The Labour Relations Board
Saskatchewan

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1881, Applicant v. TOWN OF KAMSACK, Respondent

LRB File No. 136-11; December 15, 2011
Chairperson, Kenneth G. Love; Members: Mick Grainger and Jim Holmes

For the Applicant Union: Vicky O'Dell
For the Respondent Employer: Tom Campbell

Unfair Labour Practice – Employer introduces new job descriptions for consideration part way through collective bargaining process – Union objects to new job descriptions being introduced late in bargaining process and claims they were not mentioned in original Employer proposals.

Duty to Bargain in good faith – Employer files new job descriptions well into bargaining process – Employer says new job descriptions not subject for negotiations – Union objects to proposals claiming they are receding horizon bargaining or were not tendered as part of original Employer proposals.

Duty to Bargain in good faith – Board reviews recent jurisprudence dealing with similar situation.

REASONS FOR DECISION

Background:

[1] Canadian Union of Public Employees, Local 1881, (the "Union") is certified as the bargaining agent for a unit of employees employed by the Town of Kamsack (the "Town"). While engaged in collective bargaining for a renewal collective bargaining agreement the Town provided sample job descriptions to the Union which it wished to have considered in a proposed process external to the collective bargaining process. The Union objected to these job descriptions being included in the collective bargaining process and filed an Unfair Labour Practice application with the Board alleging that the Town was not bargaining in good faith contrary to section 11(1)(c) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*").

Facts:

[2] The Board heard testimony from two (2) witnesses with respect to this matter. Vicky O'Dell testified for the Union and Ms. Laurie-Anne Rusnak testified for the Town. Ms. O'Dell is a National Representative of the Union. Ms. Rusnak is a labour consultant for the Town.

[3] The parties provided the Board with an agreed book of documents which was referred to by both witnesses.

[4] Both witnesses described the negotiations for a renewed collective agreement which the parties engaged in during 2011. Ms. O'Dell was the spokesperson for the Union and Ms. Rusnak was the spokesperson for the Town.

[5] Notice was given by the Union respecting negotiations for a renewed collective agreement on November 1, 2010. The collective agreement then in effect had a term of January 1, 2008 to December 31, 2010. The parties met on January 25, 2011 and exchanged proposals with respect to this round of collective bargaining. Ms. O'Dell testified that the parties engaged in some discussion following the tabling of their proposals on that date.

[6] After exchanging proposals the parties met to bargain. Some progress was made, but no monetary proposals had been made. On April 13, 2011, the parties agreed to a labour-management meeting prior to scheduled negotiations on April 14, 2011. On April 14, 2011, the parties again met to bargain collectively.

[7] On April 14, 2011, the Town presented a series of new job descriptions for the positions within the bargaining unit. They also provided the Union with a monetary offer based upon those new job descriptions. Ms. O'Dell testified that at that bargaining session the Town put forward the new job descriptions, but "the Employer said that they were not a bargaining issue". Ms. Rusnak similarly testified that the Employer "had no intention of including job descriptions within the collective bargaining agreement."

[8] Ms. O'Dell testified that the Union was displeased by the tabling of these job descriptions during negotiations. She testified that it was like a "slap in the face" and that the

atmosphere in the negotiations cooled considerably. Ms. Rusnak testified that the job descriptions were tabled for information purposes since the Town and the Union had been stick handling the issue of revised job descriptions for employees within the bargaining unit for the last three (3) collective agreements and had achieved nothing to date.

[9] Notwithstanding this disruption, the parties continued to bargain. On April 18, 2011, the Union made a counterproposal regarding the contract language related to the job descriptions, which was to revert to the language in the former (January 1, 2005 to December 31, 2007) collective agreement.

[10] Also, on June 22, 2011, the Town made a final offer based upon the job classifications contained under the expired collective agreement which included a monetary component of 2% for a (1) one year term. Ms. Rusnak advised that this offer was proposed as conciliatory insofar as the Town wanted to put the issue of job descriptions aside for the short term, resolve a (1) one year contract with wages improved based upon the current settlements and then start fresh on negotiations to deal with the unresolved concerns over job descriptions.

[11] The Union took the final offer to its members, but the membership rejected the offer.

[12] The history of the language in the collective agreement regarding job descriptions is important to the context of this issue. In the collective agreement which was effective from January 1, 1999 to December 31, 2001, the collective agreement included within it, job descriptions for all of the positions covered by the collective agreement. In the collective agreement from January 1, 2002 to December 31, 2004, the parties agreed as follows:

> *ARTICLE 27 – CLASSIFICATIONS AND RATES OF PAY*
>
> *…*
>
> *(c) The parties agree to set up a Joint Committee to negotiate revisions to job descriptions.*
>
> *Job descriptions and classifications as set out shall not be altered or deleted without the agreement of the Union. The parties agree to an ongoing committee to study and review job descriptions and classifications.*
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> *The job descriptions as outlined in Schedule "B" of the Collective Agreement between the Town of Kamsack and CUPE Local 1881 in*

> *force from January 1, 1999 to December 31, 2001, shall be the job descriptions for all employees until changed through negotiations as outlined in Article 27(c).*

[13] In the collective agreement effective from January 1, 2005 to December 31, 2007, the wording regarding establishment of a joint committee remained the same. In the collective agreement effective from January 1, 2008 to December 31, 2010, the wording was changed as follows:

> *ARTICLE 26 – CLASSIFICATION AND RATES OF PAY*
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> *(c) The Employer agrees to draw up job descriptions for all jobs for which the Union is the bargaining agent. These job descriptions shall be mutually agreed upon with the Union prior to their adoption.*

[14] In the proposals provided to the Union by the Employer in January of 2011, the Employer's proposal contained a proposal to delete paragraph (c) of Article 26. It also contained a comment that "The Employer reserves the right to submit a revised schedule of wages, classifications and salaries". The Union proposed the following with respect to Article 26:

> *The parties agree to set up a Joint Committee to negotiate revisions to Job Descriptions. These Job Descriptions shall be mutually agreed upon prior to their adoption. Job Descriptions and Classifications as mutually agreed upon shall not be altered or deleted without the agreement of the Union. The parties agree to an ongoing committee to study and review Job Descriptions and Classifications.*

[15] Ms. O'Dell testified that the nature and tone of negotiations changed following the introduction of the job descriptions on April 14, 2011. She testified that the parties were having difficulty getting past them in negotiations. Ms. Rusnak testified in somewhat the same vein. She testified that the Employer made its final offer, which included a monetary offer, because the Union was insisting on a wage offer as a precondition to ongoing negotiations. Ms. Rusnak testified that it was not the intention to negotiate the job descriptions, and that they were introduced so that the Union would know what the Employer was looking for in respect to job descriptions, but that the Employer remained willing to negotiate the process whereby the job descriptions were finalized.

Relevant statutory provision:

[16] Relevant provisions of the *Act* include the following:

> *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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> *. . .*
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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;*

Union's arguments:

[17] The Union argued that a good faith bargaining process generally starts off as an exercise in narrowing issues. They argued that the introduction of the job descriptions at a late stage of the bargaining constituted receding horizon bargaining.

[18] The Union further argued that the introduction of the job descriptions put a chill on the bargaining process and that the introduction of the proposals was a deviation from the normal standards of collective bargaining. In support, they quoted from the BC Labour Relations Board case of *Ladner Private Hospital Ltd. et al. v. Hospital Employees Union, Local No. 180.*[1]

[19] The Union argued as well that the process of collective bargaining was diverted from the goal of collective bargaining, that is, achievement of a collective agreement, by the introduction of the job descriptions. They argued that the Employer had not given notice, through its proposals that job descriptions would be an issue in the negotiations. In support it quoted from the Alberta Labour Board's decisions in *United Food and Commercial Workers Union, Local 280-P v. Gainers Inc.*[2] and *Glass, Molders, Pottery, Plastics & Allied Workers International Union, Local 371 and Barber Industries.*[3]

[20] The Union also referenced this Board's decision in *CUPE v. Saskatchewan Association of Health Organizations et al*[4] where the Board set out, at paragraph [23] some of the indicia of bad faith bargaining. The Union argued that by the introduction of the job descriptions that the Employer was attempting to thwart negotiations which showed an

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[1] [1977] CLB 5250
[2] [1986] Alta L.R.B.R. 529 @ 555
[3] [1989] CLB 11834, 89 C.L.L.C. 16024, 3 C.L.R.B.R. (2nd) 275
[4] [2009] CanLII 45864, LRB File No.: 029-09

unwillingness to conclude a collective agreement or, alternatively, that the bargaining posture went against bargaining standards in the industry.

Employer's arguments:

[21] The Employer argued that both it and the Union had placed the process to deal with job descriptions in play for this round of collective bargaining by its reference to deletion of Article 26(c) and by its reservation of the right to submit a revised schedule of wages, classifications and salaries. Similarly, it noted the Union had also proposed changes to Article 26(c).

[22] The Employer cited a decision of the Public Service Labour Relations Board in *Public Service Alliance of Canada v. Senate of Canada*[5] as support for its argument that the introduction of the job descriptions was not receding horizon bargaining.

[23] The Employer cited the Supreme Court of Canada decision in *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*[6] in support of its argument that the Board should not focus on the contents of the collective bargaining process, but, as directed by the Supreme Court the Board should analyze the duty to bargain in good faith on a subjective standard, while the making of reasonable efforts to bargain should be measured on an objective standard.

[24] The Employer also referenced the Board's recent decision in *CUPE v. SAHO et al.*[7]. It relied upon the same provisions that the Union relied upon in support of its argument that the conduct of the Employer did not breach the acceptable standard of conduct so as to constitute an unfair labour practice under the *Act*. The Employer argued that the job descriptions were not introduced to be a subject of collective bargaining, but rather to bring some progress to a long delayed process of renewal of the job descriptions. They argued that there was nothing illegal in the proposals, they were not an attempt to derail or lengthen the process of bargaining.

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[5] [2008] PSLRB 100 (CanLII)
[6] [1996] CanLII 220
[7] *Supra* note 4

Analysis and Decision:

[25] The Board most recently considered a situation akin to this in its decision in *CUPE v. SAHO et al*[8]. That decision, as here, considered an allegation that the Employer had introduced a proposal into bargaining at a late date. In that decision, the Board said:

> *[21] The Board will not normally become engaged in the collective bargaining process between the parties.*[9] *The purpose for clause 11(1)(c) is to ensure that parties to the collective bargaining process engage fully in such process, in good faith, in an attempt to reach a collective agreement.*
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> *[22] The Board has held* [10] *that there "are no rules for the bargaining process." While the parties to the process may have some expectations based on their past bargaining experiences "that issues will be discussed in a particular sequence, or that there will be particular proportionality between proposal and counterproposal or the other can always expect to achieve improvements in its favour, the Board will not impose sanctions if there are deviations from the anticipated course of bargaining or proposals."*
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> *[23] The Board has also held that notwithstanding its reluctance to become involved in the reasonableness or otherwise of the bargaining positions taken by either party, the Board may find that a specific proposal does constitute bad faith bargaining if:*
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> *a. the proposal contains some illegality; or*
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> *b. the proposal in itself or in conjunction with other conduct indicates a subjective unwillingness to conclude a collective bargaining agreement; or*
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> *c. the proposal is or should be know to go against bargaining standards in the industry and to be generally unacceptable to either include or refuse to include in a collective agreement, i.e. it has the effect of blocking the negotiations of a collective agreement.*[11]

[26] Also, in that case, at paragraph [25], the Board relied upon this quote from *CUPE v. Indian Head School Division #19*[12]*:*

> *If a party introduces new proposals after having indicated that it has none, that might be evidence of bargaining in bad faith. However, even then, a finding of*

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[8] *Supra* Note 4
[9] See *International Brotherhood of Electrical Workers, Local 2067 v. SaskPower and Government of Saskatchewan* [1993] 1st Quarter Sask. Labour Rep. 268, LRB File No. 256-92 at 292-293
[10] *Retail, Wholesale and Department Store Union v. Westfair Foods Ltd.,* [1993] 1st Quarter Sask. Labour Rep. 57, LRB File No. 007-93
[11] *Saskatchewan Government Employees' Union v. Government of Saskatchewan, Saskatchewan Association of Health Organizations, Mamawetan Churchill River District Health Board, Keewatin Yathé District Health Board and North East District Health Board*, [1999] Sask. L.R.B.R. 307, LRB File No. 109-98
[12] [1990] Winter Sask. Labour Rep. 68, LRB File No.: 089-90

> *bad faith would not be automatic as the Board must have regard to all the circumstances. Secondly, in this case, it is just as likely that the employer made its position perfectly clear at the first meeting and the union somehow misunderstood. The employer cannot be responsible in those circumstances. Thirdly, the union does not even suggest that the employer's proposals were a tactic designed to impede collective bargaining. Finally, the Board does not think it would be in the interests of unions or employers to draw the procedural rules of bargaining as tightly and rigidly as the union suggests. The parties must be left some margin because the Board does not wish to turn bargaining into a procedural exercise that diverts the parties from their real task. Furthermore the Board does not think it would be advisable to lay down a rule that prevents a party from tendering its proposal during such an early stage of bargaining simply because the other side was under the impression that they would not be tendering proposals. One can easily imagine the reverse of the present situation where an employer tendered its proposals first and the union found itself prevented from raising any proposals because the employer testified that the union had not made it crystal clear at the first meeting that it would be coming forth with proposals.*

[27] In this case, both sides had put the process whereby job descriptions were to be developed, in play in their initial proposals. Both sides proposed amendments to Article 26(3). In addition, the Town made it clear that they "reserved the right to submit a revised schedule of wages, classifications and salaries".

[28] Additionally, and equally importantly, the evidence from both parties' testimony makes it clear that neither intended the job descriptions to be a matter for collective bargaining. The only issue was the process whereby the job descriptions were to be developed and the involvement of both parties in the process. The Union understandably wanted more control, the Town, less control.

[29] The testimony of Ms. Rusnak made it clear that the Town was frustrated over the process of renewing the job descriptions. In her testimony, Ms. O'Dell admitted that the collective agreement with the Town was unique among its municipal peers insofar as it included job descriptions as a part of the collective agreement. Over the course of negotiations, Ms. Rusnak noted that the Town had made progress towards a process for development of job descriptions, first by a joint committee concept, and then later by the Town preparing the job descriptions on its own for review.

[30] However, Ms. Rusnak also noted that the process, however designed, did not function as intended. It was for that reason, she testified that the Town ultimately proposed a one year contract with a 2% wage increase in the hopes of getting the issue of job descriptions

moved along to a new set of bargaining meetings after settlement of the contract on an interim basis.

[31] The facts do not support the Union's claim that the Town was engaged in receding horizon bargaining with this proposal. As noted above, the process was in play, and additionally, there was no intention to negotiate the job descriptions as they were tabled for information as to what the Town and the Union might later discuss.

[32] There was clearly nothing illegal in the proposal. Nor did the proposal have the effect of derailing negotiations as they continued for some time after the introduction of the job descriptions. Nor were they a bargaining item.

[33] As noted in *CUPE v. SAHO et al, supra,* "the determination of bad faith bargaining is determined by the context in which the proposal is made, and the underlying objective for which the proposal was introduced".[13] As noted above, the factual situation here, and the evidence adduced by the parties, does not support a finding that an unfair labour practice has been engaged in by the Town.

[34] It is also clear to the Board that the parties are best suited to formulate a solution to the process of determining how new job descriptions are to be developed. The parties are represented by sophisticated and knowledgeable negotiators who are much better able than the Board to resolve issues as they arise at the bargaining table.

[35] The application is hereby dismissed.

DATED at Regina, Saskatchewan, this **15th** day of **December, 2011.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson

[13] *Supra* Note 4 @ paragraph 31

Dissent by Member Holmes

[36] I dissent from the majority award.

[37] The issue in this case is did the Employer created a receding horizon or undermine the decision-making of the Union by introducing new proposals late in bargaining.

[38] The bargaining began on January 25, 2011. The parties met several times and some substantial progress was made on non-monetary provisions.

[39] On April 14, 2011 the Employer tabled a job description document which is the subject of this allegation.

[40] The Employer argued this document was a logical development from its proposal and the Unions proposal on Article 26(c).

[41] With respect, this argument is not convincing. Each parties' proposal addressed the *process* for determining job descriptions. The Employer wanted the right to act unilaterally; the Union wanted an amendment of the existing joint approach. Neither proposed negotiating the *content* of the job descriptions.

[42] Alternately, the Employer argued the document was covered by "The Employer reserves the right to submit a revised schedule of wages, classifications and salaries."

[43] This argument is not convincing either. By agreement, the parties entered four collective agreements dating back to 1999. They also entered five interim letters of understanding regarding wages and job classifications and sometimes job descriptions. Wages and job classifications are distinct from job descriptions in those documents. Sometimes a change in one will result in a change of the other, but often it does not.

[44] It is the evidence of both parties that the negotiation of job descriptions is unusual in municipal agreements in Saskatchewan. Examining the totality of the Labour Board's decisions, it appears the negotiation of wages, classifications and salaries is usual in Saskatchewan collective agreements.

[45] The Employer also suggested that the proposal was tabled to allay the Union's concern about what type of job description the Employer would implement of given the unilateral right to do so.

[46] This assertion is not credible. The document contains a sweeping set of very contentious proposals. It was presented as non-negotiable, although it would have a dramatic affect on collective agreement provisions already agreed.

[47] The April 14, 2001 document does contain list of job duties which one would expect in job descriptions. However, it also contains a list of attributes which would typically be found in a *personal* employee evaluation, not in an objective job description.

[48] Most of these attributes are difficult to evaluate objectively. Some are troubling; "must be able to work in a political environment." The addition of these contentious attributes would be enough to derail negotiations.

[49] The April 14, 2011 document also contains a proposal to establish a system of progression through many of the job classifications.

[50] The current collective agreement provides for open posted positions filed partly on bargaining unit wide seniority. Originally, each party proposed some minor changes to the job posting Articles. The Employer proposed some minor changes to the Seniority article.

[51] The April 14, 2011 document also proposes that each employee in its progression system serve a probationary period in each new position.

[52] Currently a probationary employee is one who may be dismissed without just cause. An employee currently is on probation only once, after first being hired. Neither party originally proposed a change to this provision.

[53] Currently, an employee who is moving between positions serves a trial period. If either the Employer or the employee, during the trial period, decides the new situation is unsuitable, the employee moves back to their old position at their previous rate of pay. There is no effect on the employee's permanent status.

[54] Adding new or resurrected issues to the bargaining table late in the bargaining destroys the decision-making framework because it threatens to undo all of the bargaining that preceded it, bargaining that comprised many finely tuned judgments about priorities and acceptable trade-offs. It betrays intent to subvert what has already been accomplished in bargaining and delay or prevent the conclusion of an agreement. [14]

[55] Labour Relations Boards have often remarked that taking a new approach may overcome an impasse.

[56] However, given the comments above about the probable destructive effects of a sudden change in issues or positions, a new approach must be entered very carefully.

[57] The Employer's proposal of April 14, 2011 was not careful. Job posting or assignment, seniority and job security are traditionally seen as the key elements of a collective agreement.[15] They can be the subject of bargaining and may take many forms. The Employer's late introduction of an attack on these issues "betrays intent to subvert what has already been accomplished in bargaining and delay or prevent the conclusion of an agreement".

[58] While intent may be a strong indicator of bad faith, this Board is not required to determine motivation. The *Act* contains not only the malicious "refuse to bargain" but also the objective "fail to bargain." Whether the filing of the job description document late in negotiations, with its attached troubling attributes and contradictions of the agreed collective agreement, was a provocation or simply an extraordinarily insensitive disruption, it was not bargaining in good faith.

[59] The continuation of negotiations after the initial act complained of is not evidence of lack of bad faith bargaining.

[60] It is not unusual that a party who perceives it is the victim of bad faith bargaining will attempt to find a way to get the bargaining back on track, by clarifying, seeking other approaches or threatening an unfair labour practice application.[16] The only certain outcome of a

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[14] Gateway Casinos GP Inc quoted in *Public Service Alliance of Canada v Senate of Canada* 2008 PSLRB 100
[15] *UFCW, Local 1400 v Madison Development Group Inc*., [1997] Sask. L.R.B.R. 68
[16] *Canadian Union of Public Employee v Wadena School Division.* [2003] LRB File No. 188-03

referral to the Board will be some delay in the negotiations. The parties should be encouraged to seek their own resolution and only apply to the Board as a last resort.

[61] The Town proposed a one year agreement with a 2% wage increase and the conclusion of new job descriptions within (60) sixty days.

[62] Given the huge gulf, the April 14, 2011 proposal had opened between the parties, the possibility of success was non-existent. The attempt to devise new job descriptions would take place when the Union was bound by a signed collective agreement not to strike.

[63] Labour Boards in Canada are properly reluctant to intervene in bargaining.

[64] In this case the Union requests, as remedy for the unfair labour practice, the removal of the April 14, 2011 proposal from the bargaining table. This would simply return the parties to their original January 25, 2011 positing plus all the other areas upon which they subsequently agreed. They could then work through their differences or even refer the issue of job description *process* to another form of resolution or another set of negotiations.

[65] The remedy sought by the Union would be an intrusion into collective bargaining but an intrusion justifiable by the Employer's conduct.

Jim Holmes, Board Member