, and relying upon the process and agreements that the parties had made concerning how and to whom retroactive payments were to be made, that the Union recanted its position and both refused to execute the MOA proposed by the City, and took steps, through the grievance procedure to suggest an alternate interpretation as to how the retroactive payments should be made. The Union's conduct, in so doing, was a violation of its duty to bargain in good faith.

Failure to Ratify the MOA:

[68] For the reasons outlined above, and based upon the evidence presented to the Board, the conclusion is that there was an understanding between the parties as to how the retroactive payments were to be made. The MOA was provided by the City to the Union for the express purpose of committing this understanding to writing, in accordance with the requirements of the *Act* that collective agreements be in writing.

[69] There are numerous Board decisions and decisions from other jurisdictions which make it clear that the refusal to execute such an MOA constitutes a violation of the duty to bargain in good faith.[19] In this case, the Union did not, at the outset, based on the testimony of Ms. Schlechte who testified that when she discussed the Union's refusal to execute the MOA with Mr. Baraniecki, that he advised her that the Union didn't want to take an unnecessary document to the membership. It was not until April, well after the City had expended considerable sums in making retroactive payments that the actual refusal to execute the MOA occurred in the context of the grievance application.

[70] The Board is satisfied that this refusal to execute the MOA is also a breach of the duty to bargain in good faith.

Remedy:

[71] In cases like this, the remedy to be ordered is difficult. As we have noted before, the primary purpose of the Board is to promote harmonious labour relations between the parties

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[19] See *St. Thomas More College v. St. Thomas More College Faculty Union (1977),* [2008] S.L.R.B.R. No. 2, CLLC para 220-024, 148 C.L.R.B.R. (2nd) 291, LRB File No. 123-07, *Canadian Union of Public Employees v. Potashville School Division No. 80,* [2000] Sask. L.R.B.R. 231, LRB File No. 206-98, *Prince Albert Police Association and Prince Albert Board of Police Commissioners* [1998] Sask. L.R.B.R. 296 , LRB No. 005-97, *University of Regina Faculty Association v. Saskatchewan Indian Federated College* [1995] 1st Quarter Sask. Labour Rep. 139, LRB File No. 217-94, and cases referred to in those decisions.

and to supervise their conduct *vis a vis* each other toward the promotion of that goal. Clearly as noted in our decision concerning deferral of this matter to arbitration, this issue is causing considerable friction and is damaging the former good relations between the parties in their mature labour relations relationship.

[72] As noted by the Board in *St. Thomas More*[20] at paragraph 87, the overriding goal of the Board is to put the "Employer in the position that it would have been but for the Union's unfair labour practice. A remedy should not be punitive but should support and foster healthy collective bargaining, which is an underlying purpose of the *Act*."

[73] In keeping with that philosophy, this Board hereby orders:

(1) **THAT** the Respondent shall, within five (5) business days of receipt of this decision, execute and deliver the Memorandum of Agreement as drafted by the Applicant to the City of Saskatoon;

(2) **THAT** the Memorandum of Agreement shall be dated and be effective from and after December 31, 2007. Fully executed copies shall be returned to the Respondent immediately thereafter; and

(3) **THAT** a copy of the shall be posted on all employee bulletin boards to which employees of the Applicant have access.

DATED at Regina, Saskatchewan, this **30th** day of **November**, **2009.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson

[20] Supra at footnote 19