The Labour Relations Board
Saskatchewan

REGINA PUBLIC LIBRARY BOARD, Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1594, Respondent

LRB File No. 001-12; August 2, 2012
Chairperson, Kenneth G. Love, Q.C.; Members: Bert Ottenson and Mick Grainger

For the Applicant Employer: Brian Kenny, Q.C.
For the Respondent Union: Guy Marsden

Section 11(2)(c) – Employer alleges that Union was not bargaining in good faith during recent round of negotiations – Union began public campaign for support which included a "blog" site check-us-out.net – Union published information on website Employer felt was false and misleading and which portrayed a false picture of what the Employer's position was at the bargaining table – Employer alleges that these postings were intended to interfere with the negotiations for a collective agreement – Board denies application.

Board reviews jurisprudence related to "bargaining in good faith" – applies principles developed in cases involving section 11(1)(c) as provisions sufficiently similar in intent – Board determines that Union was publishing its interpretation of the Employer's position to its members and the public through the website.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Q.C., Chairperson:** The Canadian Union of Public Employees, Local 1594, (the "Union") is certified as the bargaining agent for a unit of employees of the Regina Public Library Board (the "Employer"). The Employer applied to this Board on January 3, 2012, alleging that the Union was not bargaining in good faith, contrary to Section 11(2)(c) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"). For the reasons that follow, this Board dismisses the Employer's application.

[2] At the time of the application, the Union and the Employer were engaged in collective bargaining for a new collective agreement. The former agreement between the parties

expired on December 31, 2009 and the parties had been engaged in collective bargaining since that date.

Facts:

[3] Since the expiry of the Collective Agreement governing employees of the Employer, the parties met on numerous occasions for bargaining, but had been unable to reach an agreement. In October of 2011, the Union made a decision to begin a public campaign for support of its efforts to negotiate a new collective agreement.

[4] Part of the public campaign was the establishment by the Union of a website with the address "check-us-out.net." That website was solely under the control of the Union and was moderated by the Union. Materials posted on the website were either prepared by the Union or, if there were comments from the public, they were posted on the website only after they had been reviewed and approved by either Debbie Mihial, Local Union President, Guy Marsden, National Representative assigned to the Union Local, or by Beth Smillie, a communications representative of the Union.

[5] Over the course of negotiations, the issues were fairly fundamental. The Employer was seeking significant concessions from the Union, and the Union was intent upon resisting the Employer's demands for concessions.

[6] At the opening of negotiations, the Employer presented what was described by its witness, Mr. Jeff Grant, Manager of Human Resources for the Employer, as an "aggressive package" of proposals. Those proposals included changes to several benefits previously negotiated, central of which were Article 18, which provides for a pay-out of up to seventy-eight (78) days of unused personal and sick leave entitlements, Article 30 which provides for a dental plan which may be accessed by all employees, regardless of their status as full-time or part-time employees and regardless of the number of hours worked by part-time employees, and Article 33 which provided Health Plan benefits to all employees as was the case with dental benefits.

[7] Part of what the Employer was attempting to achieve in its negotiations was a limitation on the number of days which to be paid out on retirement to employees under Article 18, as well as a limit on the benefits paid to part-time employees under Articles 30 and 33. The Union was seeking to maintain the *status quo*.

[8] As negotiations continued, there was some movement on the various proposals as between the parties, but there was no agreement on the Articles referenced above. On January 4, 2011, the Employer provided a revised proposal package to the Union. That proposal contained a new definition of "Permanent Position" as follows:

> *2.09 "Permanent Position" means a position designated by the Employer as a permanent position and includes all **part time** positions **scheduled to work 15 or more hours each week**.*

[9] This new definition was a new proposal that had not been included in the Employer's earlier proposal package delivered on August 23, 2010. The original proposals contained language which was directed limiting the number of days paid out under Article 18 to fifty (50) days and to pro-rate benefits based upon the number of hours worked under Article 30 and 33.

[10] The Union testified that they interpreted the proposed new definition for "Permanent Position" as affecting existing employees who worked less than fifteen (15) hours a week. The Employer testified that it was their intention that it was only to apply to new employees hired after the conclusion of a new collective agreement. This difference in interpretation ultimately resulted in the filing of the unfair labour practice application by the Employer.

[11] Negotiations continued, but were not fruitful, culminating in the Union's decision in October, 2011 to commence a public campaign for support for the library workers, which included the development of the "check-us-out.net" website.

[12] The website was a "blog", which is defined by Wikipedia as "a discussion or information site published on the world wide web…". It was developed by the Union with the assistance of a communications representative of the Union, Beth Smillie. It was "moderated" or the content of the blog was controlled by the Union through Debbie Mihial, Local Union President, Guy Marsden, Union National Representative or Beth Smillie.

[13] The existence of the blog was announced by employees of the Employer wearing buttons with the web site address shown thereon. These buttons were worn so as to be visible

to the general public and members of management of the Employer. Mr. Jeff Grant, the Manager of Human Resources, noticed the buttons, went to the website and noted content which he felt was inaccurate and misleading. On October 19, 2011, he sent a Memo to both Debbie Mihial and Guy Marsden complaining about "inaccuracies and misrepresentations around both the Employer's proposals and certain out-of-scope compensation rates."

[14] In particular, he complained that:

> *…we wish to strongly state the CUPE Local 1594's decision to communicate the Employer's proposals with not only its membership but the general public as well in a manner that describes portions of the proposals out of their full context or misrepresents the impact of certain proposals that have clearly been described as being "sunset" clauses that would only impact future employees is very discouraging.*

[15] He also pointed out that other content of the website, which suggested the Library Director received a pay increase while other employees had not, was erroneous and misleading. He requested that the Union retract the erroneous information and provide the Employer with an apology.

[16] Mr. Marsden responded to Mr. Grant's memo on October 27, 2011. In his response, Mr. Marsden says:

> *In your letter, you indicate your disappointment that employer proposals haven't been properly described as being "sunset" clauses that would only impact future employees. However, from our perspective, the written proposals provided to the union do not reflect this intention.*

[17] The evidence was consistent that on several occasions, the Employer had indicated to the Union that its proposals respecting Articles 18, 30 and 33 was intended to impact only future employees. The Union, however, refused to accept any oral assurances, relying solely upon the written proposals made by the Employer.

[18] On August 11, 2011, the Employer tabled new proposals which contained specific language which limited the impact of changes the proposed changes to Articles 30 and 33 to employees hired after January 1, 2012. No change was proposed with respect to the proposed definition of "Permanent Employee" in Article 2.09.

[19] No change was made to the "check-us-out" website as a result of this change in the Employer's proposals. The Union, in its evidence, continued to maintain that a large number of its members were part-time employees who would be impacted by the proposed change in the definition of "Permanent Employee". The Employer continued to maintain that its position was, and always had been, that any changes would only impact newly hired employees.

[20] Negotiations resumed on October 20, 2011 after the launch of the website by the Union. At that meeting, the notes of both Mr. Grant and Ms. Mihial agree that the chief spokesperson for the Employer made it clear to the Union that the proposed changes to Articles 30 and 33 were intended to impact only new employees.

[21] The parties bargained again on December 6, 2011. At that meeting, the Employer advised that it was withdrawing its proposed change to Article 2.09 and would accept the language formerly in the agreement. The Employer also again confirmed that the new proposals for Articles 30 and 33 made it clear that only new employees would be impacted by the changes.

[22] On December 9, 2011, a bargaining update was posted to the website. In that update, posted by thecommunityunion they reported, in part that "[Y]our committee is very pleased to report that the Employer has dropped its proposal to take away permanent status from RPL employees working under 18 hours per week".

[23] On December 21, 2011, the Employer printed off a screen print from the "check-us-out" website. On that print out was an article dated as having been posted on October 5, 2011, by thecommunityunion. In that posting, the following paragraph appears:

> *The library board continues to insist on roll-backs and benefit cuts for part-time employees. They also want library workers to accept wage increases far below what every other group of municipal employees received.*

[24] In his evidence, Mr. Grant took exception to this posting remaining on the website after it had been made clear by the Employer's negotiating team that their proposals were intended to impact only new employees, not existing employees as confirmed in the changes to the Employer's latest package offer.

[25] Mr. Grant also took exception to another posting of a press release from the Union, also posted by thecommunityunion on October 19, 2011 and which was also still on the website as of December 21, 2011. In that press release, the Union makes the following comments:

> *But the library board has shown no interest in negotiating contract improvements. Instead the board wants CUPE library workers to accept a long list of concessions, including:*
>
> - *Fewer benefits for part-time employees and no guaranteed hours of work*
> - *Removal of permanent status for many part-time employees, some with over 20 years of service*
>
> …

[26] Also, on a screen print on December 21, 2011, there was another posting by thecommunityunion dated December 17, 2011. As a part of that posting, the Local Union President, Debbie Mihial was quoted as having said "[T]he President also thanked the Chair for the Board's decision to remove their concessions that would have resulted in many part-time members losing their permanent status." The reference in that quote was to the Chair of the Library Board, Ms. Darlene Hincks-Joehnck.

[27] On January 10, 2012, a communication was posted to the website, again by thecommunityunion. In that communication, the Union advises its members that conciliation talks between the parties had broken down. It also characterized the proposals made by the Employer that the benefits in Articles 30 and 33 should be limited insofar as newly hired employees was concerned that it "would effectively create a two-tiered workforce at the RPL by cutting benefits for new part-time employees and accumulated sick leave pay-outs for all new employees".

[28] On January 20, 2011, Mr. Grant sent a memorandum to all employees providing them with a bargaining update. In that memo, he says, in part:

> *The Library has also proposed a couple of changes to make our service delivery more affordable. These changes deal with how we address severance payments and benefits in the future.*
>
> *The Library has proposed that employees hired in the future not receive severance payments based on unused sick leave credits when they leave the Library.*

The Library has also proposed that part-time employees who are hired in the future and who work less than half-time hours receive benefits that are half of what full-time staff receives.

These proposed changes to severance and benefits do not apply to any current staff.

[29] Again, on January 27, 2012, a screen print from the website contained the following posting:

The library board wants to roll-back many hard won gains in our collective agreement.

Here are a few examples:

The RPL Board's Proposals

The Library Board wants to remove the "permanent" status from many of our part-time employees. Even though some of these employees have more than 25 years of service, the Library Board wants to change their status to spare board (casual) employees. As casual employees, they only would be considered for lateral vacancies or promotions if permanent employees did not qualify.

…

Our Library Board is proposing that over 40 per cent of our part-time members, some of who have worked for the library for more than 20 years should no longer receive the Dental Benefits they have always received, or the health care benefits they currently receive.

…

[30] On February 15, 2012, thecommunityunion again posted to the website. In that communication, the Union says as follows:

The Regina Public Library claims that their proposed changes to severance and benefits in the current protracted round of bargaining will not apply to current staff.

It is true that the RPL wants to slash benefits for new hires by making them ineligible for severance payments based upon unused accumulated personal and family sick leave and cutting benefits in half for new part-time employees who work less than 18.125 hours a week. In many ways, the RPL's proposal package aims to create a two-tiered work force.

However, the reality is that the RPL bargaining committee is also demanding a significant concession from current employees. The RPL is proposing that family sick leave credits be deleted from the severance pay calculation for employees hired prior to January 1, 2012.

Full-time employees currently accumulate family sick leave credits at the rate of one-quarter day per month, while part-time employees earn one-quarter for every 157 hours worked. This is an important benefit which employees can use to care for immediate family members who are ill.

Still, some long-term employees may accumulate a significant amount of unused family sick leave credits. The deletion of these credits will reduce the severance payment provided to the long-serving employees.

[31] A screen print from the website on March 28, 2012 contained the same posting set out in paragraph 27, with some modification. It appeared as follows:

The library board wants to roll-back many hard won gains in our collective agreement.

Here are a few examples:

The RPL Board's Proposals

The Library Board wants to ~~remove the "permanent" status from many of our part-time employees. Even though some of these employees have more than 25 years of service, the Library Board wants to change their status to spare board (casual) employees. As casual employees, they only would be considered for lateral vacancies or promotions if permanent employees did not qualify.~~ [This proposal has been taken off the bargaining table due to the pressure and advocacy of our bargaining team, members and this web site. Thanks to all for your continued hard work and solidarity.]

…

Our Library Board is proposing that over 40 per cent of our part-time members, some of who have worked for the library for more than 20 years should no longer receive the Dental Benefits they have always received, or the health care benefits they currently receive.

[32] On April 2, 2012, the Union conducted a strike vote amongst its members. The membership voted overwhelmingly to go on strike (83%). On April 4, 2012, the Employer provided a "final" offer to the Union. This final offer was unacceptable to the Union.

[33] On April 4, 2012, Mr. Grant wrote to all employees concerning the Employer's final offer. In that memo, to which he attached a copy of the Employer's final offer, he says, in part:

To summarize the package, the major proposals are:

…

> 3. *The Library will not pay severance pay to employees that start work with the Library after December 31, 2012.*
>
> ***This proposal has always been intended to affect future employees only and will not affect any current employees of RPL.***
>
> *…*
>
> 6. *Part-time employees that start work with the Library after December 31, 2012, and who work less than half-time hours in a year will receive 50% coverage for health and dental benefits. Part-time employees who work greater than half-time hours will receive 100% benefits coverage.*
>
> ***This proposal has always been intended to affect future employees only and will NOT affect any current employees of RPL.***

[34] A screen print of the website taken on April 5, 2012 shows the same posting as set out above in paragraph 31.

[35] Having had no response to their final offer, the Employer contacted the Union on May 28, 2012 to suggest that the parties "meet and discuss the content of the Final Offer". A meeting was arranged, with the result that the parties returned to conciliation of their dispute, which ultimately resulted in a tentative agreement on Friday, July 13, 2012, which was five (5) calendar days prior to the commencement of the hearing of this matter.

Relevant statutory provision:

[36] The relevant statutory provision is as follows:

> *11(2) It shall be an unfair labour practice for any employee, trade union or any other person:*
>
> *. . .*
>
> *(c) to fail or refuse to bargain collectively with the employer in respect of employees in an appropriate unit where a majority of the employees have selected or designated the trade union as their representative for the purpose of bargaining collectively;*

Employer's argument:

[37] The Employer argued that the Union, by virtue of false and misleading information posted on the website, was not bargaining in good faith, which responsibility included negotiating in good faith. In making this argument, the Employer relied upon the Board's decision in *Wheat*

City Metals v. United Steelworkers of America, Local 5917[1] and the Canada Board's decision in *Serco Facilities Management Inc.*[2] The Employer argued that dissemination of false or misleading information on the website in order to influence the negotiations for a collective agreement constituted bargaining in bad faith.

[38] The Employer also argued that the dissemination of the false and misleading information on the website was not protected by the right to freedom of expression. The Employer argued that the statements went beyond mere expression or communication of a viewpoint and were intended to improperly pressure the Employer to concede to the Union's negotiating demands. In support of its position, the Employer cited the Supreme Court of Canada decision in *Re: Kmart Canada,*[3] which decision dealt with Union leafleting during a labour dispute.

Union's argument:

[39] The Union argued that there were no rules for collective bargaining. The Union further argued that the communications were legitimate communications with its members and the public and were not false or misleading. The Union argued that there was a difference of interpretation regarding the Employer's proposals between how the Union viewed them and how the Employer sought to portray them. It argued further that the postings on its website were both legitimate and accurate.

[40] The Union asserted that they did not refuse to bargain collectively after the launch of the website, and in fact, continued to bargain throughout the period when the website was active, including two periods of conciliation, ultimately leading to a tentative collective agreement.

[41] The Union also argued that the postings on the website were protected by freedom of expression and that they were "fair comment" on the state of negotiations. They argued that the website was amended to reflect the current Employer position in a timely fashion.

Analysis:

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[1] [2005] S.L.R.B.D. 19, CanLII 63019 (SK LRB), LRB File No. 060-05. This decision was upheld on review by the Saskatchewan Court of Queen's Bench, [2005] SJ 544

[2] [2008] C.I.R.B.D. No. 33

[3] [1999] 2 SCR 1083, CanLII 650 (SCC), 176 DLR (4th) 607, 9 WWR 161, 66 CRR (2nd) 205, 66 BCLR 211

[42] Section 11(2)(a) of the *Act* deals with alleged unfair labour practices arising out of communications by a trade union, employee or other person. That section was not plead, nor relied upon by the Employer in this application, nor was there any application made to include a breach of that application in the Employer's application. More importantly, there was no evidence presented directed towards this provision. Accordingly, the Board has not considered the applicability of this section and has considered only s. 11(1)(c) for the purposes of this application.

[43] Additionally, the parties raised issues concerning the constitutional right of freedom of expression. However, neither party sought a declaration of unconstitutionality of any provision of the *Act*, nor was there any notice provided under *The Constitutional Questions Act, 2012.*[4]

[44] The duty to bargain in good faith was well described by the Supreme Court of Canada in its decision in *Re: Royal Oak Mines*[5]. At paragraphs 41 and 42, the Court says:

> *41. …In the context of the duty to bargain in good faith a commitment is required from each side to honestly strive to find a middle ground between their opposing interests. Both parties must approach the bargaining table with good intentions.*
>
> *42. Section 50(a) of the Canada Labour Code has two facets. Not only must the parties bargain in good faith, but they must also make every reasonable effort to enter into a collective agreement. Both components are equally important, and a party will be found in breach of the section if it does not comply with both of them. There may well be exceptions but as a general rule the duty to enter into bargaining in good faith must be measured on a subjective standard, while the making of a reasonable effort to bargain should be measured by an objective standard which can be ascertained by a board looking to comparable standards and practices within the particular industry. It is this latter part of the duty which prevents a party from hiding behind an assertion that it is sincerely trying to reach an agreement when, viewed objectively, it can be seen that its proposals are so far from the accepted norms of the industry that they must be unreasonable.*

[45] Most, if not all, of the Board's past jurisprudence interprets s. 11(1)(c) rather than s. 11(2)(c). However, the wording of the two provisions is sufficiently similar, with the main difference being that s. 11(1)(c) deals with actions by the employer and s. 11(2)(c) deals with actions by a trade union, that the Board's jurisprudence concerning s. 11(1)(c) may be utilized to analyze s. 11(2)(c).

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[4] S.S. 2012 c. C-29.01

[46] In the Board's previous jurisprudence, it usually deals with events that have occurred at the bargaining table or which directly impacted on matters under discussion at the bargaining table. Here, the argument is that the public campaign by the Union, specifically the website and the items posted thereon, were an unfair intrusion into the collective bargaining process and that the Union gained an unfair advantage by posting false and misleading information on the website.

[47] The following comment by George Adams in his book, *Canadian Labour Law*[6] which deals with an employer's right to communicate with its employees and is somewhat relevant to this situation:

> *A particularly thorny issue is whether the employer is allowed to communicate directly with its employees while negotiations are under way. On the one hand, an employer's right to free speech is guaranteed by many statutes* ***and a trade union cannot be counted on to give an impartial explanation of the employer's position****. [Emphasis added]*

[48] It is not, we submit, unusual for there to be differing points of view during collective bargaining. Each side will want to "spin" their perspective of the events in bargaining to their best advantage in negotiations. The creation of the website by the Union was one of the vehicles utilized to provide the "spin" on proposals and the state of negotiations. Additionally, the website was a part of their public campaign to gain support for their position with the general public and so as to put pressure on the Library Board to make changes to their position.

[49] It has long been recognized that the process of collective bargaining is not a process conducted according to "the Marquess of Queensbury rules."[7] In *Unite Here Union, Local 41 v. West Harvest Inn,*[8] the Board considered communications from the Employer during negotiations that the Union alleged were inaccurate. In that case, the Board commented that "[A] communication must be accurate in order not to cause a violation of 11(1)(c). It also adopted the following comment from the Ontario Labour Relations Board in *Forintek Canada Corp. v. Public Service Alliance of Canada:*[9]

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[5] [1996] S.C.J. No. 14 , [1996] 1 S.C.R. 369
[6] 2nd Edition, Canada Law Book at paragraph 10.2000
[7] *CKLW Radio Broadcasting Ltd.,* [1977] C.L.L.C. 16,110 at p. 16,784
[8] [2007] CanLII 68748 (SK LRB), LRB File No. 127-07

> *In assessing whether employer communications during or in relation to collective bargaining go beyond the bounds of permitted speech into the realm of prohibited interference, the Board has considered whether they reflect an attempt to explain the position the employer has taken at the bargaining table or, rather, an attempt to disparage the union or its proposals.* ***The Board looks at the context, content, accuracy and timing of employer communications in discerning their purpose and effect.*** *Communications made after good faith bargaining has reached an impasse are less suspect than those made during early stages of bargaining, accurate statements are less suspect than inaccurate ones and, in any event, communications of explanations or positions not first fully aired at the bargaining table are highly suspect.* [Emphasis added]

[50] In the *Unite Here Union, Local 41 v. West Harvest Inn,*[10] the Board found as a fact that the communications from the Employer contained two typographical errors that the Board found significant. The letter said that one of the Employer's proposals was "Delete the Clothing Allowance clause and replace with 65% on the employees rate of pay." According to the evidence, the Employer's actual proposal was .65%, not 65%. The letter also stated that the Union's proposal was 5%-5%-5% "on 1st year rate" and 6%-6%-6% "on 1st year rate," which latter figures should be for the "2nd year rate" according to the evidence. There was no evidence as to whether these errors were dealt with during bargaining.

[51] In that case, the Board, notwithstanding a finding that the statements made by the employer were, in fact, inaccurate, based upon an objective view, found that the communications were not in violation of the *Act.*

[52] In that case, in dealing with an allegation of a breach of s. 11(1)(c), the Board says at paragraph 41:

> ***[41]*** *The Union also alleged that the Employer's memo violated s. 11(1)(c). The Board's position, as stated in Canadian Linen, supra, is:*
>
> *An employer is not considered to have bargained directly with his employees, or failed to have negotiated in good faith with the union by fairly and accurately informing employees of* ***its version of the negotiations taking place. . .*** *[Emphasis added]*

[53] The situation here is similar. Viewed objectively, we are satisfied that the Union presented its version of the Employer's proposals on its website. That version was clearly one with which the Employer did not agree, and in respect of which, on many occasions it attempted

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[9] [1986] OLRB Rep. April 453 at 474
[10] [2007] CanLII 68748 (SK LRB), LRB File No. 127-07

to explain to the Union in bargaining. While the Union's view as presented on the website may have been self interested, may have been a "spin" of the Employer's position, and may have impacted on the Employer's position at the bargaining table such that it finally withdrew its offered definition of "Permanent Employee" and added wording to Articles 30 and 33 to better define the impact of those proposals, it is not conduct which the Board finds censorable under s. 11(2)(c).

[54] Utilizing the Board's wording in *Unite Here, supra,* a union is not considered to have bargained directly with the employer, or failed to have negotiated in good faith with the Employer, by fairly and accurately informing employees of **its version** of the negotiations taking place. The important part of this statement, is, of course, the words "its version". The Employer says that the Union perverted its intent while the Union says that it followed the black and white text of the Employer's proposals. Taking a reasonable view of the postings on the website and the wording of the actual proposals and their impact, the postings by the Union were sufficiently accurate from its perspective to not cross the line.

[55] During the hearing, and in argument, it was clear that the parties do not enjoy a good relationship, there being a lack of trust between the parties, which, to a great extent, we believe was responsible for the refusal on the part of the Union to accept oral assurances by the Employer as to its intentions with respect to the definition in Article 2.09 and Articles 30 and 33. Similarly, the Employer also, in our view failed to fully appreciate the Union's position regarding these proposals prior to the Union posting its position on its website.

DATED at Regina, Saskatchewan, this **2nd** day of **August, 2012.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson