The Labour Relations Board
Saskatchewan

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKS INTERNATIONAL UNION (UNITED STEELWORKERS), LOCAL 7458, Applicant v. POTASH CORPORATION OF SASKATCHEWAN INC. (CORY DIVISION), Respondent

LRB File No. 026-09; March 17, 2010
Vice-Chairperson, Steven Schiefner; Members: Maurice Werezak and Clare Gitzel

For the Applicant Union: Mr. Gary L. Bainbridge
For the Respondent Employer: Mr. Kevin C. Wilson, Q.C.

Duty to bargain in good faith – Mid-term bargaining – Union alleged Employer violated duty to bargain exclusively with bargaining agent - After consultation with Union, Employer advised employees of opportunity to waive all or portion of accumulated vacation entitlement contrary to wishes of Union – Union alleged Employer's proposal involved terms or conditions of workplace and Employer's action in flagrant disregard for Union's role as exclusive bargaining agent – Board finds Employer's proposal occurred outside statutory "open period" and not something Employer was required to negotiate with Union.

The Trade Union Act, ss. 2(b), 3, 11(1)(c)

REASONS FOR DECISION

Background:

[1] **Steven D. Schiefner, Vice-Chairperson**: The United Steelworkers, Local 7458 (the "Union") is the certified bargaining agent for all employees (with certain named exclusions) employed by the Potash Corporation of Saskatchewan Inc. (the "Employer") at its potash mine located near Cory, Saskatchewan. The Employer's operations at the Cory mine include both underground potash mining operations and surface refining operations. These facilities generally operate on a continuous basis, involving both employees and contract service providers.

[2] On March 23, 2009, the Union filed an application with the Saskatchewan Labour Relations Board (the "Board") alleging that the Employer had engaged in an unfair labour practice within the meaning of s. 11(1)(c) of *The Trade Union Act*, R.S.S. 1978, c.T-17 (the "*Act*") by failing to bargain collectively with the Union (the "application"). Specifically, the Union alleged

that the Employer failed to bargain with the Union as the exclusive bargaining agent by communicating directly with employees and providing them with the option of waiving all or a portion of their respective accumulated vacation entitlements contrary to the express wishes of the Union.

[3] On April 13, 2009, the Employer filed a Reply with the Board denying the Union's allegations.

[4] The Union's application was heard by the Board on January 18, 2010 in Saskatoon.

[5] The Union called Mr. Randy Rounce, the President of the United Steelworkers, Local 7458. The Employer called Ms. Kavita Britton, the Employer's Superintendent of Human Resources.

Facts:

[6] The evidence relevant to these proceedings was not significantly in dispute. Certainly, the tenor of the evidence with respect to the relevant events, including meetings and/or conversations between management and representatives of the Union, was largely consistent. Mr. Rounce admitted uncertainty in his recollection as to the dates when the meetings and/or conversations took place. As a consequence, we have preferred the evidence of Ms. Britton in recounting the timeline of events. The Board found both witnesses to be thoughtful, credible and forthright in their testimony.

[7] The parties have a mature bargaining relationship and have negotiated collective agreements from time to time, with the last such agreement having a term of operation of November 14, 2008 to April 30, 2011 (the "collective agreement").

[8] The matters in issue relative to the Union's allegations against the Employer relate to the provision of annual vacation (holiday) leave and pay. At the relevant time, the parties had negotiated a somewhat unusual method of providing employees with vacation entitlements; or rather, a somewhat unusual practice of temporally separating the monetary payment for annual vacation leave from the period during which such leave was actually taken by employees. By agreement, each employee was paid his/her respective annual vacation pay

in advance (i.e. at the start of the vacation year) based on that employee's anticipated holiday entitlement during the upcoming vacation year. Employees were then expected to "take" their annual leave prior to the expiration of that vacation year. In this context, the word "take" is a euphemism for scheduling a period during which the employee would not be working. During this period (i.e. when the employees were "taking" their holidays, so to speak), the employees were on unpaid leave because they have already been paid by the Employer for their respective vacation entitlements for that vacation year.

[9] The vacation year at issue in the application ran from July 1, 2008 to June 30, 2009 (the "2008-2009 vacation year"). As a consequence of the foregoing practice, on July 1, 2008 the members of the bargaining unit were paid a sum equivalent to their anticipated vacation entitlement and were expected to take their corresponding unpaid vacation leave prior to June 30, 2009.

[10] However, as it turned out, the 2008-2009 vacation year was unusual for a number of reasons. Firstly, the members of the Union engaged in a strike from August 7, 2008 until November 13, 2008. As a consequence, the period during which the employees could take their vacation time for that vacation year was reduced by approximately three (3) months. Secondly, in response to lagging sales of potash, the Employer planned an "inventory correction"; a period during which the production of potash would cease or be reduced, allowing current inventories to be reduced and/or to prevent excessive inventories from accumulating. The Employer's planned inventory correction was anticipated to take place from March 22, 2009 until May 16, 2009. As a consequence, the period during which employees could take their vacation time for the 2008-2009 vacation year was anticipated to be further reduced by approximately two (2) additional months.

[11] Prior to announcing the inventory correction and posting notices of concomitant layoffs, the Employer met with the Union to discuss the upcoming layoffs, which were anticipated to involve a large number of employees. This meeting took place on or about February 9, 2009, to which both Ms. Britton and Mr. Rounce were present. Ms. Britton testified that it had been approximately four (4) years since the Employer had been required to issue layoff notices (for an inventory correction) and this was her first experience in doing so. From Ms. Britton's perspective, the purpose and goal of the meeting was to discuss the impending layoff notices and to ensure the Employer was conducting itself in compliance with the collective agreement.

During this meeting, the parties discussed and agreed upon the appropriate procedure to be utilized for issuing layoff notices.

[12] During this meeting, the Employer also discussed with the Union the potential of allowing employees to "waive" their vacation entitlement. Section 37 of *The Labour Standards Act*, R.S.S. 1978, c. L-1, permits employees and employers to enter into written agreements to, in effect, remove the obligation on employers to provide, and the corresponding obligation on an employee to take, annual holiday leave that would otherwise be required by operation of *The Labour Standards Act*.

[13] The Employer believed that allowing employees to waive or forego their vacation entitlement could be potentially beneficial to both the employees and the Employer. The employees could benefit by being allowed to earn addition money during the 2008-2009 vacation year by working during the period they would otherwise be obligated to be on unpaid vacation leave. The Employer could benefit by reducing the accumulation of vacation entitlement. At this point in time, the Employer's records indicated that there was an accumulation of approximately 3,000 hours of vacation entitlement for surface workers and approximately 6,000 hours of vacation entitlement for workers in underground operations. Although the accumulation of vacation hours was not a monetary concern for the Employer, it was a concern with respect to operation management.

[14] Both the Employer and the Union recognized that, between the strike and the planned inventory correction, the available period during which employees could take their vacation entitlement would be reduced during the 2008-2009 vacation year by approximately five (5) months. The Employer proposed to the Union that employees be given the option of waiving all, or a portion of, their remaining vacation entitlement for that vacation year. The Employer proposed this as a voluntary option for employees, exercisable at their discretion.

[15] The Union's initial response to the Employer's proposal was "*no*" (i.e. that employees should not be given the option to do so). Mr. Rounce testified that the Union was concerned that waiving vacation entitlements would establish an undesirable precedent. For several collective agreements, the Union had been seeking to increase vacation entitlements for their membership and the Union was concerned that, allowing members to give up their vacation entitlement, even on a one-time basis, could weaken the Union's bargaining position on this

issue in the future. Ms. Britton testified that the Employer offered to make this arrangement a "*one time deal*" and attempted to provide assurances to the Union that the Employer would not use this one unique situation against the Union in future negotiations.

[16] Suffice it to say, discussions with respect to the waiver of accumulated vacation entitlements were not the primary concern of either management or representatives of the Union at this point in time. Mr. Rounce testified that his primary concern was preserving jobs for the membership by encouraging the Employer to maximize the use of members of the bargaining unit and to reduce the number of contractors being used during the shut down. Ms. Britton's primary concern was properly conducting a large scale layoff of the company's employees and compliance with the collective agreement in doing so.

[17] Meetings occurred between management and the Union over the next few days involving both Ms. Britton and Mr. Rounce. During these meetings, the parties were discussing issues related to the inventory correction and the issuance of layoff notices. Ultimately, the parties agreed that below a certain seniority line, employees would receive layoff notices and, above that line, they would not. During these meetings, the Employer renewed its desire to give employees the option of waiving all or some portion of their accumulated vacation entitlement. The Employer bolstered its argument by stating that management had been approached by employees desiring this option. While maintaining their objection, the Union executive decided that it may be useful to poll their membership on the issue; an action the Employer endorsed and, in fact, permitted members of the executive to do so on work time.

[18] Ms. Britton testified that the Employer, in considering the option of allowing employees to waive the respective vacation entitlement, believed that management had the right to offer this option to its employees irrespective of the Union's wishes. Nonetheless, the Employer consulted with the Union before it did so, albeit advising the Union of management's belief that, as the collective agreement was silent on this particular issue, management believed it had the right to proceed irrespective of the Union's wishes. The Employer and the Union reviewed specific sections of *The Labour Standards Act* during their discussions around the Employer proposals, with the Employer seeking to persuade the Union to agree and the Union being reluctant to do so.

[19] On or about February 11, 2009, the Union had concluded the survey of its membership, the results of which indicated that approximately eighty percent (80%) of the membership were not interested in taking part in the Employer's proposal. On the basis of this survey, the Union took the position that the majority of the membership had spoken on the issue. To which end, the Union indicated that it was opposed to the Employer giving individual employees the option of waiving their respective vacation entitlements. The Employer again attempted to persuade the Union otherwise, but failed to do so. The Union's position was that the Employer should allow the employees to carry over their respective unused vacation entitlement into the next vacation year, something the Employer did not wish to do. The discussions with respect to the Employer's proposal were left with the parties "*agreeing to disagree*."

[20] On or about February 12, 2009, the Employer formally announced the inventory correction and posted notices of layoff in accordance with the Union's collective agreement. Both Ms. Britton and Mr. Rounce were away from work from February 13 to 20, 2009 and no discussions took place between the parties until February 25, 2009.

[21] On February 25, 2009, the Employer advised the Union of its intention to offer the proposal that had been earlier discussed with the Union, to its employees. To which end, the Employer posted notices at the workplace advising employees of the option of forgoing all or a portion of their remaining vacation time and indicating how employees interested in doing so could get the requisite forms.

[22] Section 37 of *The Labour Standards Act* provides that, for employees and employer to avoid the prescribed obligations with respect to providing and taking vacation leave, they must enter into a written agreement and that these agreements must be filed with the Director of the Labour Standards Branch. The Employer prepared boiler-plate agreements (i.e. forms) to be executed by employees and filed by the Employer in compliance with the statutory obligation. In the end, approximately twenty (20) employees entered into agreements with the Employer and these agreements were filed the Director of the Labour Standards Branch in accordance with the requirements of *The Labour Standards Act*.

[23] Finally, Ms. Britton testified that, except for the employees who agreed to forego a portion of the vacation entitlement, all other employees "took" their respective vacation entitlements before the end of the 2008-2009 vacation year.

Argument of the Parties:

The Union's Argument:

[24] The Union alleged that the Employer committed an unfair labour practice by bargaining individual waiver agreements with individual employees to the exclusion of the Union. The Union noted the uncontested evidence that the Employer sought to enter into individual agreements with individual employees regarding the waiver of vacation entitlements. The Union argued that the Employer's actions in doing so constituted a flagrant disregard for the Union's role as the exclusive bargaining agent in the workplace for all terms and conditions of employment. The Union argued that the Employer's action was particularly egregious because it did so contrary to the express wishes of the Union.

[25] The Union argued that it is no defense for the Employer to argue that some employees wanted to waive their vacation entitlement or that the arrangements were for the benefit of certain employees. The Union argued that the mischief the *Act* seeks to avoid is not the results of the individual waiver agreements (which may well be beneficial for individual members of the bargaining unit). Rather, the mischief the *Act* seeks to avoid is direct bargaining, itself, because of the corrosive effect circumventing the Union can have on the Union's role as the exclusive representative agent for all members of the bargaining unit.

[26] The Union relied upon this Board's decision in *United Food and Commercial Workers, Local 1400 v. Culinar Inc.*, [1999] Sask. L.R.B.R. 97, LRB File No. 038-98 for the proposition that merely communicating an offer to members of the bargaining unit is sufficient for the Board to find direct "bargaining" or "negotiating" within the meaning of the *Act*. The Union relied upon this Board's decisions in *United Food and Commercial Workers, Local 1400 v. Madison Development Group Inc.* [1996] Sask. L.R.B.R. 75, LRB File No. 131-95; and *Saskatoon City Police Association v. Saskatoon Board of Police Commissioners*, [1993] Sask. Lab. Rep. 4th Quarter 158, LRB File No. 240-93 for the proposition that it is a violation of s. 11(1)(c) of the *Act* for an employer to offer a benefit directly to members of a bargaining unit if that benefit was obtained without reference to the Union.

[27] The Union placed particular emphasis on the fact the Employer entered into individual agreements with individual members of the bargaining unit and took the position that, in a unionized environment, there is no room left from private negotiations of individual contracts. For this proposition, the Union relied upon the decisions of the Supreme Court of Canada in *Le Syndicat Caholique des Employes de Magasins de Quebec Inc. v. La Compagnie Paguet Ltee*, [1959] S.C.R. 206; and *McGavin Toastmaster Limited. v. Bernice Letitia Ainscough, et al*, [1976] 1 S.C.R. 718.

[28] The Union argued that the parties had specifically negotiated and agreed to provisions dealing with vacation entitlements. The Union pointed to the fact that Article 6.05 of the collective agreement specifically dealt with vacation entitlement, including the quantum thereof, payment therefore, and the period during which vacation entitlement must be taken. In addition, Article 6.05(b) dealt with the procedures by which an employee may carry over accumulated vacation leave into the next vacation year. The Union also relied on the evidence of Mr. Rounce that established that the parties had negotiated a letter of understanding with respect to vacation payout (providing employees the option of being paid their vacation pay when they take their vacation). The Union pointed out that none of these provisions permitted employees to waive their vacation entitlement as proposed by the Employer. As a consequence, the Union took the position that the Employer's proposal (i.e. to allow employees to waive their vacation entitlement) was contrary to the collective agreement. The Union argued that s.37 of *The Labour Standards Act*, which purported to permit the Employer's proposal, was incompatible with the collective agreement and thus could not be relied upon by the Employer. In this regard, the Union relied upon the decision of the Supreme Court of Canada in *Isidore Garon Ltee v. Syndicat du bois Ouvre de la Region de Quebec Inc.*, [2006] 1 S.C.R. 27.

[29] Furthermore, the Union argued that, even if s.37 of *The Labour Standards Act* was not incompatible with the collective agreement, this provision was still unavailable to the Employer on the basis that the provision only applied in the cases of a "*shortage of labour*". The Union pointed to the fact that, at the time the Employer made its proposal to the members of the bargaining unit, the Employer was preparing to lay-off many of its employees, which by definition involved the opposite of a "shortage of labour"; rather there was a "shortage of work" and, thus, a corresponding excess of labour.

[30] For the foregoing reasons, the Union asked this Board make a declaration that the Employer had committed an unfair labour practice. Further, the Union also asked this Board to declare that the individual vacation waiver agreements executed by individual employees were null and void.

The Employer's Argument:

[31] The Employer took the position that neither its proposal (which gave employees the option of waiving all or a portion of their unpaid vacation entitlement in accordance with s. 37 of *The Labour Standards Act*) nor its communication with employees with respect to that proposal, involved any violation of *The Trade Union Act*.

[32] Firstly, the Employer took the position that not every benefit offered to employees is considered a term or condition of employment that must be negotiated with the Union. Specifically, the Employer argued that allowing employees to waive or forego their vacation entitlement was not a term or condition of employment that the Employer was obligated to negotiate with the Union. Rather, the Employer argued that the Employer's proposal was analogous to employees submitting their vacation requests or seeking maternity leave, parental leave, or adoption leave. The Employer pointed to the evidence of Mr. Rounce that the Union was not involved in the arrangements between the Employer and an employee with respect to these other forms of leave. The Employer argued that the waiver of vacation entitlement, absent express language in the collective agreement to the contrary (which the Employer argued did not exist), was a matter to be resolved directly between the Employer and its employee and did not involve the Union. Finally, the Employer argued that, in the unique circumstances of this workplace (wherein employees were paid for their vacation entitlement in advance), the waiver of unpaid vacation entitlement did not affect the kind of fundamental term or condition of work that would not normally be governed by a collective agreement.

[33] Secondly, the Employer argued that, even if it could be said that the Employer's proposal involved a term or condition of employment, it was still not obligated to negotiate with the Union on whether or not it could be implemented in the workplace. The Employer took the position that, because the Employer's proposal took place outside the open period provided for in s. 33(4) of the *Act* and did not fall within any of the categories giving rise to a mid-term obligation on the Employer to bargain collectively with the Union, the Employer was under no obligation to negotiate the matter with the Union. In support of its position, the Employer relied

upon the decision of this Board in *Canadian Union of Public Employees, Local 600-3 v. Saskatchewan (Community Living Division)* 2009 CanLII 49649 (SK L.R.B.), LRB File No. 238-05.

[34] The Employer argued that there was no provision in the collective agreement that prevented the Employer from making its offer to employees and, even if there was such a provision, such a matter would then properly have been the subject of a grievance and not an application alleging an unfair labour practice before this Board. To which end, the Employer argued the fact that the Union had not filed a grievance with respect to this matter should be indicative to the Board that the Union acknowledged that the Employer's proposal was not contrary to the collective agreement.

[35] Because the Employer's proposal was not contrary to the collective agreement and because the Employer's proposal did not involve any of the prescribed circumstances related to mid-terms negotiations, the Employer argued that its proposal fell within its management rights as set forth in Articles 3.01, 3.02 and 3.03 of the collective agreement and was thus not something that the Employer was obligated to negotiate with the Union.

[36] The Employer argued that s. 37 of *The Labour Standards Act* (upon which the Employer relied), unlike other provisions in *The Labour Standards Act,* such as s.7(2)(a) and 9(2)(a), anticipated that vacation waiver agreements would be between the Employer and employees and <u>not</u> between the Employer and the Union. To which end, the Employer argued that there was also nothing in *The Labour Standards Act* that obligated it to negotiate with the Union with respect to vacation waiver agreements.

[37] Finally, the Employer denied that its actions detrimentally affected the Union and noted that it was consistent with the Union in taking the position that it had the right to offer employees the opportunity to waive all or a portion of the accumulated vacation entitlement irrespective of the wishes of the Union.

[38] The Employer asked that the Application be dismissed.

Relevant Statutory Provisions:

[39] The relevant provisions of *The Trade Union Act* are as follows:

> *2. In this Act:*
>
> *(b) "bargaining collectively" means negotiating in good faith with a view to the conclusion of a collective bargaining agreement, or a renewal or revision of a bargaining agreement, the embodiment in writing or writings of the terms of agreement arrived at in negotiations or required to be inserted in a collective bargaining agreement by this Act, the execution by or on behalf of the parties of such agreement, and the negotiating from time to time for the settlement of disputes and grievances of employees covered by the agreement or represented by a trade union representing the majority of employees in an appropriate unit;*
>
> *. . .*
>
> *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.*
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> *. . .*
>
> *11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*
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> *. . .*
>
> *(c) to fail or refuse to bargain collectively with representatives elected or appointed, not necessarily being the employees of the employer, by a trade union representing the majority of the employees in an appropriate unit;*

Conclusion and Analysis:

[40] We have concluded that the Union's application must be dismissed. For the reasons that follow, we find that neither the proposal which the Employer communicated to members of the bargaining unit nor the individual agreements that were signed with individual employees represent a violation of s. 11(1)(c) of the *Act*.

[41] In *Saskatchewan (Community Living Division), supra*, this Board outlined the obligations on parties to engage in mid-term negotiations. In this regard, paragraphs 26 – 34 are particularly instructive:

> *26 One of the principle tenets of the Act is that the parties are only required to bargain collectively during the open period provided for in ss. 33(4) of the Act. Furthermore, pursuant to s. 44 of the Act, there can be no strike or lock-out*

during the term of a collective agreement. Nor is there any general requirement in Saskatchewan, that once a collective agreement has been reached, that the parties must re-open that agreement to deal with any issue that may arise. Where an issue arises, it may be dealt with in a number of ways. These are:

(a) by virtue of the "technological change" provisions of s. 43 of the Act;

(*b)* by virtue of a re-opener provision in the collective agreement;

(c) by voluntary agreement to re-negotiate between the parties; or

(d) by submission by way of the grievance procedure where the issue impacts upon the already agreed upon provisions of the collective agreement.

. . .

28 *In Grain Services Union (ILWU – Canada) v. Saskatchewan Wheat Pool, Heartland Livestock Services (324007 Alberta Ltd.) and GVIC Communications Inc., the Board considered the duty to bargain in good faith and outlined the limited circumstances in which parties are required to engage in mid term bargaining. Point 2 of the agreed statement of facts makes it clear that the parties had engaged in collective bargaining prior to the implementation of the revised CRC policy. Those negotiations had been successful and there was a new collective agreement in place when the policy was implemented.*

29 In the Heartland Livestock case, supra, the Board considered a similar situation to that faced by the original panel in this case. There, the Union alleged that the Employer committed an unfair labour practice by failing or refusing to bargain collectively "in regard to the treatment of employees affected by the sales of Heartland and Western Producer with respect to their membership in and participation in the SWP/GSU Pension Plan."

30 In that case, the Board also considered if it was appropriate to defer the matter to arbitration, as was done by the original panel. As was the case with the original panel, the Board in Heartland Livestock, supra, also determined that they would be able to deal with the issue and did not exercise their discretion to defer to arbitration.

31 At paragraph [89] of the Heartland Livestock case, supra, the Board says:

> *In certain cases a refusal to bargain may be a breach of an extant collective agreement, as where the agreement contains a provision for mid-term bargaining in certain circumstances. However, with few exceptions – for example, negotiating for the settlement of disputes and grievances, failure to comply with which is a violation of s. 11(1)(c) of the Act, and pursuant to s. 43, the technological change provisions of the Act – the Act does not expressly require an employer to bargain collectively with a certified union during the term of a collective agreement. Otherwise, under the Act, the parties are bound to bargain collectively only upon notice during the "open period" in the circumstances described in s. 33(4) for the renewal or revision of the agreement, or in the case of a first collective agreement imposed by the Board, s. 26.5(9).*

> *32 The Board went on, in the Heartland Livestock case, supra, to explain the rationale and logic behind this statement. It recognized the harshness of this obligation as noted by the Board in Communications Workers of Canada v. Northern Telecom Canada Limited, et al. In that case, the Board recognized that s. 33(4) of the Act "abrogated any contractual capacity to vary the statutory time frame", and concluded at p. 48, "that the employer's 'willingness to negotiate' despite the union's untimely notice to revise did not create a duty to bargain."*
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> *33 In Heartland Livestock, supra, the Board also distinguished an earlier decision of the Board in Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. WaterGroup Canada Ltd., et al. on the basis that this decision was "predicated, in large measure, upon the fact that the actions complained of occurred prior to the conclusion of a first collective agreement."*
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> *34 In the present case, the original panel got off course when it began its inquiry by answering the question "Is the CRC policy a term or condition of employment?." There is little doubt that such a policy could properly be the subject of collective bargaining between the parties. However, it is, we believe an erroneous "leap of logic" to use that analysis to then conclude that the fact that it can be a subject of collective bargaining means that it must be a subject of collective bargaining; and to then determine that the failure to reopen negotiations outside the open period amounts to an unfair labour practice is contrary to both the provisions of the Act and to the Board's previous jurisprudence as noted above . ...*

[42] As this Board found in *Saskatchewan (Community Living Division), supra*, the Employer's proposal could certainly have been the subject of collective bargaining; certainly the parties had negotiated and agreed to similar workplace issues. However, it would be an erroneous leap of logic to conclude that allowing employees to waive or foregoing all or a portion of their accumulated vacation entitlement must be the subject of collective bargaining outside of the statutory "open period" provided for in the *Act*.

[43] The Employer's proposal occurred mid contract and outside of the statutory obligation on the parties to bargain collectively. As a consequence, the circumstances of this case are distinguishable from the facts in *Madison Development Group Inc. supra*, and *Saskatoon City Police Association, supra*. Furthermore, the Employer's proposal did not involve a "technological change" within the meaning of s. 43 of the *Act*, as was the case in *Culinar Inc., supra*. Finally, the Board could not find, and the parties did not identify, a "re-opener" provision in the collective agreement that would have been triggered by the Employer's proposal. As a consequence, the Board's is satisfied that the Employer's proposal fell within the scope of the management rights clause provided for within the collective agreement. These rights are set forth in Articles 3.01, 3.02 and 3.03 of the collective agreement and provide as follows:

> ***MANAGEMENT RIGHTS***
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> ***3.01*** *The Union recognizes the right of the Company to operate and manage its business in all respects except as expressly modified or restricted by this Agreement and to make and alter from time to time, reasonable rules and regulations to be observed by employees, provided however, that any dispute as to the reasonableness of such rules and regulations or any dispute involving claims of discrimination, inequity, or unfairness against any employee in the application of such rules and regulations shall be subject to the Grievance Procedure of this Agreement.*
>
> ***3.02*** *The company shall have the right to hire; to discipline, demote and discharge employees for just and sufficient cause; and to direct the workforce, provided however, that any exercise of these rights in conflict with the provisions of this Agreement shall be subject to the Grievance Procedure.*
>
> ***3.03*** *The Company shall not exercise its right to direct the workforce in a discriminatory, inequitable or unfair manner.*

[44] The Union placed particular emphasis on the fact the Employer entered into individual agreements with individual members of the bargaining unit and took the position that, in a unionized environment, there is no room left from private negotiations of individual contracts. The fact that the employer entered into written agreements with participating employees was a function of the requirements of *The Labour Standards Act*. In the Board's opinion, the fact that written agreements were involved did not elevate or change the substance of the transaction that occurred. In this respect, we agree with the Employer's argument that its proposal was analogous to an employee seeking, and the Employer granting, other forms of leave (such as maternity, parental or adoptive leave). In the absence of a provision in the collective agreement to the contrary, the processing of such arrangements is a matter between the Employer and individual employees. To which end, we can not accept the argument of the Union that the absence of a provision in the collective agreement expressly permitting the Employer's proposal or providing for the operation of s.37 of *The Labour Standards Act* prevented the Employer from proceeding with its proposal without the consent of the Union. To do so, would be to render meaningless the management right clauses in the collective agreement.

[45] The Union argued that, in light of the maturity of the parties bargaining relationship and the comprehensive nature of their collective agreement, the management right clauses had largely been rendered meaningless and, as such, could not be relied upon by the Employer in this case. With all due respect, we can not accept this argument. As the parties define the nature of their relations and the terms and conditions of employment are delineated in a collective agreement, an employer's otherwise unfettered right to operate and manage its

business is modified and restricted. As the scope of a collective agreement grows, management rights become more and more interstitial. Nonetheless, the Board must be mindful that management rights are only restricted to the extent expressly set forth in the collective agreement; it is not the other way round, as suggested by the Union. In making this observation, the Board is aware that whether or not the Employer has violated the collective agreement is properly the matter for grievance proceedings. The role of this Board is to examine the facts and circumstances to determine whether or not the proposal which the Employer communicated to members of the bargaining unit represented a violation of s. 11(1)(c) of the *Act*. In doing so, we must be caution not to embark upon enquiries that would trench outside our jurisdiction. If the Union believes that the Employer has breached the collective agreement, the appropriate forum for resolution of that dispute in these circumstances is the grievance procedure.

[46] The Union also argued that s.37 of *The Labour Standards Act* was not applicable to the Employer because the circumstances under which the Employer made its proposal to the employee did not meet the requirements of that Act. With due respect, this line of enquiry also exceeds the jurisdiction of this Board. Our role is to interpret and apply the provisions of *The Trade Union Act*. Whether or not the Employer's proposal complied with *The Labour Standards Act* is not for this Board to determine.

[47] Finally, we are not satisfied that the Employer's conduct in consulting with the Union prevented it from later implementing its proposal over the objections of the Union. Firstly, the Board is mindful that ongoing communication between management and trade unions is the foundation of productive labour relations in the workplace and should be encouraged by the Board at all times, not just during the statutory open period. Secondly, the Board accepts the evidence of Ms. Britton that the Employer advised the Union early in the discussions that it felt it has the management right to present its proposal to the employees irrespective of the Union's position on the matter. To which end, the Board is satisfied that the Employer was honest and forthright with the Union with respect to its intentions. At the conclusion of their discussions with respect to whether or not employees should be offered the opportunity to waive all or a portion of the accumulated vacation entitlement, the parties "*agreed to disagree*". Such is often the case in a mature bargaining relationship. While the Union may have wished it were otherwise, the Employer was not, at that time, under an obligation to accede to the wishes of the Union regarding its proposal. Of particular significance in coming to this conclusion, the Board notes

that the Employer's proposal occurred mid contract and outside of the statutory obligation on the Employer to bargain collectively with the Union.

[48] For the foregoing reasons, we are not satisfied that the evidence discloses a violation of *The Trade Union Act* of the nature alleged by the Union. As a consequence, the Union's application must be dismissed.

DATED at Regina, Saskatchewan, this **17th** day of **March, 2010.**

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson