The Labour Relations Board
Saskatchewan

MOSAIC POTASH COLONSAY ULC, Applicant v. UNITED STEELWORKERS UNION, Local 7656, Respondent

LRB File No. 165-12; October 4, 2012
Chairperson, Kenneth G. Love, Q.C.; Members: Mick Grainger and John McCormick

For the Applicant: Keir Vallance
For the Respondent: Steve Seiferling

Remedy – Interim Order – Union Members refuse overtime. Employer claims refusal concerted effort by Employees to affect union negotiations – No strike vote taken by Union – Employer alleges that concerted refusal is an unlawful strike activity – Employer requests Board to issue injunction against Union Members' Activity.

Unlawful Strike – Union Members engaged in concerted effort to refuse overtime – Union takes steps to encourage members not to engage in refusal to work overtime – Employer alleges that efforts of Union inadequate

Unlawful Strike – Union Members engaged in concerted effort to refuse overtime – Union takes steps to encourage members not to engage in concerted refusal – Union alleges that it took necessary actions to prevent Members engaging in unlawful activity.

Interim Order – Board finds that Employer advances arguable case, that Interim Order required and that balance of convenience favours the issuance of Order.

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

REASONS FOR DECISION

Background:

[1] Mosaic Potash Colonsay ULC (the "Employer"), filed an application on September 11, 2012, alleging that the United Steelworkers Union, Local 7656 (the "Union") was engaged in an unfair labour practice and unlawful strike contrary to sections 11(2)(d) and 44(2) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") by refusing to work overtime in accordance with the Collective Agreement between the parties.

[2] Also, on September 11, 2012, the Employer filed an application[1] returnable September 26, 2012 seeking interim relief including, *inter alia,* an order of the Board enjoining the Union's members from engaging in any form of a strike as defined by the *Act* and enjoining the Union members from further violation of s. 11(2)(d) of the *Act*.**:**

Preliminary Matters:

[3] The parties raised two preliminary points prior to the commencement of the hearing. The first point was raised by the Union regarding portions of the affidavit of Corry Grieve. The Union argued that the latter portion of the affidavit, being paragraphs 6-10 should be struck as they dealt with matters which occurred after the date that the application was filed. The Employer argued that these portions of the affidavit were relevant and material to the application. The Board reserved on this preliminary point.

[4] The second matter was an application by the Employer to introduce an affidavit from a worker at the Colonsay mine, whose identity the Employer did not want disclosed so that this employee would not be the subject of any reprisals from fellow employees or the Union. After consideration of arguments from both parties, the Board declined to accept the affidavit because it would be difficult, if not impossible, for the Union to confirm or deny the content of the affidavit if the identity of all of the parties was deleted. The application to file the anonymous affidavit was denied.

[5] With respect to the preliminary objection of the Union regarding the Grieve affidavit, the Board sees no objection to the paragraphs of the affidavit which the Union sought to have struck. Some reference is made to events subsequent to the date of the application. So too, however, is there reference to events subsequent to the date of the application in the affidavits filed by the Union.[2] Often, affidavits are filed following the date of the application to supplement the affidavits filed with the application or in reply to those filed by the Union. The Board often requires the full picture be provided which may include events subsequent to the date of the application. Accordingly, the application by the Union to strike those portions of the affidavit of Cory Grieve is denied.

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[1] LRB File No. 165-12

Facts:

[6] The Union is the certified bargaining agent for some employees at the Mosaic Potash mine in Colonsay, Saskatchewan. The Union and the Employer have been engaged in collective bargaining since April 12, 2012, but have not reached a collective bargaining agreement. In late July, 2012, the Union and the Employer reached a tentative agreement which the Union agreed to take back to its members for a ratification vote.

[7] The mine was undergoing shutdown from late July, 2012 until mid-August of 2012. As a result, the ratification vote did not occur until the week of August 20, 2012. The Union advised the Employer on August 22, 2012 that the vote was not to support the tentative agreement. As of the date of the hearing, the Union had not taken a strike vote of its members

[8] The evidence from both parties was relatively consistent. The Board received affidavits from Neil R. Anderson, Erika Fox and Cory Grieve on behalf of the Employer and from Mike Pulak, Scott Ruston, Jarett Danyluk, and Doug Purshega, on behalf of the Union.

[9] The Company's evidence was that concurrently with the vote on the tentative agreement, a number of the Union's members indicated to the Employer that they would not work overtime until the Employer agreed to return to bargaining with the Union. Mr. Anderson, the Mill Manager at Colonsay, deposed that prior to August 7, 2012; the Employer had had no trouble filling its overtime "Call-Out/Overtime Board" with Union members.

[10] Mr. Anderson deposes that on August 23, 2012, he and Jim Ryan, the Superintendent of Maintenance for Colonsay, met with the mill mechanical group to address the refusal to work overtime. He deposes that they were advised by some

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[2] See for example the Affidavit of Mike Pulak at paragraph 9 and paragraphs 7 and 8 of the affidavit of Scott Ruston.

Union Members "that the refusal to work overtime would continue until Mosaic returns to the bargaining table".

[11] On August 24, 2012, the Employer's counsel sent a letter to the Union advising them that the Employer considered the Union Members' actions in refusing overtime to be an unlawful strike, which letter, the Union acknowledged receipt. Mr. Anderson deposes that on August 29, 2012, Union Members again began signing up for overtime work.

[12] In Mr. Grieve's affidavit, he recounts a conversation which he had with Sheldon Yanoshewski, a Union Member on September 12, 2012. Mr. Grieve deposed that Mr. Yanoshewski made the following comments concerning working overtime:

> I will not sell my soul and work overtime without a contract. Anyone who is working overtime right now will have no one to blame in one or two years when they are all on shift or working every weekend. I will take my chances now rather than regret it later.

[13] The Union's affidavits expressly denied that the Union did not "ever ask for, imply, encourage, or condone any work stoppage, slowdown, or, specifically refusal of overtime by the membership".[3] Scott Ruston, the Union President, deposes that following receipt of the letter of September 24, 2012, that he "discussed with the Union Executive how we were to get the message out to the members that if there was indeed a strike action happening, that it is to stop, as we were not in a lawful strike position".[4]

[14] Mr. Ruston also deposes with respect to meetings which he and Mr. Purshega, the Union Financial Secretary, held with members of the mill maintenance crew and the underground highbay crew on August 27, 2012 and September 13, 2012 respectively. At the meeting with the mill maintenance crew, Mr. Ruston deposes that he "stressed to the crew that we were not in a legal strike position and that if individual workers wanted to work overtime, then they should". At the highbay crew meeting, he deposes that he "instructed the members that the Union was not in a legal strike position

[3] See paragraph 7 of the Affidavit of Mike Pulak

and that if strike action or 'work to rule' action was taking place, that it was to stop". He also deposes that on September 14, 2012, he "posted a Notice in mill dry by both time clocks and on the door to the mill tunnel, as well as in mine dry by the time clocks and on the door to the dry and the door to the mine tunnel", a copy of which he attached to his affidavit. A copy of that notice is attached to this decision as Appendix "A". (the "Notice") Mike Pulak in his affidavit also deposes that a copy of the Notice was also posted "on the bulletin boards at Mosaic Potash Colonsay".

[15] Attached to the affidavit of Neil Anderson were copies of the signup sheets for the Overtime/Callout Board. Those sheets show that from August 7, 2012 to August 29, 2012 only one (1) employee signed up for overtime. As of August 29, 2012, ten (10) employees had signed up for overtime. In his affidavit, Mr. Anderson deposes that "prior to August 7, Mosaic did not have trouble filling it's overtime 'Call-Out/Overtime Board' with USW members." As support for that statement, he attached similar signup sheets for the period July 3, 2012 to July 19, 2012. With the exception of the period July 16 to 19, 2012, the signup sheets were well populated with overtime volunteers.

Statutory Provisions:

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

> ***2.(k.1)*** *"strike" means any of the following actions taken by employees:*
> *(i) a cessation of work or a refusal to work or to continue to work by employees acting in combination or in concert or in accordance with a common understanding; or*
> *(ii) other concerted activity on the part of employees in relation to their work that is designed to restrict or limit output or the effective delivery of services;*
>
> ***11 (2)*** *It shall be an unfair labour practice for any employee, trade union or any other person: (d) to declare, authorize or take part in a strike unless a strike vote is taken by secret ballot among the employees who are:*
> *(i) in the appropriate unit concerned; and*
> *(ii) affected by the collective bargaining;*
>
> *and unless a majority of the employees voting vote in favour of a strike, but no strike vote by secret ballot need be taken among employees in an appropriate unit consisting of two employees or fewer;*

[4] See paragraph 3 of the Affidavit of Scott Ruston

> ***42*** *The board shall exercise such powers and perform such duties as are onferred or imposed on it by this Act, or as may be incidental to the attainment of the objects of this Act including, without limiting the generality of the foregoing, the making of orders requiring compliance with the provisions of this Act, with any regulations made under this Act or with any decision in respect of any matter before the board.*

Arguments:

The Employer:

[17] The Employer filed a written argument which we have reviewed and found helpful. The Employer also filed a decision of the Ontario Labour Relations Board being *Westroc Inc. v. National Automobile Aerospace Transportation and General Workers Union of Canada (CAW Canada) and its local 1256*[5].

[18] The Employer relied upon the *Westroc* case to support its claim that a concerted refusal of overtime, even voluntary overtime, constitutes an unlawful strike. It further relied upon that decision for its assertion that the union has an affirmative obligation to attempt to end the unlawful strike.

[19] The Employer also argued that it faced labour relations harm, in addition to economic loss, if the requested injunction did not issue and the unlawful strike activity arrested. It argued that the labour relations harm to the Employer outweighed any labour relations harm to the Union which may arise if the requested order were issued.

The Union

[20] The Union filed an Ontario arbitral decision and a decision from the Ontario Labour Relations Board for our consideration. The arbitral decision was Re*: United Steelworkers, Local 6571 and Lake Ontario Steel Co. Ltd.*[6]*.* The Ontario Board decision was *Hickeson-Langs Supply Company v. Teamsters Local No. 419 et al.*[7]

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[5] [2002] CanLII 41383 (Ont. LRB)
[6] [1968] O.L.A.A. No. 6, 19 L.C.C. 260 decision of H.W. Arthurs, D.M. Storey, and I.H. McGowan
[7] [1991] OLRB Rep. May 636, File No. 0350-91-U

[21] The Union argued that the application by the Employer relied upon a fundamental misunderstanding of Labour Relations in Saskatchewan. The Union argued that the Union was not the same as its members and cannot be held accountable for the actions of its members. The Union argued that they had tried to stop the illegal activity, but argued that it was unable to instruct its members to accept voluntary overtime.

[22] The Union argued that there were other alternatives available to the Employer to deal with the issue. It suggested that the Employer could have:

1. Filed a grievance under the Collective Bargaining Agreement, which it acknowledged that the Employer had done; or
2. Made mandatory shift changes; or
3. Discipline those employees engaging in the unlawful activity.

[23] The Union also argued that the Employer has failed to show that the refusal of overtime was a "concerted" activity on the part of the Union. It argued that the Union's action was not improper insofar as the Union was not taking a position on whether its members' actions were improper or not.

[24] The Union argued that it had taken reasonable steps to control the activity by its members, but could not force its members to accept overtime. They argued that they had advised their members of their obligations under the *Act*.

Analysis:

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

[26] The test to be met on applications for interim relief has been well established by the Board. A statement of the test is found in *Startek*[8] as follows at 135 through 139:

[8] [2004] CanLII 65599 (SK LRB), LRB File No. 032-04

[31] The test for the granting of interim relief was enunciated by the Board in Regina Inn, supra, Hotel Employees and Restaurant Employees Union, Local 206 v. Canadian Hotels Income Properties Real Estate Investment Trust #19 Operations Ltd. (o/a Regina Inn), [1999] Sask. L.R.B.R. 190, LRB File No. 131-99 as follows, at 194:

> *The Board is empowered under ss. 5.3 and 42 of the Act to issue interim orders. The general rules relating to the granting of interim relief have been set down in the cases cited above. Generally, we are concerned with determining (1) whether the main application reflects an arguable case under the Act, and (2) what labour relations harm will result if the interim order is not granted compared to the harm that will result if it is granted. (see Tropical Inn, supra, at 229). This test restates the test set out by the Courts in decisions such as Potash Corporation of Saskatchewan v. Todd et al., [1987] 2 W.W.R. 481 (Sask. C.A.) and by the Board in its subsequent decisions. In our view, the modified test, which we are adopting from the Ontario Labour Relations Board's decision in Loeb Highland, supra, focuses the Board's attention on the labour relations impact of granting or not granting an interim order. The Board's power to grant interim relief is discretionary and interim relief can be refused for other practical considerations.*

[32] As explained above, the test is adapted from that set out by the Ontario Labour Relations Board in Loeb Highland, [1993] OLRB Rep. March 197. With respect to the [first of the] *two parts of the test – that is, whether the main application raises an arguable case – the Ontario Board stated as follows, at 202:*

> *Turning first to the idea of a threshold test with respect to the merits of the main application, we have some concern about applying a high level of scrutiny to that application at the time of a request for an interim order. To the extent that such scrutiny may imply a form of prejudgment of the final disposition of the main matter, it is not particularly compatible with the scheme for interim relief set out in the Act and the Board's Rules of Procedure. More specifically, the procedure for interim relief contemplated by the Board's Rules reflects the inherent necessity for expedition in these matters. To that end, evidence is filed by way of certified declarations which are not subject to cross-examination. Indeed, s. 104(14) of*

> *the Act and Rules 92 and 93 indicate the Board may not hold an oral hearing at all, but may receive the parties' arguments in writing as well.*
>
> *This means that the Board is not in a position to make determinations based on disputed facts. In these circumstances, it would normally be unfair for an interim order to be predicated to any significant extent on a decision with respect to the strength or weakness of the main case. That should await the hearing of the main application when the Board hears oral evidence and can make decisions with respect to credibility based on the usual indicia, in a context where the parties have a full right of cross-examination. This is particularly important in cases such as the section 91 complaint to which this application relates, where decisions are often based on inferences and the various nuances of credibility play a key role. In other words, the granting of interim relief in this context should usually be based on criteria which minimize prejudging the merits of the main application.*

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

. . .

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

> *Any interim order must first and foremost be directed to ensuring the fulfillment of the objectives of the Act pending the final hearing and determination of the issues in dispute. This includes not only the broad objectives of*

> *the Act but also the objectives of those specific provisions alleged to have been violated.*
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> *[38] Accordingly, and as iterated in Chelton Suites Hotel, supra, at 446, each application for interim relief is determined according to its specific facts. Certain types of applications have particular factors that the Board takes into account in assessing the application according to the test. The factors considered are driven by the specific objectives of the particular statutory provisions alleged to have been violated. In applications such as the present one, where it is alleged that an employee was terminated for activity in support of the union, or in attempted intimidation of union supporters, the Board has considered the potential for a negative effect on the status of the union and the potential for loss of support and confidence, as well as the impact on the individual employee who was terminated. The fragility of the union's status and strength of support, and the vulnerability of its supporters to pressure exerted by the employer prior to certification, is generally accepted and not seriously disputed.*

[27] In applying the first part of the test, that is, whether the main unfair labour practice application reflects an arguable case under s. 11(2)(d) of the *Act*, the Board finds at a minimum that there is an arguable case under s. 11(2)(d).

[28] There is little dispute regarding the facts in this case. The Employer says that the Union Members are engaged in a concerted effort to disrupt the Employer's operations in furtherance of its collective bargaining position, which activity, the Employer says amounts to an unlawful strike. The Union says that any such activity is not condoned by the Union and has been condemned by it. It says that it is unable to control its members or to force them to work overtime.

[29] When the Board receives an application like this, the Board must first determine if the application raises an arguable case. At this stage of the proceedings, it is not necessary that the application prove conclusively that there has been an unlawful strike, but must only show that there is an arguable case that may be put before a panel on the main unfair labour practice application. The *Act* defines a strike as:

> (k.1) "strike" means any of the following action taken by employees:

> (i) a cessation of work or a refusal to work or to continue to work by employees acting in combination or in concert or in accordance with a common understanding; or
> (ii) other concerted activity on the part of employees in relation to their work which is designed to restrict or limit output or the effective delivery of services;

[30] What constitutes an illegal strike has been considered in many cases. In *International Longshoremen's Association v. Maritime Employers' Association et al.*[9], at pp. 138-139, the Court says:

> "... There is no room for doubt now that Parliament has adopted an objective definition of 'strike', the elements of which are a cessation of work in combination or with a common understanding. Whether the motive be ulterior or expressed is of no import, the only requirement being the cessation pursuant to a common understanding. ...

[31] At this stage of the proceedings, we do not need to determine if an unlawful strike has occurred, only whether or not the Applicant has shown an arguable case that one may have occurred. Based upon the evidence filed by the Employer, we have concluded that an arguable case has been shown.

[32] Having found that an arguable case has been shown, we must then move to the second part of the test, the balance of labour relations harm. In *SGEU v. Saskatchewan Government*[10], the Board restated its long standing jurisprudence concerning the granting of interim relief. At para 32 *et seq* the Board says:

> *[32] The second part of the test – balance of convenience - is an adaptation of the civil irreparable harm criteria to the labour relations arena. See: Hotel Employees and Restaurant Employees Union, Local 206 v. Chelton Suite Hotel (1998) Ltd., [2000] Sask. L.R.B.R. 434, LRB File Nos. 091-00, 110-00, 125-00, 139-00, 144-00 & 145-00. In determining whether or not the Board ought to grant interim relief prior to a full hearing on the merits of an application, we are called upon to consider various factors, including whether or not a sufficient sense of urgency exists to justify the desired remedy. See: Grain Services Union, Local 1450 v. Bear Hills Pork Producers Ltd.*

[9] [1979] 1 S.C.R. 120
[10] [2010] CanLII 81339, LRB File No. 150-10

> *Partnership, [2000] Sask. L.R.B.R. 223, LRB File No. 079-00. The Board will also balance the relative labour relations harm that is anticipated to occur prior to the hearing of the main application without intervention by the Board compared to the harm that could result should a remedy be granted. See: Saskatchewan Joint Board, Retail Wholesale and Department Store Union v. Regina Exhibition Association Limited, et. al., [1997] Sask. L.R.B.R. 667, LRB File No. 266-97; United Brotherhood of Carpenters and Joiners of America, Local 1985 v. Con-Force Structures Limited, [1999] Sask. L.R.B.R. 599, LRB File No. 248-99; and International Association of Fire Fighters, Local 1318 v. South Saskatchewan 911, [2001] Sask., L.R.B.R. 97, LRB File No. 037-01. In assessing the relative labour relations harm, the Board is particularly sensitive to the potential for irreparable or non-compensable harm. See: Retail, Wholesale and Department Store Union, Local 455 v. Tai Wan Pork Inc., [2000] Sask. L.R.B.R. 219, LRB File No. 076-00.*
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> *[33] In addition, the Board had enunciated certain policy restrictions on when interim relief should be granted (or rather should not be granted). For example, the Board has stated that the relief sought may not be granted were doing so would have the practical effect of granting what the applicant might hope to obtain on the main application. See: Tai Wan Pork Inc., supra.*
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> *[34] While the Board uses a two-part test to aid in its consideration (and for ease of reference), each application for interim relief involves a matrix of considerations involving the factual circumstances of the application, the general goals of the Act, the policy objectives of the particular provision alleged to have been violated, and the nature of the relief being sought.*

[33] A noted in paragraph [34] above, there are times when there is an overarching policy element in a case which cannot be ignored. In such cases, this policy element may supersede or supplement the balance of convenience analysis which normally would prevail in cases of this nature.

[34] The *Act* makes a clear policy statement that no strike activity can, or indeed, should occur during the currency of a collective Agreement. Such activity is prohibited. That is made clear by section 44(2) of the *Act*. That provision is buttressed by section 11(2)(d) of the *Act* which requires that a strike vote be taken prior to the implementation of any strike activity. No such strike vote has been taken here.

[35] Section 44 of the *Act* is intended to support the policy objective that there be industrial peace during the currency of a collective agreement. Similarly, section 11(2)(d) supports that policy objective by requiring that a Union obtain a mandate from its members before engaging in any strike activity. Those provisions are intended to and must be interpreted so as to prohibit "wildcat" strikes or lockout actions.

[36] The Union argued that it cannot be responsible for the actions of its members who may engage in unsanctioned actions. They also argued that they took immediate and decisive steps to insure that its members were aware that the Union did not support their actions. With respect, we do not agree.

[37] In the Arbitration decision cited by the Union, *Re: United Steelworkers, Local 6571 and Lake Ontario Steel Co. Ltd.*[11], the Arbitration Board said at paragraph 16:

> 16 Thus we turn to the fourth ground advanced by the Company as the basis of Union liability. On the reasoning of the *Canadian General Electric* and *Polymer* cases, *supra*, the company contends the union has an obligation, through its officers, stewards and committeemen, to take prompt, effective and affirmative action to end a strike which has begun spontaneously. **We agree with this position as a matter of law.** Has the Union discharged its obligations in the instant case. [Emphasis added]

[38] In that case, the Arbitration Board concluded that the Union had not discharged its obligations to take "prompt, effective and affirmative action" to end the strike and remained seized of the matter for the purpose of assessing damages.

[39] Also, in the other case cited by the Union, *Hickeson-Langs Supply Company v. Teamsters Local No. 419 et al.*[12], the Ontario Board says at paragraph 15:

> A trade union is an artificial entity which can only act through its officials (or perhaps by the unanimous resolution of its membership), and the mere occurrence of an unlawful work stoppage does not establish or imply union authorization or

[11] [1968] O.L.A.A. No. 6, 19 L.C.C. 260 decision of H.W. Arthurs, D.M. Storey, and I.H. McGowan
[12] [1991] OLRB Rep. May 636, File No. 0350-91-U

> approval. Indeed, even the presence of a union officer in the midst of the strikers may not, in itself, establish union complicity…

[40] In that case, however, the Ontario Board went on to say in the following paragraph:

> On the other hand, the arbitral jurisprudence establishes that a union is ordinarily responsible where stewards instigate, encourage or actively participate in unlawful activity, and a union has an affirmative obligation to attempt to end the strike. In Re Polymer Corporation Ltd., 91959) 59 CLLC 18,158, Professor Laskin, as he then was, concluded that:
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> > The essential thing was to show official disassociation from the unlawful strike by separating union functionaries from demonstrators.
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> In International Longshoreman's Association Local 273 et al v. Maritime Employers' Association et al, 78 CLLC 14,171 the Supreme Court of Canada put it this way:
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> > The language of the contract placed an affirmative duty on the union acting on its leaders at all levels of the organization so as to reveal intent through appropriate overt acts to abide by and to promote the terms of the Collective Agreement. The evidence on the record in these proceedings is quite the opposite. Not only is there no evidence of any action on the part of the union through its agents, that its officers, to perform the undertaking given in the articles set forth above [the no strike clause], but, on the contrary, the leaders of the Locals themselves failed to respond to the request by the Association [the Employer] to report for work.

[41] In *Westroc Inc. v. National Automobile Aerospace Transportation and General Workers Union of Canada (CAW Canada) and its local 1256*[13], cited by the Employer, the Ontario Board was dealing with fact situation similar to that found here. The Ontario definition of strike being considered in that case was also similar to the definition in our *Act*. The Ontario Act definition was as follows:

> "strike" includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in

[13] [2002] CanLII 41383 (Ont. LRB)

> accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output.

[42] The Ontario Board then went on to say:

> Job action designed to pressure an employer with respect to a grievance or bargaining objectives is not permitted while a collective agreement is in effect or during the conciliation process. Some employees seem to think that if their collective agreement specifies that overtime is "voluntary" in that it permits them to refuse to work overtime on an individual basis, they may also do so, whether expressly or tacitly, in combination or in concert in order to put pressure on their employer either in support of some bargaining objective or otherwise. *That is not so.* Such a concerted refusal to work overtime constitutes an illegal strike. In addition, as the Board has previously noted, the arbitral jurisprudence establishes that a union has an affirmative obligation to attempt to end the strike. (See for example, Hickeson-Langs Supply Company, [1991] OLRB Rep. May 636 at paragraph 16).

[43] Parts of these quotes, support our finding above regarding an arguable case having been made out by the Employer. Additionally they support the policy objective that the prohibition from engaging in strike action during the currency of a collective agreement is an important policy in labour relations and as more particularly described within our *Act*.

[44] Section 44 not only prohibits strikes during the currency of a collective agreement, it also prohibits lockouts. The rational for that provision is to insure industrial peace during a collective agreement. Neither side may engage in economic warfare against the other.

[45] When a collective agreement has expired, as is the case here, the collective agreement remains in effect, subject to s. 34, which allows for strike or lock out actions, provided the provisions of the *Act* regarding notice and other formalities are followed. One of these formalities is set out in s. 11(2)(d) which is that it is an unfair labour practice for **any employee, trade union or any other person** "to declare, authorize or take part in a strike unless a strike vote is taken by secret ballot among the employees…". [Emphasis added]

[46] The legislature has made its industrial relations policy clear in the *Act* that "wildcat"strike or lockout action is not permitted. That having been said, and since we have concluded that there is an arguable case that an unlawful strike activity has or continues to have occurred at the Colonsay Potash Mine, we think it appropriate that such activity be arrested.

[47] However, before concluding that relief should be granted, it is necessary to examine the actions of the Union in taking "prompt, effective and affirmative action" to end the strike when the actions of the employees in refusing overtime were brought to its attention, most notably by the August 24, 2012 letter from the Employer's counsel.

[48] The Union's evidence in that respect is that:

1. On August 14, 2012 it advised its members that "if the vote on the employer's [offer] was "no", it was business as usual at the mine site".[14]

2. Members of the Union executive met with the mill maintenance crew in the lunchroom on August 27, 2012. The Union says that it "stressed to the crew that we were not in a legal strike position and that if individual workers wanted to work overtime, then they should".[15]

3. Mr. Ruston says that he met with the underground maintenance crew on September 17, 2012. He says that "if strike action or "work to rule" action was taking place, that it was to stop".

4. The posting by the Union of the notice attached as Appendix "A" at the locations set out above.

[49] These activities, viewed as a whole, do not, in our opinion, satisfy the legal obligation on the part of the Union to attempt to curtail the strike action. This failure to fully commit to curtailing the unlawful strike activity may have been tempered by the Union's view that overtime was a voluntary activity and that they were unable to control the members as to whether they could undertake to perform additional overtime work. Nevertheless, as noted by the Ontario Board in *Westroc Inc. v. National Automobile*

[14] Affidavit of Mike Pulak at para. 6.

Aerospace Transportation and General Workers Union of Canada (CAW Canada) and its local 1256[16], refusal of overtime work on an individual basis, in a concerted manner can constitute an unlawful strike.

[50] In its evidence, the Union acknowledges that it was aware, as early as August 14, 2012 that there could be an issue regarding refusal of overtime by its members. It says on that date it reminded its members that it was "business as usual" if the ratification vote was unsuccessful. Following that, and following receipt of the letter from the Employer's counsel on August 24, 2012, it then had one meeting with the mill maintenance crew on August 27, 2012. Nothing further was done until September 17, 2012 when another meeting was held with the crew in underground maintenance, a gap of 3 ½ weeks and almost 4 weeks from the date of the letter of August 24, 2012.

[51] The Union says that it posted notices in various places throughout the mine regarding the refusal of overtime. That notice contained the following:

> … Please be assured that your Union has not solicited or participated in any such actions and will not unless we have the legal right to do so. USW Local 7656 has not taken a strike mandate vote, so all members need to continue working as usual. Talks are scheduled for September 20th and hopefully we can get the issues raised by the membership solved at that session. If you have any questions or concerns please contact the Union office.
>
> Thank You
>
> Mike Pulak – USW Staff Representative

[52] The actions referenced in the notice are the refusal of overtime and the Employer's allegation that the refusal of voluntary overtime amounted to an "Unlawful Strike Action" by the Union's members.

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[15] Affidavit of Scott Ruston at para 5.
[16] [2002] CanLII 41383 (Ont. LRB)

[53] In our opinion, the response by the Union was an insufficient response to their obligation to take "prompt, effective and affirmative action to end a strike which has begun spontaneously'.[17] The Union's actions here were neither prompt, effective, nor affirmative, as particularly shown by the notice which was posted.

[54] Notwithstanding the overarching public policy issue in this case, which is the prevention and arrest of "wildcat" strike actions, the balance of convenience test also favours the Employer in this case. The *Act* is clear that neither the Employer may lockout nor the Union may strike as noted above. Here the Union (or, arguably its members) is utilizing economic weapons which the Legislature has clearly stated must not be utilized until certain pre-requisites such as a strike vote have been satisfied. As was the case in *Westroc Inc. v. National Automobile Aerospace Transportation and General Workers Union of Canada (CAW Canada) and its local 1256*[18], the balance of convenience favours the imposition of a cease and desist order by the Board to restore industrial harmony between the parties.

[55] The above should not be taken as being in any way confirmatory that an unlawful strike has occurred. The order here is simply for the purpose of returning the workplace to its former situation where overtime was routinely accepted by Union members. If, as alleged by the Union, there is no concerted refusal of overtime by its members, the Order will have no effect since the members are already acting in accordance with the *Act.* However, on the other hand, and members are participating in a concerted effort to undermine bargaining by refusal of overtime, then the granting of an Order is justified.

[56] Nor should this decision should not be taken as absolving the Employer from any fault in this matter and placing the blame only on the Union. It is clear, as suggested by counsel for the Union, the Employer had other actions that it could have taken, rather than make this application to the Board. However, as noted by the arbitration Board in *Re: United Steelworkers, Local 6571 and Lake Ontario Steel Co.*

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[17] See *Hickeson-Langs Supply Company v. Teamsters Local No. 419 et al* [1968] O.L.A.A. No. 6, 19 L.C.C. 260 decision of H.W. Arthurs, D.M. Storey, and I.H. McGowan at para 16.
[18] [2002] CanLII 41383 (Ont. LRB)

Ltd.[19], the impact of any culpability of the Employer can be better judged in the final application.

[57] An order of the Board will issue as follows:

1. that the Employer has made out an arguable case that the Employees of Mosaic Potash Colonsay ULC (the "Employer"), represented by The United Steelworkers, Local 7656 (the "Union") have engaged in a concerted refusal to work voluntary overtime at the Mosaic Potash Mine in Colonsay, Saskatchewan, and have thereby engaged in an unlawful strike contrary to the Act. Public policy reasons and the balance of convenience favour the Board making this order.

2. that the employees of the Employer, represented by the Union are hereby ordered to cease and desist from engaging in an unlawful strike; which is to say, "a cessation of work or a refusal to work or to continue to work in combination or in concert or in accordance with a common understanding; or to engage in other concerted activity on the part of the employees in relation to their work which is designed to restrict or limit output or the effective delivery of services". In particular, the employees are directed to cease and desist from the concerted refusal to work voluntary overtime at the Mosaic Potash Mine in Colonsay, Saskatchewan, and to return to work forthwith;

3. that the Union, through its officials, officers, and stewards, are to post, and pass out in writing to all of its members, the following notice, which they shall also post conspicuously throughout the Employers workplace where all members of the Union may view it. This notice shall be posted within 7 days of the receipt of this decision and shall remain posted for a period of not less than 30 days from the date of its posting.

NOTICE

Until the Union conducts a strike vote among its members in which the members vote to engage in strike activity, the union is not in a legal position to strike. The Saskatchewan Labour Relations Board has determined that our members may be in violation of *The Trade Union Act* by virtue of

[19] [1968] O.L.A.A. No. 6, 19 L.C.C. 260 decision of H.W. Arthurs, D.M. Storey, and I.H. McGowan

members refusing to sign up for overtime work since turning down the latest Company offer. A strike is defined in *The Trade Union Act* as being:

(k.1) "strike" means any of the following actions taken by employees:

(i) a cessation of work of a refusal to work or to continue to work by employees acting in combination or in concert or in accordance with a common understanding; or

(ii) other concerted activity on the part of employees in relation to their work that is designed to restrict of limit output or the effective delivery of services;

The Board treats allegations of illegal strike activity seriously. So should the persons involved in such activity. In the event of an unlawful strike, an employer may seek a number of remedies:

1. Orders of the Board are filed in the office of the local registrar of the Court of Queen's Bench and are thereupon enforceable as a judgment or order of the Court of Queen's Bench and in the same manner as any other judgment or order of the court…

2. An employer may discipline employees who engage in unlawful concerted activity because engaging in an unlawful strike is a serious breach of an employee's employment obligations which warrants at least discipline and, in the view of some arbitrators, discharge.

3. The Employer may seek consent to prosecute employees engaged in an unlawful strike as being a person who takes part in, aids, abets, counsels or procures any unfair labour practice or contravenes any provision of *The Trade Union Act* as provided for in s. 15 of the Act.

4. The Employer may seek the assistance of the Courts to enforce this order of the Board. The Saskatchewan Labour

> Relations Board treats any declarations and orders which it makes with respect to unlawful strikes seriously. So do the Courts. The Courts are not slow to enforce and give effect to directions given by the Board with respect to unlawful strike activity.

[58] A copy of this decision shall be posted in the workplace where it may be viewed by all affected employees alongside the notice to be posted pursuant to the Board's order herein and for the same period of time.

DATED at Regina, Saskatchewan, this **4th** day of **October, 2012**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.,
Chairperson