The Labour Relations Board
Saskatchewan

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1400, Applicant v. AFFINITY CREDIT UNION., Respondent

LRB File No. 115-11 & 140-11; September 26, 2011
Chairperson, Kenneth G. Love, Q.C.; Members: Donna Ottenson and Brenda Cuthbert

For the Applicant: Drew Plaxton
For the Respondent: Larry Seiferling, Q.C.

Remedy – Interim Order – Employer changes hours of work of Employees – Change to hours of work were the subject of negotiation between Employer and Union – Parties unable to agree on proposed changes – Employer provides notice to Employees and Union of change in hours of work – After notice and final attempt to bargain changes to hours of work, Employer implements change.

Interim Order – Board finds that Union advances arguable case, but fails to satisfy the Board that Interim Order required and that balance of convenience favours the issuance of Order.

***The Trade Union Act*, ss. 5.3 and 11(1)(c) & (m).**

REASONS FOR DECISION

Background:

[1] United Food and Commercial Workers Union, Local 1400 (the "Union"), filed an application on July 11, 2011, which application was amended on August 29, 2011, alleging that Affinity Credit Union (the "Employer") engaged in an unfair labour practice as defined by ss. 11(1)(c) and (m) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") by changing the hours of work for employees employed at the Employer's Regina "Hill Avenue" branch.[1]

[2] On August 30, 2011, the Union filed an application[2] returnable September 6, 2011 seeking interim relief including, *inter alia,* an order of the Board restoring the

[1] LRB File No. 115-11
[2] LRB File No. 140-11

status quo, that is, a return of the hours of work of employees of the Hill Avenue Branch to the hours that they were working prior to August 29, 2011.

Facts:

[3] The Union was certified to represent employees of the Hill Avenue Branch of the Employer by Order of the Board dated September 3, 2009. Since certification, the Union and the Employer have been engaged in collective bargaining, but have not reached a collective bargaining agreement.

[4] The evidence from both parties was relatively consistent and, for the most part, uncontradicted. The Board received affidavits from Mr. Darren Kurmey and Michael Anthony Parisone on behalf of the Union and from Ms. Lolita Humm on behalf of the Employer. Ms. Humm's affidavit provided uncontradicted and a more detailed account of the history of the implementation of the change in hours and, for that reason, we have relied upon the recitation of facts contained within that affidavit.

[5] The evidence from both parties was that prior to certification of the Union to represent the employees at the Hill Avenue Branch, that employees worked from Tuesday through Saturday of every week. They were permitted to work additional hours (37.5 hours per week rather than 36 hours per week) during the work week so that they could bank sufficient hours to permit them to take one day (Saturday) off with pay every four (4) weeks.

[6] Ms. Lolita Humm, the Labour Relations Manager for the Employer, deposed that the issue of changes to scheduled hours of work was discussed on numerous occasions, but most particularly on September 27, 2010. During negotiations, Ms. Humm deposed that "[W]e advised the union we had no need for staff for the hours we were scheduling at that time. We told them on September 27, 2010 that we wanted to go back to a Tuesday to Saturday schedule that was similar to the schedule we used prior to creating these schedules". This was a reference to the scheduling of hours of work prior to the implementation of the system described above which permitted banking of additional work hours.

[7] Ms. Humm also deposed that at that time the Employer initiated a study of all branch hours. Following completion of the study, she deposes that: “I advised the union on April 19, 2011 that we would be changing the branch hours on August 29, 2011”. She also deposed that, notwithstanding the notice, the Employer “agreed, however to have discussions with them [the Union] if they wanted”.

[8] Following the April 19, 2011 notice to the Union, the parties continued to bargain collectively and met for that purpose on May 27, 30 & 31, 2011. During those negotiations, Ms. Humm deposes that there was discussion of hours of work. She deposes that: “[T]he union, after discussion, on which we again identified our position, agreed to provide a full response on all language issues that were outstanding in bargaining”.

[9] When no response was received from the Union, as promised, Ms. Humm deposes that she emailed the Union on June 7, 2011 and June 15, 2011 asking for the promised response. On June 9, 2011, Ms. Humm deposes that she emailed *inter alia* all of the employees of the Hill Avenue Branch to advise them of the schedule change.

[10] A response from the Union was received by the Employer on June 28, 2011. In response, Ms. Humm again advised the Union that they would be receiving a letter from the Employer advising that in accordance with its notice given on April 19, 2011, that the hours of work for employees at the Hill Avenue Branch would be changed effective August 29, 2011. Included with that letter was a copy of a notice to all employees of the Hill Avenue Branch regarding the change which notice was to be posted in the workplace on July 4, 2011.

[11] Ms. Humm deposes that following the response provided by the Union on June 28, 2011 the Employer “indicated to the union that to the date of the unfair labour practice [July 11, 2011], the union has not provided a formal proposal with alternative options and suggested a meeting date to have these discussions on options prior to the implementation on August 29, 2011”. The parties met on August 23 & 24, 2011 to discuss the issue. Ms. Humm deposes that:

> *On August 23rd the union said they would provide a full proposal "Without Prejudice" by 2:00 p.m. that day. At 2:15 p.m. on August 23rd no proposal was presented giving any options on the issue raised in this application. On 11:15 a.m. on August 24th we again met and the union's proposal on Article 8 regarding the issue in this case was identical to the union's original proposal dated November 27, 2009.*

[12] Ms. Humm also deposed that in the early afternoon of August 24, 2011, she received a copy of a letter to the Employer's counsel from the Union advising that the Union intended to take this application for interim relief if the Employer persisted in making the proposed schedule change.

[13] Relevant statutory provisions of the *Act* are as follows:

> *5.3 With respect to an application or complaint made pursuant to any provision of this Act or the regulations, the board may, after giving each party to the matter an opportunity to be heard, make an interim order pending the making of a final order or decision.*
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> *. . .*
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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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> > *(m) where no collective agreement is in force, to unilaterally change hours of work or other conditions of employment of employees in the appropriate unit without bargaining collectively respecting the change with the trade union representing the majority of employees in the appropriate unit;*

Arguments:

<u>The Union</u>

[14] The Union argued that the first part of the test for the granting of its interim application required only that it show that the Union had an arguable case that the Employer had violated s. 11(1)(m) of the *Act*. It argued that the cases relied upon by the Employer to justify its position, being *RWDSU, Locals 454 and 480 v. Canada Safeway Limited*[3] and *RWDSU, Locals 496, 635 and 955 and Teamsters Dairy and Produce Workers, Local 834 v. Dairy Producers Cooperative Limited*[4] had been reviewed by the

[3] LRB File No. 392-85
[4] LRB File Nos. 181-89 to 186-89; 238-89 to 239-89.

Board in a later decision, *RWDSU v. O.K. Economy Stores (a division of Westfair Foods Limited*).[5]

[15] The Union argued that the change in hours had been instituted unilaterally by the Employer without the consent of the Union. The Union argued that the jurisprudence of the Board established this to be a breach of s. 11(1)(m) of the *Act*.

[16] The Union also took the position that the application for interim relief was necessary to protect employees who would be forced to now book a Saturday off as a holiday or as time off in lieu of a statutory holiday. That time, they argued, would be lost resultant in a loss to the employee of the enjoyment of the previous scheduled time to spend with family or otherwise away from the workplace.

[17] The Union also argued that the workplace was a small one – only five (5) employees would be affected. They argued that because there was no first collective agreement, these employees and the Union's representation of them was fragile and required the Board's intervention to ensure that the Union's position as collective bargaining agent for those employees was not undermined.

[18] Counsel for the Union referred to these cases in the course of its argument. *Canadian Union of Public Employees, Local 3597 v. Town of Watrous*[6]*, Construction and General Workers' Union, Local 890 v. Brekmar Industries Ltd.*[7]*, SJBRWDSU v. O.K. Economy Stores*[8]*, SJBRWDSU v. O.K. Economy Stores*[9]*, SJBRWDSU v. O.K. Economy Stores (a division of Westfair Foods Limited)*[10]*, SJBRWDSU v. Watergroup Companies Inc.*[11]*, SJBRWDSU v. Westfair Foods Ltd.*[12]*, SJBRWDSU v. Winners Merchants International L.P.*[13] *and United Food and Commercial Workers Union, Local 1400 v. D & D Taxi Ltd.*[14]

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[5] [1994] Sask. Labour Rep., 2nd Quarter 131, LRB File No. 039-94
[6] [1993] 4th Quarter Sask. Labour Rep. 52
[7] [1993] 1st Quarter Sask Labour Rep. 126
[8] [1994] S.L.R.B.D. No 6
[9] [1994] CanLII 4986 (SKQB)
[10] *Supra* Note 5
[11] [1992] 1st Quarter Sask Labour Rep. 68
[12] [1995] 2nd Quarter Sask. Labour Rep. 234
[13] [2005] CanLII 63021 (SKLRB)

The Employer

[19] The Employer argued that the facts in this case do not justify the Board making an interim order. The Employer argued that employees will get the time off that they would normally have taken under the old schedule. The Employer argued that if the Employer was ultimately found by the Board to have violated s. 11(1)(m), that those employees could be compensated in money for any loss suffered.

[20] The Employer argued that the Employer had attempted on numerous occasions to engage the Union in negotiations concerning the proposed schedule change, but the Union failed to engage or make any alternate proposals other than the *status quo*.

[21] The Employer argued that section 11(1)(m) does allow an employer to make changes to conditions of employment and quoted several cases from the Board in support of that position.

[22] Counsel for the Employer referred to these cases in the course of its argument. *SJBRWDSU v. Prairie Micro-Tech Inc.*[15]*, Grain Services Union, Local 1000 v. Saskatchewan Wheat Pool*[16]*, U.F.C.W., Local 1400 v. Ne-Ho Enterprises Ltd.*[17]*, United Steelworkers of America v. Conservation Energy Systems Inc,*[18] *RWDSU, Locals 454 and 480 v. Canada Safeway Limited*[19]*, RWDSU, Locals 496, 635 & 955 and Teamsters Dairy and Produce Workers, Local 834 v. Dairy Producers Cooperative Limited*[20] *and Construction and General Workers Union, Local 890 v. Midway Sales (1979) Ltd.*[21]

Analysis:

[23] It is the Board's decision that the application for interim relief should be denied for the reasons which follow.

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[14] [2004] S.L.R.B.D. No. 29
[15] LRB File No. 238-94
[16] LRB File No. 241-94
[17] LRB File Nos. 005-89, 022-89 & 024-89
[18] LRB File Nos 215-92, 216-92 & 217-92
[19] *Supra* Note 3
[20] *Supra* Note 4
[21] LRB File No. 302-86

[24] The test to be met on applications for interim relief has been well established by the Board. A recent statement of the test is found in *Startek, supra,* as follows at 135 through 139:

> *[31] The test for the granting of interim relief was enunciated by the Board in Regina Inn, supra, Hotel Employees and Restaurant Employees Union, Local 206 v. Canadian Hotels Income Properties Real Estate Investment Trust #19 Operations Ltd. (o/a Regina Inn), [1999] Sask. L.R.B.R. 190, LRB File No. 131-99 as follows, at 194:*
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> > *The Board is empowered under ss. 5.3 and 42 of the Act to issue interim orders. The general rules relating to the granting of interim relief have been set down in the cases cited above. Generally, we are concerned with determining (1) whether the main application reflects an arguable case under the Act, and (2) what labour relations harm will result if the interim order is not granted compared to the harm that will result if it is granted. (see Tropical Inn, supra, at 229). This test restates the test set out by the Courts in decisions such as Potash Corporation of Saskatchewan v. Todd et al., [1987] 2 W.W.R. 481 (Sask. C.A.) and by the Board in its subsequent decisions. In our view, the modified test, which we are adopting from the Ontario Labour Relations Board's decision in Loeb Highland, supra, focuses the Board's attention on the labour relations impact of granting or not granting an interim order. The Board's power to grant interim relief is discretionary and interim relief can be refused for other practical considerations.*
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> *[32] As explained above, the test is adapted from that set out by the Ontario Labour Relations Board in Loeb Highland, [1993] OLRB Rep. March 197. With respect to the* [first of the] *two parts of the test – that is, whether the main application raises an arguable case – the Ontario Board stated as follows, at 202:*
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> > *Turning first to the idea of a threshold test with respect to the merits of the main application, we have some concern about applying a high level of scrutiny to that application at the time of a request for an interim order. To the extent that such scrutiny may imply a form of prejudgment of the final disposition of the main matter, it is not particularly compatible with the scheme for interim relief set out in the Act and the Board's Rules of Procedure. More specifically, the procedure for interim relief contemplated by the Board's Rules reflects the inherent necessity for expedition in these matters. To that end, evidence is filed by way of certified declarations which are not subject to cross-examination. Indeed, s. 104(14) of the Act and Rules 92 and 93 indicate the Board may not hold an oral hearing at all, but may receive the parties' arguments in writing as well.*

> *This means that the Board is not in a position to make determinations based on disputed facts. In these circumstances, it would normally be unfair for an interim order to be predicated to any significant extent on a decision with respect to the strength or weakness of the main case. That should await the hearing of the main application when the Board hears oral evidence and can make decisions with respect to credibility based on the usual indicia, in a context where the parties have a full right of cross-examination. This is particularly important in cases such as the section 91 complaint to which this application relates, where decisions are often based on inferences and the various nuances of credibility play a key role. In other words, the granting of interim relief in this context should usually be based on criteria which minimize prejudging the merits of the main application.*

[33] With respect to the second part of the test – consideration of the respective labour relations harm – as the Board explained in Hotel Employees and Restaurant Employees Union, Local 206 v. Chelton Suites Hotel (1998) Ltd., [2000] Sask. L.R.B.R. 434, LRB File Nos. 091-00, 110-00,125-00,139-00,144-00 &3 145-00, at 444, it is an adaptation of the civil irreparable harm criterion to the industrial relations arena.

. . .

[37] On an application for interim relief we are not charged with determining whether the allegations have been proven, but rather with whether the status quo should be maintained pending the final determination of the main application: an interim order is intended to be preservative rather than remedial. As the Board observed in Chelton Suites Hotel, supra, an interim order must be consonant with the preservation and fulfillment of the objectives of the Act as a whole and of the specific provisions alleged to have been violated. The Board stated at 443:

> *Any interim order must first and foremost be directed to ensuring the fulfillment of the objectives of the Act pending the final hearing and determination of the issues in dispute. This includes not only the broad objectives of the Act but also the objectives of those specific provisions alleged to have been violated.*

[38] Accordingly, and as iterated in Chelton Suites Hotel, supra, at 446, each application for interim relief is determined according to its specific facts. Certain types of applications have particular factors that the Board takes into account in assessing the application according to the test. The factors considered are driven by the specific objectives of the particular statutory provisions alleged to have been violated. In applications such as the present one, where it is alleged that an employee was terminated for activity in support of the union, or in attempted intimidation of union supporters, the Board has considered the potential for a negative effect on the status of the union and the potential

> *for loss of support and confidence, as well as the impact on the individual employee who was terminated. The fragility of the union's status and strength of support, and the vulnerability of its supporters to pressure exerted by the employer prior to certification, is generally accepted and not seriously disputed.*

[25] In applying the first part of the test, that is, whether the main unfair labour practice application reflects an arguable case under s. 11(1)(m) of the *Act*, the Board finds at a minimum that there is an arguable case under s. 11(1)(m). There is clearly a difference between the parties as to the applicable jurisprudence that the Board should follow in respect of the alleged breach of s. 11(1)(m). It is uncontradicted that the change was implemented unilaterally, which, in and of itself raises a question under s. 11(1)(m).

[26] This case, however does not satisfy the requirement that the labour relations harm to the Union is greater than that which would be suffered by the Employer. While the Union raised the specter that the actions of the Employer in making this unilateral change would weaken the Union's representation of the 5 affected employees, we cannot agree. Section 11(1)(m) is not an absolute interdiction against any change to terms and conditions of employment. The section requires only that any such change be first negotiated with the Union.

[27] On the basis of affidavit evidence, it is difficult, in not impossible, to determine if the unilateral implementation of this change meets the requirements for negotiation set out in the section. At this stage, any such finding would be premature.

[28] Employees who wish to take a Saturday off, as they have been accustomed to doing, may do so, by either utilizing a statutory holiday for that purpose, or taking a holiday as a part of their annual leave. The Employer has indicated through the affidavit of Ms. Humm that such arrangements would be accommodated.

[29] In the final result, the harm to the Employees is compensable in money. If the Employer is found to have violated s. 11(1)(m), the remedy can be either a monetary award, or the reinstatement of any holidays which they have taken to insure that there usual practice of having a Saturday off is accommodated.

[30] A recent Board decision in *SGEU v. Saskatchewan Government*[22], the Board restated its long standing jurisprudence concerning the granting of interim relief where there is no demonstrable potential for irreparable or non-compensable harm. At para 32 *et seq* the Board says:

> *[32] The second part of the test – balance of convenience - is an adaptation of the civil irreparable harm criteria to the labour relations arena. See: Hotel Employees and Restaurant Employees Union, Local 206 v. Chelton Suite Hotel (1998) Ltd., [2000] Sask. L.R.B.R. 434, LRB File Nos. 091-00, 110-00, 125-00, 139-00, 144-00 & 145-00. In determining whether or not the Board ought to grant interim relief prior to a full hearing on the merits of an application, we are called upon to consider various factors, including whether or not a sufficient sense of urgency exists to justify the desired remedy. See: Grain Services Union, Local 1450 v. Bear Hills Pork Producers Ltd. Partnership, [2000] Sask. L.R.B.R. 223, LRB File No. 079-00. The Board will also balance the relative labour relations harm that is anticipated to occur prior to the hearing of the main application without intervention by the Board compared to the harm that could result should a remedy be granted. See: Saskatchewan Joint Board, Retail Wholesale and Department Store Union v. Regina Exhibition Association Limited, et. al., [1997] Sask. L.R.B.R. 667, LRB File No. 266-97; United Brotherhood of Carpenters and Joiners of America, Local 1985 v. Con-Force Structures Limited, [1999] Sask. L.R.B.R. 599, LRB File No. 248-99; and International Association of Fire Fighters, Local 1318 v. South Saskatchewan 911, [2001] Sask., L.R.B.R. 97, LRB File No. 037-01. In assessing the relative labour relations harm, the Board is particularly sensitive to the potential for irreparable or non-compensable harm. See: Retail, Wholesale and Department Store Union, Local 455 v. Tai Wan Pork Inc., [2000] Sask. L.R.B.R. 219, LRB File No. 076-00.*
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> *[33] In addition, the Board had enunciated certain policy restrictions on when interim relief should be granted (or rather should not be granted). For example, the Board has stated that the relief sought may not be granted were doing so would have the practical effect of granting what the applicant might hope to obtain on the main application. See: Tai Wan Pork Inc., supra.*
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> *[34] While the Board uses a two-part test to aid in its consideration (and for ease of reference), each application for interim relief involves a matrix of considerations involving the factual circumstances of the application, the general goals of the Act, the policy objectives of the particular provision alleged to have been violated, and the nature of the relief being sought.*

[31] In its Practice Directive No. 1, the Board makes the requirements to obtain an interim Order very clear. That directive states in part:

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[22] [2010] CanLII 81339

> *In the urgent circumstances which give rise to applications of this kind, the procedural rules which protect the right of a respondent to reply adequately are already abbreviated. Applications for interim or interlocutory relief which are not sufficiently particular may therefore be dismissed on that ground.*
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> *In drafting an application of this kind, it should be kept in mind that the Board must be persuaded that there is some compelling reason to grant a remedy without a full hearing of the case. The courts have said that an applicant must demonstrate that there will be "irreparable harm" which cannot be cured later when a decision is made and remedies ordered on the case as a whole. [emphasis added]*

[32] The parties have agreed to an expedited hearing of this matter commencing on October 20, 2011. This also mitigates against the exercise of our discretion to issue an interim order since the matter will be heard and determined quickly and, as a result, there is little urgency to have this matter placed in abeyance pending the final hearing.

[33] Also, the parties are still engaged in collective bargaining. This is clearly an issue which could be settled by the parties at the bargaining table without the necessity for the Board to become involved. We would urge the parties to continue to bargain their respective positions.

[34] The application for an interim order is dismissed. A copy of this decision shall be posted in the workplace where it may be viewed by all affected employees.

DATED at Regina, Saskatchewan, this **26th** day of **September, 2011**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.,
Chairperson