The Labour Relations Board
Saskatchewan

COMMUNICATIONS, ENERGY, AND PAPERWORKERS UNION, LOCAL 922, Applicant v. POTASH CORPORATION OF SASKATCHEWAN, Respondent

LRB File No. 167-11; July 27, 2012
Chairperson, Kenneth G. Love Q.C.; Members: Maurice Werezak and Greg Trew

For the Applicant Union: Peter Barnacle
For the Respondent Employer: Kevin Wilson, Q.C.

Practice and Procedure – Employer applies for non-suit at the conclusion of Union case – Board reviews jurisprudence respecting making an election not to call evidence and supports that jurisprudence – Board also reviews onus required for applicant to show evidence in support of its case – Board adopts "arguable case" standard to be consistent with standard applied in applications for summary dismissal prior to commencement of a hearing.

Unfair Labour Practice – Board discusses jurisprudence regarding s. 11(1)(a), (b), (c) and (e) of the *Act* regarding communication from Employer to Employees. Finds communication did not offend any of these sections and no Unfair Labour Practice was committed by Employer.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Q.C., Chairperson:** The Communications, Energy and Paperworkers Union, Local 922, (the "Union") is certified as the bargaining agent for a unit of employees of The Potash Corporation of Saskatchewan (the "Company"). On November 7, 2011, the Union filed an Unfair Labour Practice application with the Board alleging breaches of ss. 11(1)(a), (b), (c) and (e). The Employer replied on December 8, 2011 denying all of the Union's allegations. The Board sat to hear evidence and argument related to the application on June 26 and 27, 2012. For the reasons which follow, the application is dismissed.

[2] The application by the Union was in respect of a grievance the Union had filed with the Employer on March 15, 2011 related to payment of holiday pay on payments made to Employees under the Short Term Incentive Plan (STIP), which was implemented by the Employer in 2008. Upon filing of the grievance, the Union and the Employer met on (2) two occasions to discuss the matters raised in the grievance.

[3] These meetings did not reach any resolve and the parties agreed to dispense with following the grievance procedures in the collective bargaining agreement and to refer the matter directly to arbitration. The Employer, however, took the position that the matter was not arbitral and advised the Union that this would be its position at the commencement of the arbitration proceedings.

[4] The final meeting between the parties was held on August 15, 2011. On September 9, 2011, the Employer wrote to the Union denying the Union's grievance. In that letter, the Employer says:

> *Thank you for meeting with us on August 15, 2011 to discuss the Union's grievance regarding the payment of vacation pay on gross earnings specifically related to STIP. As explained, it is the Company's position that vacation pay is not owing on STIP.*
>
> *Given the foregoing, the Union's grievance is denied. Also, as agreed upon in our meeting of August 15, 2011, we are prepared to waive the remaining steps of the grievance procedure. Please advise if the Union wishes to refer this matter to arbitration.*

[5] On September 12, 2011, the Union advised the Employer of its wish to proceed to arbitration on the issue.

[6] As noted above, the Board met to hear evidence and argument related to this matter on June 26 and 27, 2012. At the closure of the Union's case, the Employer moved for a non-suit. The Board heard argument concerning the non-suit and adjourned to allow Union counsel to better prepare his arguments. For reasons that follow, the Board determined that it would not require the Employer to elect not to call evidence prior to accepting the application for non-suit. The Board dismissed also the Employer's application for non-suit.

Facts:

[7] This application is about the STIP instituted for members of the Union by the Company in 2008. Both parties were in agreement that the program operated outside of the collective agreement between the parties and that it was solely administered and implemented by the Company. The STIP provides for bonus payments to employees upon achievement of goals set by the Company related to Corporate performance and on Divisional performance in

areas which included safety, environmental compliance, controllable costs and production targets.

[8] For 2011, the overall target for STIP had been set by the Company at 5% of base pay divided equally between Corporate performance and Divisional performance. This bonus percentage was set solely by the Company, as were the goals required to achieve this bonus payment.

[9] There are (5) five production divisions in Saskatchewan to which the STIP applied. These were the Company's mine sites located at Cory, Saskatchewan; Patience Lake, Saskatchewan; Allen, Saskatchewan; Lanigan, Saskatchewan and Rocanville, Saskatchewan.

[10] The employees at each of these production divisions are organized by various trade unions. The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("USW") represent employees at Cory, Saskatchewan; Patience Lake, Saskatchewan and Allen, Saskatchewan. Employees at Rocanville, Saskatchewan are represented by the Rocanville Potash Employees Association. The Union represents employees at Lanigan, Saskatchewan who have initiated this application.

[11] As noted above, following the filing of the grievance regarding payment of holiday pay on the STIP bonus amounts, the Union and the Company met to consider the grievance, but were unable to achieve a resolution. They agreed to refer the matter to arbitration. Throughout the grievance discussions, the evidence established that the Company made it clear to the Union that it was committed to maintaining the current cost structure of the STIP. Mr. Jakubowski, the Director of Employee and Industrial Relations for the Company testified that he spoke to Mr. Bailey of the Union on August 16, 2011 to ensure that he understood the Company's position regarding the need to contain the cost of the STIP.

[12] When discussions concerning the grievance failed and the parties agreed to disagree and refer the matter to arbitration, the Company sent a letter (hereinafter the "letter") to all employees, at their home addresses, on October 7, 2011 announcing changes to the STIP. This letter is the focus of this application, so it has been attached to this decision in its entirety as Appendix "A". The letter was, essentially, a notification to the members of the Union that for

2011, the Company was reducing the overall bonus percentage payable under STIP from 5% to 4.5%.

[13] Both the witness for the Company, Mr. Jakubowski and Mr. Bailey testified about the delivery of this letter. It was sent to employees on Friday, October 7, 2011, which was the last business day prior to the Thanksgiving holiday in 2011, which fell on October 10, 2011. Both witnesses also testified about a discussion that they had concerning the letter which took place on October 12, 2011. Mr. Jakubowski initiated the contact by asking Mr. Bailey to call him, which Mr. Bailey did on October 12, 2011.

[14] During their telephone conversation, Mr. Jakubowski advised Mr. Bailey that the letter had been sent to all of the Union's represented employees at Lanigan. He also advised Mr. Bailey of the contents of the letter and provided him with a copy of it by email following the telephone conversation.

[15] The Union then took some time to consider the content of the letter and its impact. On October 24, 2011, Mr. Bailey contacted Mr. Jakubowski by email which asked the following question by way of clarification of the Company's position: "Are we understanding correctly that the .5% reduction that is being deducted for 2011 will not be given to the membership if the Company should be successful in this case?" On that same date, Mr. Jakubowski responded as follows: "To clarify, if the Company is successful in arbitration we will not be making any retroactive adjustments to 2011."

Relevant statutory provision:

[16] Relevant statutory provisions are as follows:

> *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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> > *(a) to interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by this Act, but nothing in this Act precludes an employer from communicating facts and its opinions to its employees;*
> >
> > *(b) to discriminate or interfere with the formation or administration of any labour organization or contribute financial or other support to it; but an employer shall not be prohibited from permitting the bargaining committee or officers of a trade union representing his employees in any unit to confer with him for the*

> *purpose of bargaining collectively or attending to the business of a trade union without deductions from wages or loss of time so occupied or from agreeing with any trade union for the use of notice boards and of the employer's premises for the purpose of such trade union;*
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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;*
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> *. . .*
>
> *(e) to discriminate in regard to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including discharge or suspension or threat of discharge or suspension of an employee, with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in any proceeding under this Act, and if an employer or an employer's agent discharges or suspends an employee from his employment and it is shown to the satisfaction of the board that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right under this Act, there shall be a presumption in favour of the employee that he was discharged or suspended contrary to this Act, and the burden of proof that the employee was discharged or suspended for good and sufficient reasons shall be upon the employer; but nothing in this Act precludes an employer from making an agreement with a trade union to require as a condition of employment membership in or maintenance of membership in the trade union or the selection of employees by or with the advice of a trade union or any other condition in regard to employment, if the trade union has been designated or selected by a majority of employees in any such unit as their representative for the purpose of bargaining collectively;*

Union's arguments:

[17] The Union's case revolved around the content and timing of the letter. The Union argued that the letter constituted an improper communication to its members contrary to s. 11(1)(a) of the *Act*. It also argued that the letter interfered with the Union's representational rights, contrary to s. 11(1)(b) of the *Act*, relying upon decisions from the Manitoba Labour Board in *Assiniboine Regional Health Authority*[1] and the Commission des Relations du Travail in *Syndicat des professionnelles d'organismes communautaires v. Atelier de travail Jeunesse 01*[2]

[1] [2009] M.L.B.D. No. 21, 170 C.L.R.B.R. (2d) 294
[2] [2011] QCCRT 209 (CanLII) as translated by Lancaster's Labour Board Law eNewsletter June 7, 2012, Issue No. 43

[18] The Union also relied upon *C.U.P.E., Local 59 v. City of Saskatoon*[3] *and C.U.P.E., Local 1594 v. Regina Public Library* [4] to support its arguments that the letter interfered with the Union's collective bargaining rights contrary to s. 11(1)(c) of the *Act*.

[19] Finally, relying upon an Ontario Labour Relations Board decision in *I.A.T.S.E. and Moving Picture Machine Operators of the United States and Canada v. Famous Players Inc.*[5] and *Re: Starbucks Coffee Canada, Inc.*[6] the Union argued that the letter was coercive or intimidating to employees contrary to s. 11(1)(e) of the *Act*.

Employer's arguments:

[20] The Employer denied each of the Union's allegations and argued that the letter was a legitimate exercise of its rights of communication with its employees.

Analysis:

Application for Non-suit

[21] At the close of the Union's case, the Employer made a motion for a non-suit of the Union's case, arguing that the Union had failed to provide any evidence of any violation of the *Act*. In making his motion, counsel for the Employer urged the Board to adopt the "majority" rule in Canada that in making such a motion, the Employer would not be required to elect not to call evidence in respect of this matter.

[22] In a recent ruling,[7] the Board reviewed and discussed its jurisprudence concerning motions for non-suit. At paragraph [55] of that decision, the Board concluded:

> *The Board wants to restate and emphasize the Board's policy as stated in Mitchell's Gourmet Foods, that the Board has a discretion as to whether or not it will allow an application for non-suit to proceed without election. In so doing, it will consider, inter alia, the factors referenced by the Board therein.*

In this case, the Board permitted the application for non-suit to proceed without the requirement that the Employer forgo calling any evidence.

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[3] [1990] S.L.R.B.D. No. 18, LRB File No. 253-89
[4] [2001] Sask. L.R.B.R. 834, LRB File No. 096-01
[5] [1997] CanLII 15526 (ON LRB)
[6] [2008] S.L.R.B.D. No. 26, 162 C.L.R.B.R. (2d) 233, LRB File No. 138-06
[7] *City of Saskatoon v. C.U.P.E., Local 59* [2009] CanLII 67430 (SK LRB), LRB File No. 168-08

[23] Following argument by both parties, the Board concluded that it would not grant the application for non-suit and requested the Employer to call evidence regarding this matter. However, on review of the previous Board decisions regarding this matter, and, in particular the Board's decision in *Mitchell's Gourmet Foods,*[8] it appeared that there was some issue concerning the threshold test to be met by the Applicant to avoid a non-suit being granted.

[24] Other cases before the Board have used the term "*prima facie" case,* "some evidence" or "*any evidence"* to describe the threshold or hurdle which the Applicant must achieve to avoid a non-suit being granted. This was not strictly analyzed in the City of Saskatoon decision referenced above and the Board utilized several of these terms, somewhat interchangeably, in its decision.

[25] It appears to us that the threshold to be applied should be consistent with Board practice in other areas and in accordance with the extended grant of authority to the Board resultant from the 2005 amendments to the *Act* which added the additional powers set out in s. 18 of the *Act*.

[26] Based upon those recently added powers, the Board now enjoys statutory authority to "summarily dismiss a matter if there is a lack of evidence or no arguable case."[9] This authority has generally been utilized by the Board prior to a hearing in accordance with the tests set out in *Beverly Soles v. C.U.P.E., Local 4777.*[10] In *Soles*, *supra*, the Board adopted the test taken from the Canada Board, which was that the case could be dismissed if there was a finding by the Board that the applicant has disclosed no "arguable case". We are of the view that this should also be the standard by which applications for non-suit are analyzed.

[27] At paragraph [27] of the *Soles* case, *supra*, the Board says about how the Board will assess if an arguable case has been presented as follows:

> *As stated, in the case before us, it is necessary to examine whether the application discloses an arguable case such that it should not be dismissed without an oral hearing. At this stage, we do not assess the strength or weakness of the Applicant's case but simply determine whether the application*

[8] [1999] Sask. L.R.B.R. 577, LRB File Nos. 115-98 & 151-98
[9] s. 18(p)
[10] [2006] CanLII 62947 (SK LRB), LRB File No. 085-06

> *and/or written submission discloses facts that would form the basis of an unfair labour practice or violation of the Act that falls within the Board's jurisdiction to determine.*

[28] In *Mitchell's Gourmet Foods, supra,* at para. 21, the Board made a similar comment:

> *In the present situation, the test applied is whether, accepting the applicant's evidence at face value, a prima facie case has been established in law or that the evidence is so unsatisfactory or unbelievable that the burden of proof has not been satisfied. The motion for non-suit cannot succeed if there is some evidence upon which the Board could return a finding that successorship and a transfer of bargaining obligations had occurred. The weight of the evidence is not at issue. We must determine whether there are any facts to support SGEU's assertion of successorship; then we must determine whether a reasonable inference can be drawn from the facts to support its contention.* ***The facts must be examined to determine whether SGEU has presented some evidence in support of each of the essential elements of its claim.*** *[Emphasis added]*

[29] In setting the threshold for analysis of non-suit applications based upon a determination that the applicant has provided evidence of an arguable case, the Board is not seeking to elevate its existing standard, but rather to make it consistent with the approach adopted in *Soles, supra*. The same rationale which would apply to an application for dismissal of an application on a pre-hearing basis should apply equally to an application to dismiss the application in the midst of a hearing when additional evidence to buttress the Applicant's claims would have been presented.

[30] The Board analyzed the evidence presented and determined that the Union had made out an arguable case that an offence had been committed. For that reason, the non-suit application was denied. The Board then called upon the Employer to present its evidence.

The Unfair Labour Practice Allegations

[31] The Union relies upon (4) four provisions of the *Act* in support of its application. While set out above, for ease of reference, we will deal with each of them in turn and will quote the provision under review prior to commencement of our analysis.

Section 11(1)(a):

> *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:*

> *(a) to interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by this Act, but nothing in this Act precludes an employer from communicating facts and its opinions to its employees;*

[32] Mr. Stephen Suchy, the President of the Union, testified that it was his belief that no communication by the Employer to its employees was permissible. However, counsel for the Union took the more reasonable position that s. 11(1)(a) and the 2008 amendment to the *Act* should be interpreted by the Board as adding nothing to the Employer's limited right to communicate with its employees. The Employer took the opposing view that communication was not only permitted, but enhanced by the 2008 amendment.

[33] The Board considered a similar argument in *Re: Button (UFCW, Local 1400 v. Wal-Mart).*[11] At para. 94 the Board says:

> *Having considered the argument of the parties, we disagree with the position advanced by the Union that the 2008 amendment to s. 11(1)(a) did not alter the restrictions on employers in communicating with their employees. A plain reading of the 2008 amendment to s. 11(1)(a) leads to the inescapable conclusion that the previous restrictions on employer communications have been modified and that employers are now permitted to communicate facts and opinions to their employees. This Board has yet to make a substantive determination on the interpretation of this new provision but it is sufficient to say that the state of the law on employer communications changed in 2008.*

[34] The issue in this case is whether or not the letter crossed that new line and thereby interfered with, restrained, intimidated, threatened or coerced an employee in the exercise of any right conferred by the *Act.*

[35] The Employer argued that the letter was factual and was a necessary communication to its employees to communicate to them that the Employer was serious about its pledge to ensure that the STIP costs remained contained and would not be impacted by the outcome of the arbitration regarding holiday pay.

[36] The Union argued that the letter was an attempt to sway the resolve of the Union's members in their support of the decision to grieve the issue of holiday pay on the STIP payments. They pointed particularly to the final paragraph of the letter which directed questions

[11] [2011] S.L.R.B.D. No. 20, 199 C.L.R.B.R. (2d) 114, LRB File Nos. 096-04, 038-05, 001-09, 177-10, 184-10 and 224-10

concerning the change to the STIP program to the Employer's Human Resources Department and questions concerning the grievance to the Union. The Union led evidence of the disruption caused by this paragraph and, in particular, the number of comments and complaints they received. Evidence was presented of a "three week firestorm" of concern and criticism of the Union by some members. However, the evidence also showed that once the issues were properly explained to members, they seemed satisfied with the explanations provided.

[37] The Union blamed this "firestorm" on the letter. The Employer blamed it upon inadequate communication by the Union with its members. Notwithstanding the reasons for the "firestorm", the interpretation put on this paragraph of the letter by the Union, is, in our opinion, both incorrect and unreasonable. Viewed objectively, this paragraph correctly divides the responsibility for matters related to the STIP program (to the Employer's H.R. Department) and the grievance (to the Union). Arguably, it may have been improper for the Employer to have suggested that employees contact them concerning the grievance.

[38] The letter was a clear communication to the employees that the Employer would, as set out in the penultimate paragraph of the letter, that the decision to reduce the STIP bonus for 2011 "is solely for the purpose of maintaining costs and is not reflective of any change to the Company's commitment to the safety of employees."

[39] One can understand the frustration that may have been felt by the Union when the letter was sent to its members. They had hoped by filing the grievance and taking it forward to arbitration that there would be an economic benefit to their members. The letter had the effect of dashing these hopes on the rocks of despair by limiting the amount of economic benefit which may be achieved to the *status quo*.

[40] The Union's hopes were further dashed when, in response to the letter, they inquired if the reduction would be reinstated if the arbitration was supportive of the Employer's position. Mr. Jakubowski's email of October 24, 2011 confirmed that no adjustment would be made under those circumstances.

[41] The Union attempted to characterize the Employer's refusal to make a retroactive adjustment in the event of an arbitration award in favour of the Employer as being punitive. However, it must be recognized that the STIP program was totally within the control of the

Employer and was not part of the collective bargaining process. Furthermore, Mr. Jakubowski testified, in answer to a question from the Board, that the STIP bonus level is determined by the Compensation Committee of the Board of Directors. He also testified that the reduced amount was also approved by this Committee. It would be reasonable to presume that such approvals are not easily obtained, and that once the reduction was made, that decision would not again be easily reviewed.

[42] The approach taken by the Employer by maintaining its determination to keep the cost associated with the STIP program controlled, and in refusing to undo the 2011 reduction, left the Union in a difficult position. To them, it was like squeezing jello. When they squeezed to get additional economic benefits from the holiday pay grievance, the end economic result was the same or worse.

[43] Viewed objectively, we can see nothing in the letter, or the Employer's conduct surrounding its being sent to employees, as being in violation of s. 11(1)(a) of the *Act*. No evidence was provided that any employee of reasonable fortitude was interfered with, restrained, intimidated, threatened, or coerced in the exercise of any right conferred by the *Act* as a result of the delivery of the letter or the Employer's conduct surrounding its being sent to employees. Employers have the right to communicate with their employees. As noted in *Re: Sakundiak Equipment*[12] at paras. 124 & 125:

> *In order for the Union to succeed in this application, they have the onus to prove that the communications which they cite (the "tool box" meetings) has interfered with, restrained, intimidated, threatened, or coerced an employee of "reasonable fortitude" against the exercise of any right conferred by this Act. The test to be applied by the Board, being an objective test has not changed due to the 2008 amendment. We do not agree with counsel for the Union that the amendment in 2008 converted the test to be utilized to a subjective test.*
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> *The test, therefore, remains whether the Union has satisfied the Board on the evidence presented, that an employee of "reasonable fortitude" would be interfered with, restrained, intimidated, threatened, or coerced from the exercise of any right conferred by this Act.*

Here, the Union presented evidence only that the letter provoked the firestorm noted above from its members, but no evidence that any employee of reasonable fortitude was interfered with, restrained, intimidated, threatened or coerced in the exercise of any right conferred by the *Act.*

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[12] [2011] S.L.R.B.D. No 28, 205 C.L.R.B.R. (2d) 139, CanLII 72774 (SK LRB), LRB File Nos: 107-11 to 109-11, 128-11 to 133-11.

[44] The complaint on this ground is dismissed.

Section 11(1)(b):

> *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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> *…*
>
> *(b) to discriminate or interfere with the formation or administration of any labour organization or contribute financial or other support to it; but an employer shall not be prohibited from permitting the bargaining committee or officers of a trade union representing his employees in any unit to confer with him for the purpose of bargaining collectively or attending to the business of a trade union without deductions from wages or loss of time so occupied or from agreeing with any trade union for the use of notice boards and of the employer's premises for the purpose of such trade union;*

[45] The Union argued that the letter interfered with the administration of the Union in that it was intended to and did cause dissention within the Union. They argued that it was immaterial that the letter did not achieve its intended result, but rather that the attempt to interfere with the Union administration was sufficient. In support of their position, the Union relied upon a decision of the Manitoba Labour Board in *Assiniboine Regional Health Authority*[13] and the Commission des Relations du Travail in *Syndicat des professionnelles d'organismes communautaires v. Atelier de travail Jeunesse 01*[14].

[46] With respect, we find neither of these decisions helpful. The statutory provisions in those cases, while similar, are not the same as the provisions of the *Act*. The provisions of the *Act* were considered by the Board in *SJBRWDSU v. Westfair Foods Ltd. and UFCW.*[15] In that decision, at page 35, they adopted the Board's analysis of s. 11(1)(b) in *UFCW v. Federated Co-operatives Ltd.*[16] as what constituted the essence of this provision.

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[13] [2009] M.L.B.D. No. 21, 170 C.L.R.B.R. (2d) 294
[14] [2011] QCCRT 209 (CanLII) as translated by Lancaster's Labour Board Law eNewsletter June 7, 2012, Issue No. 43
[15] [1995] S.L.R.B.D. No. 35, LRB File Nos. 246-91 & 291-94
[16] LRB File No.: 213-18

> *While the Board has had relatively few occasions to interpret this section, the comments in Saskatchewan United Food and Commercial Workers v. Federated Co-operatives Ltd., LRB File No. 213-83, cast some light on how the board has seen the essence of this provision:*
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> > *Section 11(1)(b(of The Trade Union Act prohibits an employer from interfering with the formation or administration of any labour organization. The Canada Labour Relations Board considered the phrase "interference with the formation or administration of a trade union" as it appears in Section 184(1)9a) of The Canada Labour code in National Association of Broadcasting Employees and Technicians v. A.T.V. New Brunswick Limited (C.K.C.W.-T.V.) 1979 3 CLRB 342 and stated at p. 346-7:*
> >
> > > *The administration of the union. This is directed at the protection of the legal entity, and involves such matters as elections of officers, collection of money, expenditure of this money, general meetings of the members, etc. In a word all internal matters of a trade union considered as a business. This is to assure that the employer will not control the union with which it will negotiate and thus assure that the negotiations will be conducted at arm's length.*
> >
> > *A union's right to discipline its own members is as much an administrative function of the union as the election of its officers. Section 11(1)(b0 prohibits an employer from interfering with that function. Interference could occur in a number of ways. Some of the most obvious include, for example, attempting to bribe, intimidate or improperly influence witnesses or union officials involved in discipline proceedings.*
>
> *In our view, this passage suggest the appropriate focus for this section. We see it as intended to protect the integrity of the trade union as an organization, not to speak to all of the types of conflict which may arise between a trade union and an employer in the course of their dealings. Insofar as meetings between an employer and employees are permissible – and we have outlined the perils which they face on other grounds – it is to be expected that they will be planned by the employer so that the persuasive impact of the information conveyed will be maximized. This in itself, however annoying, does not constitute "interference with the administration" of a trade union within the meaning of Section 11(1)(b).*

[47] Based upon this interpretation of s. 11(1)(b), the Union's complaint must fail. There has been no evidence provided which in any way suggests that the integrity of the Union, as an organization was threatened or that there was any intended or other interference with the administration of the Union. The complaint on this ground is dismissed.

Section 11(1)(c):

> *11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*
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> *…*

> *(c) to fail or refuse to bargain collectively with representatives elected or appointed, not necessarily being the employees of the employer, by a trade union representing the majority of the employees in an appropriate unit;*

[48] The Union relied upon *C.U.P.E., Local 59 v. City of Saskatoon*[17] *and C.U.P.E., Local 1594 v. Regina Public Library* [18] to support its arguments that the letter interfered with the Union's collective bargaining rights contrary to s. 11(1)(c) of the *Act*.

[49] In *C.U.P.E., Local 59 v. City of Saskatoon* the Board found a violation of s. 11(1)(c) notwithstanding that it did not find a violation of s. 11(1)(a). However, the circumstances in that case were much different than here. In that case, there was a staff meeting in which a management representative spoke about removing existing grievances from the grievance procedure so they could be dealt with informally. In the words of the decision, "he proposed that the existing grievances be dropped and they all be solved informally and amicably." This the Board found to be direct bargaining and an interference with the Union's certified bargaining rights.

[50] In *C.U.P.E., Local 1594 v. Regina Public Library* they also dealt with issues of direct bargaining insofar as the Employer in that case utilized a workplace committee to convince part of the bargaining unit to support a particular collective bargaining proposal. This element of direct bargaining the Board found was contrary to s. 11(1)(c) of the *Act*.

[51] There was no evidence of direct bargaining in this case. The Union attempted to characterize the letter as being an attempt by the Employer to bargain directly with the employees to cause the grievance to be withdrawn. There was, however, no direct evidence on this point and it would strain the language of the letter to read it in such a way as to infer that the Employer has any motives other than to communicate factually with its employees as to its desire to contain the costs of the STIP program.

[52] In the final result, the grievance was not withdrawn or settled as a result of the letter, and, apart from the (3) three week firestorm referenced above, the arbitration has proceeded as originally agreed.

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[17] [1990] S.L.R.B.D. No. 18, LRB File No. 253-89

[53] Of secondary importance is the fact that the STIP program is not a part of the collective bargaining process. Accordingly, the Union cannot (and did not) argue that the Company refused to bargain collectively with respect to that program. The STIP program is administered exclusively and in the sole discretion of the Employer. Any adjustments to that program are therefore within its exclusive domain and need not be negotiated with the Union.

[54] For these reasons, the complaint under s. 11(1)(c) is dismissed.

Section 11(1)(e)

> *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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> *…*
>
> *(e) to discriminate in regard to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including discharge or suspension or threat of discharge or suspension of an employee, with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in any proceeding under this Act, and if an employer or an employer's agent discharges or suspends an employee from his employment and it is shown to the satisfaction of the board that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right under this Act, there shall be a presumption in favour of the employee that he was discharged or suspended contrary to this Act, and the burden of proof that the employee was discharged or suspended for good and sufficient reasons shall be upon the employer; but nothing in this Act precludes an employer from making an agreement with a trade union to require as a condition of employment membership in or maintenance of membership in the trade union or the selection of employees by or with the advice of a trade union or any other condition in regard to employment, if the trade union has been designated or selected by a majority of employees in any such unit as their representative for the purpose of bargaining collectively;*

[55] The Union relied upon the Ontario Labour Relations Board decision in *I.A.T.S.E. and Moving Picture Machine Operators of the United States and Canada v. Famous Players Inc.*[19] and *Re: Starbucks Coffee Canada, Inc.*[20] to support their argument that the letter was coercive or intimidating to employees contrary to s. 11(1)(e) of the *Act*.

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[18] [2001] Sask. L.R.B.R. 834, LRB File No. 096-01
[19] [1997] CanLII 15526 (ON LRB)

[56] The fact situation and statutory provisions in the *I.A.T.S.E.* case, *supra*, make it distinguishable from the case here. There was no differential treatment of employees as there was in *I.A.T.S.E*., *supra.* Also, as noted above, the STIP is not a part of the collective bargaining process and is wholly within the Employer's discretion as to how much or even if any bonus payments are made.

[57] Similarly, the *Starbucks* case, *supra*, dealt with a unilateral change in an "unwritten policy" regarding employee transfers. The STIP program is not an unwritten policy and is not a part of the collective bargaining process. Both parties were in agreement that the STIP was operated in the sole discretion of the Employer and that any changes to the program were not required to be bargained with the Union.

[58] There is no evidence to support a breach of s. 11(1)(e) of the *Act.*

Decision:

[59] The Application is dismissed.

DATED at Regina, Saskatchewan, this **27th** day of **July, 2012.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson

[20] [2008] S.L.R.B.D. No. 26, 162 C.L.R.B.R. (2d) 233, LRB File No. 138-06