The Labour Relations Board
Saskatchewan

GRAIN and GENERAL SERVICES UNION (ILWU CANADA), Applicant v. WESTERN PRODUCER PUBLICATIONS PARTNERSHIP, operating as WESTERN PRODUCER PUBLICATIONS, Respondent

LRB File No. 043-11; September 6, 2011
Chairperson, Kenneth G. Love, Q.C.; Members: Greg Trew and Donna Ottenson

For the Applicant Union: Mr. Hugh Wagner
For the Respondent Employer: Ms. Susan Barber, Q.C.

Unfair Labour Practice – Union alleges that Employer failed to bargain in good faith with respect to changes made to a bonus plan for sales employees which plan was not included as a part of the collective agreement.

Unfair Labour Practice – Union alleges that Employer failed to disclose, during collective bargaining, changes to bonus plan. During negotiations Employer attempted to have plan included within the terms of collective agreement. Proposal ultimately withdrawn. New targets for bonus plan established shortly following ratification of new collective agreement.

Practice and Procedure – Deferral to Arbitration – Board confirms its practice and procedure with respect to deferral to arbitration where the subject matter of the dispute is the same, the relief sought is the same and the collective agreement provides for a remedy.

The Trade Union Act, ss. 2(b), 11(1)(c) & 18(l)

REASONS FOR DECISION

Background:

[1] KENNETH G. LOVE, Chairperson: The Grain and General Services Union (ILWU Canada) (the "Union") applied to the Saskatchewan Labour Relations Board (the "Board") on March 16, 2011 alleging that Western Producer Publications Partnership, operating as Western Producer Publications (the "Employer) had contravened section 11(1)(c) of *The Trade Union Act*, R.S.S. 1878, c.T-17 (the "*Act*"). The Union alleged that the breach of the *Act* resulted from the following facts:

> *In response to questions specifically posed by representatives of the union during renewal bargaining in 2010, Company representatives stated that the method used to calculate sales targets for determining sales employees' incentive pay*

> *would not change. Subsequently a renewed and amended Collective Agreement was settled between the parties and ratified by the applicant's members on December 14, 2010. Notwithstanding the assurances and undertakings given to the applicant during agreement renewal bargaining on December 22, 2010, the respondent changed the sales targets and the method used to calculate increases to the sales targets for sales employees in the bargaining unit. In some instances the changes unilaterally implemented by the respondent had a dramatic negative impact on employees' ability to reach their sales targets and significantly reduced their prospective incentive pay.*

The application filed with the Board did not contain any claim for relief, but during the course of the hearing, it became clear that the Union was requesting that the Board order that the sales target increases be rolled back and that any sales employees be compensated for any incentive pay which should have been earned based upon the former sales targets.

[2] The application was heard by the Board on August 17, 2011. Apart from evidence as to what precisely was asked by the Union at the bargaining session on October 21 and 22, 2010, and the response by the Employer to that request, the evidence presented by both parties was relatively consistent in all material respects. The Board heard from five (5) witnesses. Three (3) were called by the Union: Dale Markling, Laurie Michalycia and Michelle Holden. The Employer called Ken Zacharias and Kelly Berg. In the recitation of the facts which follow, specific witness testimony will only be identified where necessary to the context or where there was a conflict in the evidence given. Detailed evidence concerning collective bargaining and the operation of the bonus program was also provided to the Board. We have not included any of this detail in the facts set out below to preserve the confidentiality of the negotiations and the economic information respecting both employees and the Employer.

Facts:

[3] The Employer is a publisher of agricultural focused publications. The publication at issue in this application is *The Western Producer*. The Western Producer has been published by the Employer for many years. It was acquired by the Employer from the then Saskatchewan Wheat Pool (now Viterra). It continues to be published in Saskatoon, Saskatchewan.

[4] There are twelve (12) employees who work within the sales and advertising area of the Western Producer. These individuals are responsible for sales of advertising that appears in the publication and which is a significant source of revenue for the Western Producer. Of

these twelve (12) employees, two (2) work in the City of Regina and six (6) work in the City of Saskatoon. Two (2) employees work in Guelph, Ontario and two (2) work in Calgary, Alberta.

[5] Employees employed within the sales and advertising area of the Western Producer have historically been paid a base salary (the "base") and a bonus amount (the "bonus") based upon criteria established from time to time by the Employer. The base amount is negotiated as a part of the collective agreement, but the bonus amount has been established by the Employer in its sole discretion.

[6] During collective bargaining in 2005, 2008 and 2010, the Employer put forward proposals to incorporate the bonus amounts within the collective agreement. In each case, the Union was not willing to discuss the methodology whereby the bonus amount was calculated and, as a result, the proposals were withdrawn by the Employer. Hence, the bonus criteria and calculations were left to the Employer to determine.

[7] The history of the bonus program shows that it was the subject of change since the time it was initiated. Prior to 1993, the bonus program had a different "qualitative" focus, that is, its primary focus was not on sales achievement, but on other factors important to the Employer. In 1993, the program became more focused on sales performance when management set annual budgets for the sales and advertising employees and keyed their bonus amount to achievement of these budgets.

[8] In 2004, there was a complete overhaul of the bonus program wherein the Employer set sales targets based upon 90% of the three (3) year average sales in the various sales regions. Employees were then paid a set percentage upon achievement of the sales target as well as a percentage of all sales in excess of the target.

[9] The bonus program was again adjusted in 2008 to establish new targets for sales regions. Employees were not notified of this change until March of 2008. Employees immediately reacted to this change in their targets after commencement of the sales year. The Union filed a grievance against the changes. A settlement was negotiated whereby the target increases for 2008 were withdrawn and the Employer agreed that any further target changes would be communicated no later than December 31 for the following year.

[10] Targets were increased by the Employer for 2009 and 2010 based upon price increases for advertising charged to customers.

[11] As noted above, in 2010, the Employer again put forward a proposal to include the bonus program within the collective agreement. Again, the proposal did not achieve any traction and was withdrawn by the Employer. When the proposal was withdrawn, the evidence established that a short discussion occurred between the negotiators concerning the bonus structure. There was some conflict in respect of what was said by both parties concerning the methodology whereby the targets would be set. The evidence of the Union witnesses varied as to what precisely was said as was the evidence concerning the response from the Employer. Mr. Ken Zacharias provided his notes taken during the negotiations regarding this point, which notes, we find to be reliable. Those notes reveal as follows for the negotiations held between the parties on October 21 and 22, 2010:

> *Sales Compensation*
>
> *LH – goal of proposal was to reduce base pay and increase variable pay. Response from union was no change in base. Therefore, mgt is withdrawing its commission proposal and will work within the existing bonus scheme.*
>
> *LM – will management be setting unreasonable targets.*
>
> *OS – no targets will be reasonable, use past practices to guide process. We will manage within the means and processes available to us now. Want the sales team to generate more sales.*
>
> *LM – management should consider implementing a new incentive for achieving annual budget, something beyond the current target. Consolidation within the industry a major issue in finding new revenue.*

[12] A new collective agreement was concluded on or about December 14, 2010 and was ratified by employees on that same day. That collective agreement included nothing about the bonus program.

[13] On December 22, 2010, Mr. Kelly Berg, the Advertising Director for the Employer provided details of revised targets for 2011 to all sales employees. Those targets, he testified, were determined, as was the case in 2004, based upon 90% of sales achieved during the previous three (3) years. Because the increases were, in some cases, significant, the Employer proposed that the increases be phased in over a two (2) year period. He testified that these new targets were formulated by him during the period between December 14, 2010 and December

22, 2010. The revised program also included a new bonus which could be accessed upon sales hitting a sales budget beyond the target.

[14] The Union filed a grievance regarding the implementation of the new targets by the Employer and also filed this unfair labour practice application with the Board. We were advised that the relief sought in this application, as noted above, is substantially the same relief sought in the grievance which was filed.

Arguments of the Parties:

[15] Mr. Wagner, for the Union, argued that the Employer was seeking to take advantage of the Union notwithstanding that the bonus program was outside of the collective bargaining agreement. He argued that the Employer mislead the Union in negotiations on October 21 and 22, 2010 regarding what changes might be made to targets. Mr. Wagner argued that the Employer's assurances that targets established by the Employer would not be unreasonable, was relied upon by the Union in its negotiations of other provisions of the collective agreement. This, he argued, was negotiating in bad faith contrary to s. 11(1)(c) of the *Act*.

[16] Mr. Wagner also argued that the Employer had a duty to disclose its plans to increase targets during the course of collective bargaining. He argued that the Employer had failed to disclose what past practices the Employer would be relying upon to formulate the new targets.

[17] In support of his position, Mr. Wagner relied upon several prior decisions of the Board. These were *Canadian Union of Public Employees, Local 1975 v. Saskatchewan Indian Federated College*[1], *International Brotherhood of Electrical Workers, Local 529 v. Bill's Electric City Ltd.*[2], *Canadian Union of Public Employees v. University of Saskatchewan*[3], *Canadian Union of Public Employees, Local 3078 v. Board of Education of the Wadena School Division No. 46*[4], *United Food and Commercial Workers, Local 1400 v. Impact Security Group Inc. and*

[1] [2003] Sask. L.R.B.R. 217, LRB File No. 245-02
[2] [1996] Sask. L.R.B.R. 399, LRB File No. 061-96
[3] [1996] Sask. L.R.B.R. 664, LRB File No. 035-96
[4] [2003] Sask. L.R.B.R. 443, LRB File Nos. 101-03 & 130-03

Invicta Group Inc.[5], and *Saskatchewan Union of Nurses v. Regina Qu'Appelle Health Region*[6], which cases we have reviewed.

[18] The Employer argued that since the Union had also filed a grievance with respect to this matter, that the Board should defer to the arbitrator to determine the *lis* between the parties in accordance with the Board's usual practice where there is conflicting jurisdiction.

[19] The Employer also argued that even if the Board should determine that the matter should not be deferred to arbitration, there was no evidence provided that gives rise to an unfair labour practice. The Employer argued that the 2011 targets were established by the Employer in a manner consistent to the manner in which the targets were established in 2004, except for the introduction of the new bonus for achieving budget in excess of the target figure.

[20] Counsel for the Employer filed a written brief which we have reviewed along with prior decisions of the Board and one recent decision from the Canada Labour Relations Board which we have reviewed. The cases cited in support of the Employer were *Administrative and Supervisory Personnel Association v. University of Saskatchewan*[7], *Canadian Union of Public Employees v. University of Saskatchewan and University of Regina*[8], *S.J.B.R.W.D.S.U. v. Holiday Inn Ltd.*[9], *International Brotherhood of Electrical Workers, Local 2067 v. The Power Corporation of Saskatchewan*[10], *U.F.C.W., Local 1400 v. Ne-Ho Enterprises Ltd. et al.*[11], *Saskatchewan Joint Board, Retail Wholesale and Department Store Union v. Regina Exhibition Association Limited*[12] and *Telus Communications Inc. v. T.W.U.*[13].

Relevant Statutory Provisions:

[21] Sections 2(b), 11(1)(c) and 18(l) provide as follows:

> *2. In this Act:*
>
> *(b) "bargaining collectively" means negotiating in good faith with a*

[5] [2006] Sask. L.R.B.R. 517, LRB File No. 081-06
[6] [2007] Sask. L.R.B.R. 490, LRB File No. 133-05
[7] [2005] Sask. L.R.B.R. 541, LRB File No. 070-05
[8] [2004] Sask. L.R.B.R. 45, LRB File Nos. 246-03 & 247-03
[9] Letter decision of the Board dated December 8, 1988, LRB. File Nos. 175-88, 176-88 & 178-88
[10] [1998] Sask. L.R.B.R. 95, LRB File No. 312-97
[11] Letter decision of the Board dated September 13, 1989, LRB. File No. 095-89
[12] [2001] Sask. L.R.B.R. 643, LRB File No. 302-00
[13] [2010] CarswellNat 4594, 201 L.A.C. (4th) 15, Canada LRB

> *view to the conclusion of a collective bargaining agreement, or a renewal or revision of a bargaining agreement, the embodiment in writing or writings of the terms of agreement arrived at in negotiations or required to be inserted in a collective bargaining agreement by this Act, the execution by or on behalf of the parties of such agreement, and the negotiating from time to time for the settlement of disputes and grievances of employees covered by the agreement or represented by a trade union representing the majority of employees in an appropriate unit;*
>
> *. . .*
>
> *11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*
>
> *(c) to fail or refuse to bargain collectively with representatives elected or appointed, not necessarily being the employees of the employer, by a trade union representing the majority of the employees in an appropriate unit;*
>
> *. . .*
>
> *18. The board has, for any matter before it, the power:*
>
> *. . .*
>
> *(a) to defer deciding any matter if the board considers that the matter could be resolved by arbitration or an alternative method of resolution;*

Analysis and Decision:

[22] The Board's practice and jurisprudence respecting deferral of applications to arbitration in accordance with s. 18(l) of the *Act* was described by the Board extensively in *Administrative and Supervisory Personnel Association v. University of Saskatchewan.*[14] In that case, the Board followed a longstanding policy of deferring to the grievance and arbitration process contained in a collective agreement where the issues raised involve the interpretation or application of the terms of the collective agreement and where complete relief can be obtained through the arbitration process.

[23] That case relied upon the three-part test enunciated by the Saskatchewan Court of Appeal in *United Food and Commercial Workers Union v. Westfair Foods Ltd.*[15], which established the following criteria for the Board to exercise its authority to defer to arbitration:

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[14] *Supra* Note 7 at paragraph 27 et seq.
[15] [1992] 95 D.L.R. (4th) 541

> *(i) the dispute put before the Board in an application for an unfair labour practice order and the dispute intended to be resolved by the grievance-arbitration procedure provided for in the collective agreement must be the same dispute;*
>
> *(ii) the collective agreement must make possible (i.e. empower) the resolution of the dispute by means of the grievance arbitration procedure; and*
>
> *(iii) the remedy sought under the collective agreement must be a suitable alternative to the remedy sought in the application before the Board.*

[24] The rationale for deferring to the grievance and arbitration procedure was described in *United Food and Commercial Workers v. Western Grocers, a division of Westfair Foods Ltd*:

> *In Canadian Union of Public Employees v. City of Saskatoon, LRB File Nos. 155-89, 026-90, 043-90, 044-90 and 045-90, the Board laid out a number of principles which might help to determine whether deference to arbitration would be appropriate. The Board considered what would justify deference to a private decision-making tribunal by a labour relations board deriving its mandate from statute. It found the answer in the nature and objectives of The Trade Union Act itself. Since the primary purpose of the statue is to foster and promote sound collective bargaining, the fruit of that bargaining – a collective agreement in which the parties have set out their respective rights and obligations – should be given a full and expansive role in relation to whatever disputes arise between an employer and a trade union. If the parties have decided in the course of collective bargaining to submit disputes concerning certain aspects of their relationship to a forum of their own creation, it is appropriate that a labour relations board allow the tribunal an opportunity to adjudicate the dispute. Support for this view was found by the Board in United Food and Commercial Workers v. Valdi Inc. (1980) 11 CLLC 729 (Ont. LRB) and St. Anne Nackawic Pulp & Paper Ltd. v. Canadian Paperworkers Union (1986) 86 CLLC 12, 184 (S.C.C.)*

[25] Also in *Canadian Union of Public Employees, Local 59 v. City of Saskatoon,*[16] the Board stated its view that deferral to the grievance and arbitration process "does not do violence to that scheme but, rather, enhances it" and provided a practical justification for exercising the discretion to defer at pp. 82 and 83:

> *This is particularly emphasized by the reality that, in the absence of a deferral scheme, the parties would face the prospect of doubly incurring the expenditure of time, money and emotional strain litigating essentially the same issue before two tribunals with the unacceptable prospect of inconsistent determinations. The deferral scheme discourages undue litigation and forum shopping. More*

[16] [1990] Fall Sask. Labour Rep. 77

> *importantly, it avoids the prospect of equally enforceable yet inconsistent determinations.*
>
> *Finally, it has the compelling positive effect of enhancing and encouraging the collective bargaining process by forcing the parties to utilize the procedures, processes and remedies by which they have agreed to govern themselves through the collective bargaining agreement.*

[26] In *International Brotherhood of Electrical Workers, Local 2067 v. Saskatchewan Power Corporation*[17] decision, the Board considered the issue of deferral to grievance arbitration in the context of an unfair labour practice filed by the union alleging a violation of ss. 11(1)(a) and (c). In determining that it was appropriate to defer to arbitration, the Board stated at 20 and 21:

> *Before the Board could find that the Employer was subject to the contractual obligation to bargain collectively with the trade union, it would first need to find that Article 3.04 had been violated by the Employer. In our view, this is a matter required to be determined by the grievance and arbitration provisions set out in the collective agreement or by arbitration which is mandated by s. 25(1) of the Act which requires "[a]ll differences between the parties to a collective agreement …to be settled by arbitration".*
>
> *There is no allegation contained in the materials that the Employer has failed with respect to its duty to negotiate with respect to the settlement of a grievance, as no grievance has been filed by the Union. The bargaining obligation which the Union asks the Board in this instance to enforce arises solely from the agreement itself and depends on a finding by the Board of a breach of a provision contained in the collective agreement.*
>
> *An arbitration board appointed by the parties is better equipped than the Board to hear and determine the dispute in question, being comprised of a chairperson agreed to by the parties, along with two nominees each familiar with the collective agreement between the parties. In addition, it can provide full relief to the Union should its grievance be upheld.*

[27] A similar situation had previously arisen between those same parties in *International Brotherhood of Electrical Workers, Local 2067 v. The Power Corporation of Saskatchewan.*[18] In that case the union filed an unfair labour practice application alleging that the employer violated ss. 11(1)(a) and (c) by unilaterally altering the terms of a negotiated medical services plan. In addition to filing the unfair labour practice application the union filed a grievance. The Board determined that it should defer to the jurisdiction of a board of arbitration on the basis of the following reasoning at 97:

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[17] [2000] Sask. L.R.B.R. 17, LRB File No. 162-99
[18] *Supra,* Note 10

> *The Board is of the view that it should defer its jurisdiction to the Board of Arbitration. The Union's complaint centers on SaskPower's conduct in altering the terms of a negotiated provision contained in its last collective agreement. It would seem to this Board to be impossible to determine the unfair labour practice allegations without deciding if SaskPower has breached the medical services plan provisions contained in the agreement or letter of agreement. The issue is precisely the issue that the Board of Arbitration has been asked to determine. In our view, it is appropriate to avoid duplication of decision-making on the same issue and to defer to the grievance and arbitration system when the essence of the Union's complaint concerns a possible breach of the agreement. The Board of Arbitration is in a position to provide an effective remedy to the alleged breach and can do so in an expeditious manner.*

[28] The Board also considered a fact situation similar to that before us in *Canadian Union of Public Employees v. University of Saskatchewan and University of Regina*[19] (LRB File Nos. 246-03 & 247-03), *supra*. The unfair labour practice application filed by the union involved an allegation under ss. 11(1)(a) and (c) that the employers failed to bargain in good faith by refusing to continue to bargain in relation to a job evaluation/pay equity committee. The union had also filed a policy grievance to which the employer raised issues of timeliness and the arbitrability of the grievance. The Board determined that the matter should be deferred to the grievance and arbitration process by utilizing the three part test in *Westfair Foods Ltd., supra*, and stated at 54 and 55:

> *The Union has filed a grievance relating to the failure of the U of S to continue with the job evaluation process as set out in the Terms of Reference, which form part of the collective agreement between the parties. The grievance will require an arbitrator to interpret the Terms of Reference and advise the parties how to proceed.*
>
> *From a practical perspective, if the arbitrator determines that the process is flawed (i.e. the terms of reference do not provide for a mechanism to deal with the dual JEC results) the parties could then attempt to salvage almost six years of work by revising the process. If the process is not flawed, the parties will be advised by the arbitrator how to proceed to achieve their joint goal of achieving pay equity.*
>
> *The Board has no desire to interpret the Terms of Reference when it is possible that an arbitration board could come to a different conclusion on the meaning of the Terms of Reference than this Board arrives at.*
>
> *As set out by the Board in International Brotherhood of Electrical Workers, Local 2067 v. Saskatchewan Power Corporation, [2002] Sask. L.R.B.R. 268, LRB File No. 010-02, legislative policy supports the use of arbitration as the method of resolving disputes relating to the interpretation of the Terms of Reference, which form part of the collective agreement. Likewise, the Board also accepts the proposition that the nature of the complaints that may be referred to the grievance*

[19] *Supra* Note 8

> *and arbitration process and the remedies that may be granted by an arbitration board have been significantly expanded. An arbitration board will have the jurisdiction to deal with the meaning of the Terms of Reference and will be able to provide the Union with the necessary remedies in the event the Union's policy grievance is successful.*

[29] The Union provided us with the decision in *C.U.P.E., Local 1975 v. Sask. Indian Federated College*[20]*.* This case confirmed the Board's practice and jurisprudence as set out above. In that case, however, the Board did not defer to arbitration and made a determination of the unfair labour practice allegation.

[30] The Westfair principles continue to govern the Board's approach to deferral of matters to arbitration pursuant to s. 18(l). Those principles are:

> *(i) the dispute put before the Board in an application for an unfair labour practice order and the dispute intended to be resolved by the grievance-arbitration procedure provided for in the collective agreement must be the same dispute;*
>
> *(ii) the collective agreement must make possible (i.e. empower) the resolution of the dispute by means of the grievance arbitration procedure; and*
>
> *(iii) the remedy sought under the collective agreement must be a suitable alternative to the remedy sought in the application before the Board.*

[31] The dispute here and the dispute under the grievance which was filed are the same dispute. The remedy sought under the collective agreement is the same remedy being sought before the Board, that is, the roll back of the 2011 targets, thereby restoring the *status quo*. Also, while we were not provided with a copy of the collective agreement, the fact that a grievance was filed in 2008 and again in 2011 presumes that the collective agreement empowers resolution of the dispute.

[32] At the hearing of this matter, Mr. Wagner was offered the opportunity to decide which horse he wanted to ride, that is, whether or not he wished to pursue his unfair labour practice application or the grievance. Initially, he stated that he would withdraw the grievance and proceed only with respect to the unfair labour practice. However, after consultation with his instructing parties, that offer was revoked.

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[20] *Supra* Note 1.

[33] It is clear that this case satisfies all of the *Westfair* criteria. As a result, the Board has determined to exercise its discretion pursuant to s. 18(l) and defer the resolution of this matter to arbitration.

Conclusion and Order:

[34] The application is dismissed.

DATED at Regina, Saskatchewan, this **6th** day of **September, 2011.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.,
Chairperson

DISSENT

[35] Member, Donna Ottenson dissents for the following reasons:

[36] Had the issue the union brought before the board resulted from an alleged breach of the collective agreement, I could concur the correct disposition of this application would be deferral to an arbitrator.

[37] However, the main essence of the application by the Union evolves from discussion with the Employer during contract negotiations. The Union alleges it is this discussion that ultimately resulted in the Employer engaging in an unfair labour practice.

[38] Therefore, it is my view that because of the authority granted under Section 5 of the *Act*, this matter should rightfully be determined by this Board.

[39] For these reasons, I dissent from the decision of the majority.

Donna Ottenson, Board Member