Saskatchewan
Labour Relations Board

SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant v. 101109823 SASKATCHEWAN LTD. o/a HOWARD JOHNSON HOTEL, YORKTON, Respondent Employer

LRB File No. 339-13; December 19, 2013
Chairperson, Kenneth G. Love Q.C.; Members: John McCormick and Allan Parenteau

For the Applicant Union Mr. Larry Kowalchuk
For the Respondent Employer: Ms. Kara Bashutski

Technological Change – Proper notice – Duty to bargain in good faith – Interim application – Board will not grant interim Order where the facts do not show requisite urgency, where issues are legally and factually too complex to determine on Affidavit evidence and brief oral argument, and where the remedy sought would essentially give final determination of the main application – Board dismisses interim application.

***The Trade Union Act,* ss. 5.3 and 43.**

REASONS FOR DECISION

Facts:

[1] **Kenneth G. Love, Q.C., Chairperson:** The Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, (the "Union") is certified as the bargaining agent for a unit of employees of 101109823 Saskatchewan Ltd. o/a Howard Johnson Hotel, Yorkton, Saskatchewan (the "Employer") by an Order of the Board dated November 1, 1991. At the times that are relevant to this hearing, there were thirty (30) employees employed by the Employer.

[2] On or about April 15, 2013, the Employer sent letters to some of its employees (the "restaurant employees") who were employed in the restaurant operated by the hotel, which letter advised the restaurant employees that the restaurant would be closed. Layoffs were

scheduled to take effect on July 15, 2013. It is not clear when the Union became aware of the Employer's plans to lay off the restaurant employees, since the Union was not copied on the letters to the restaurant employees.

[3] Notwithstanding not being copied on the letters to the restaurant employees, the Union met with the Employer on July 2, 2013 and on July 7, 2013. At those meetings, the parties discussed the intended closure of the restaurant and a workplace adjustment plan.

[4] On July 15, 2013, the Employer wrote to the Minister of Labour Relations and Workplace Safety to advise that the group termination scheduled for July 15, 2013 had been rescinded and that the Union and the Employer had agreed to a three (3) month trial in the restaurant "to try to improve and increase the sales of the restaurant business". The letter noted that the Employer and the Union had met, "and have discussed the three-month trial period and everyone is in agreement with this, to give this new proposal a try."

[5] On August 21, 2013, the Employer wrote to the Union "in accordance with Saskatchewan Labour Standards" to give formal notice of a "Group Termination". The letter noted that the reason for the terminations was that the restaurant was to be closed due to a lack of business. The letter noted that the decision was "strictly a business decision". The terminations affected by that notice were to come into effect on August 31, 2013 to be effective the close of business on November 30, 2013.

[6] The letter listed nine (9) staff that were impacted by the impending closure of the restaurant. The letter noted that each of them would be provided "a formal written Lay Off Notification". Individual letters were sent to the affected employees by the Employer on August 22, 2013.

[7] By letter dated August 21, 2013, the Employer also notified the Minister of Labour Relations and Workplace Safety of the Group Termination. That letter also listed the nine (9) employees impacted. The Deputy Minister of the Ministry of Labour Relations and Workplace Safety acknowledged receipt of this letter on September 6, 2013.

[8] On September 10, 2013, the Union wrote to the Employer. In that letter, the Union acknowledged receipt of the Employer's letter of August 21, 2013. The Union also advised "that you are also required to give ninety (90) days' notice of the technological change under s. 43 of the *Trade Union Act*. The letter also requested that the parties meet to negotiate a workplace adjustment plan.

[9] The Union and the Employer met on October 24, 2013. During that meeting, the Union tabled a proposal respecting a workplace adjustment plan and requesting the Employer provide financial and other information to the union. No further meetings were arranged or held.

[10] The restaurant operated as normal until November 30, 2013. From December 1 to December 8, 2013, the Employer temporarily operated a cold breakfast for hotel guests, but abandoned that after December 8, 2013. As of December 9, 2013, the restaurant closed and remains closed at the present time.

[11] On October 1, 2013, the Union filed an Unfair Labour Practice Application[1] alleging breaches of sections 11(1)(c) and 43 of the *Act.* On November 13, 2013, the Union filed two Unfair Labour Practice applications[2] alleging breaches of sections 11(1)(a), (b), (c), (e) and (f) of the *Act* and ss. 11(1)(c) and 43(8.1)[3] of the *Act*.

Relevant statutory provision:

[12] The relevant provisions of *The Trade Union Act* are as follows:

> *5.3 With respect to an application or complaint made pursuant to any provision of this Act or the regulations, the board may, after giving each party to the matter an opportunity to be heard, make an interim order pending the making of a final order or decision.*
>
> *. . .*
>
> *43(1) In this section "**technological change**" means:*
>
> > *(a) the introduction by an employer into the employer's work, undertaking or business of equipment or material of a different nature or kind than previously utilized by the employer in the operation of the work, undertaking or business;*

---

[1] LRB File No. 265-13.
[2] LRB File No. 317-13.
[3] LRB File No. 318-13.

(b) a change in the manner in which the employer carries on the work, undertaking or business that is directly related to the introduction of that equipment or material; or

(c) the removal or relocation outside of the appropriate unit by an employer of any part of the employer's work, undertaking or business.

(1.1) Nothing in this section limits the application of clause 2(f) and sections 37, 37.1, 37.2 and 37.3 or the scope of the obligations imposed by those provisions.

(2) An employer whose employees are represented by a trade union and who proposes to effect a technological change that is likely to affect the terms, conditions or tenure of employment of a significant number of such employees shall give notice of the technological change to the trade union and to the minister at least ninety days prior to the date on which the technological change is to be effected.

(3) The notice mentioned in subsection (2) shall be in writing and shall state:

(a) the nature of the technological change;

(b) the date upon which the employer proposes to effect the technological change;

(c) the number and type of employees likely to be affected by the technological change;

(d) the effect that the technological change is likely to have on the terms and conditions or tenure of employment of the employees affected; and

(e) such other information as the minister may by regulation require.

(4) The minister may by regulation specify the number of employees or the method of determining the number of employees that shall be deemed to be "significant" for the purpose of subsection (2).

(5) Where a trade union alleges that an employer has failed to comply with subsection (2), and the allegation is made not later than thirty days after the trade union knew, or in the opinion of the board ought to have known, of the failure of the employer to comply with that subsection, the board may, after affording an opportunity to the parties to be heard, by order:

(a) direct the employer not to proceed with the technological change for such period not exceeding ninety days as the board considers appropriate;

(b) require the reinstatement of any employee displaced by the employer as a result of the technological change; and

(c) where an employee is reinstated pursuant to clause (b), require the employer to reimburse the employee for any loss of pay suffered by the employee as a result of his displacement.

(6) Where a trade union makes an allegation pursuant to subsection (5), the board may, after consultation with the employer and the trade union, make such interim orders under subsection (5) as the board considers appropriate.

(7) An order of the board made under clause (a) of subsection (5) is deemed to be a notice of technological change given pursuant to subsection (2).

(8) Where a trade union receives notice of a technological change given, or deemed to have been given, by an employer pursuant to subsection (2), the trade union may, within thirty days from the date on which the trade union received the notice, serve notice on the employer in writing to commence collective bargaining for the purpose of developing a workplace adjustment plan.

(8.1) On receipt of a notice pursuant to subsection (8), the employer and the trade union shall meet for the purpose of bargaining collectively with respect to a workplace adjustment plan.

(8.2) A workplace adjustment plan may include provisions with respect to any of the following:

> *(a) consideration of alternatives to the proposed technological change, including amendment of provisions in the collective bargaining agreement;*
>
> *(b) human resource planning and employee counselling and retraining;*
>
> *(c) notice of termination;*
>
> *(d) severance pay;*
>
> *(e) entitlement to pension and other benefits, including early retirement benefits;*
>
> *(f) a bipartite process for overseeing the implementation of the workplace adjustment plan.*

(8.3) Not later than 45 days after receipt by the trade union of a notice pursuant to subsection (2), the employer or the trade union may request the minister to appoint a conciliator to assist the parties in bargaining collectively with respect to a workplace adjustment plan.

(10) Where a trade union has served notice to commence collective bargaining under subsection (8), the employer shall not effect the technological change in respect of which the notice has been served unless:

> *(a) a workplace adjustment plan has been developed as a result of bargaining collectively; or*
>
> *(b) the minister has been served with a notice in writing informing the minister that the parties have bargained collectively and have failed to develop a workplace adjustment plant.*

(11) This section does not apply where a collective bargaining agreement contains provisions that specify procedures by which any matter with respect to the terms and conditions or tenure of employment that are likely to be affected by a

technological change may be negotiated and settled during the term of the agreement.

(12) On application by an employer, the board may make an order relieving the employer from complying with this section if the board is satisfied that the technological change must be implemented promptly to prevent permanent damage to the employer's operations.

Arguments of the Parties:

[13] Both counsel filed a written Brief which we have reviewed and found helpful. Both counsel agreed that the Board has historically used a two-part test when considering applications for interim relief, that is, (1) whether the main application raises an arguable case of a potential violation under the *Act*; and (2) whether the balance of convenience favours the granting of interim injunctive relief pending a hearing on the merits of the main application.[4]

[14] The Union argued that it had demonstrated an arguable case and that closure of a portion of a business was sufficient to engage the provisions of Section 43 of the *Act.* The Union also argued that the Employer had failed to provide the required notice under that provision. Furthermore, it argued that the Employer had not engaged in good faith bargaining to reach a workplace adjustment plan.

[15] The Union argued that the balance of convenience clearly favoured the Union and the employees that it represented. It argued that the damage to the employees that had lost their jobs was more than merely a monetary loss, citing passages from the Supreme Court decision in *Pepsi-Cola Canada Beverages (West) Ltd. v. R.W.D.S.U. et al.*[5]

[16] The Employer argued that there was no arguable case. It argued that the closure of the restaurant was not a technological change such as to invoke the provisions of section 43 of the *Act*. In the alternative, it argued that even if it was a technological change, all necessary preliminary steps had been taken. In support, the Employer cited *United Brotherhood of Carpenters and Joiners of America, Local 1985 and Con-Force Structures Limited.*[6]

---

[4] See: *Saskatchewan Government and General Workers Union v. The Government of Saskatchewan [2010] S.L.R.B.D. No. 20, LRB File No. 150-10; Hotel Employees and Restaurant Employees Union, Local 206 v. Canadian Hotels Income Property Real Estate Investment Trust #19 Operations Ltd. (o/a Regina Inn)*;[1999] Sask. L.R.B.R. 190, LRB File No. 131-99.and *Canadian Union of Public Employees, Local 4973 v. Welfare Rights Centre*, 2010 CanLII 42668, LRB File No. 083-10.
[5] [2002] S.C.C. 8.
[6] LRB File No. 248-99.

[17] The Employer argued that the balance of convenience favours the *status quo*, that is that the situation should not be disturbed until a proper hearing and determination of the issues put into play by the parties in this application. Furthermore, it argued that the relief sought in the interim application was essentially the same relief sought by the Union in its Unfair Labour Practice applications.

[18] The Employer also argued that the Union had not demonstrated any urgency which required the Board to act to set the parties right. In support, it cited *Saskatchewan Government and General Workers Union v. The Government of Saskatchewan.*[7]

[19] Counsel for the Employer also objected to portions of the draft order filed by the Union which would permit *ex parte* applications to the Board.

Analysis:

[20] The Board has no difficulty in determining that an arguable case has been made out by the applicant. With that determination, we can move to the second issue, that is the balance of labour relations harm and convenience.

[21] In a nutshell, the issue is whether or not the closure of the restaurant was done properly by the Employer, in accordance with the laws of the province, as well as whether the employment of those employees impacted by the closure was properly ended. Additionally there are sub-issues regarding the propriety of the notices given, and the nature of the negotiations between the parties.

[22] On applications for interim relief, it is difficult not to make presumptions with respect to the merits of the main application. As pointed out by the Board in the *Saskatchewan Government and General Workers Union v. The Government of Saskatchewan*[8] case, "[I]nterim applications are utilized in exigent circumstances where intervention by the Board is thought to be necessary to prevent harm from occurring before an application pending before the Board can be heard".

---

[7] *Supra*, Note #4.
[8] *Supra*, Note #4 at paragraph 30.

[23] In this case, the Union argued that it tried to have the unfair labour practice applications scheduled at an early date so as to avoid any necessity to bring this interim application, but that hope was thwarted by a lack of availability on the part of the Employer. As a result, it argued, that it had no option but to bring this application on an interim basis.

[24] Unfortunately, on interim applications, the Board does not have the benefit of a complete set of facts from the parties, nor does it have the benefit of oral evidence or cross-examination. All we have before us is two affidavits, one from each party, and the sworn unfair labour practice applications and replies thereto.

[25] In dealing with the balance of labour relations harm or convenience, the Board described this process in *Saskatchewan Government and General Workers Union v. The Government of Saskatchewan* in the following terms:

> *[32] The second part of the test – balance of convenience - is an adaptation of the civil irreparable harm criteria to the labour relations arena. See: Hotel Employees and Restaurant Employees Union, Local 206 v. Chelton Suite Hotel (1998) Ltd., [2000] Sask. L.R.B.R. 434, LRB File Nos. 091-00, 110-00, 125-00, 139-00, 144-00 & 145-00. In determining whether or not the Board ought to grant interim relief prior to a full hearing on the merits of an application, we are called upon to consider various factors, including whether or not a sufficient sense of urgency exists to justify the desired remedy. See: Grain Services Union, Local 1450 v. Bear Hills Pork Producers Ltd. Partnership, [2000] Sask. L.R.B.R. 223, LRB File No. 079-00. The Board will also balance the relative labour relations harm that is anticipated to occur prior to the hearing of the main application without intervention by the Board compared to the harm that could result should a remedy be granted. See: Saskatchewan Joint Board, Retail Wholesale and Department Store Union v. Regina Exhibition Association Limited, et. al., [1997] Sask. L.R.B.R. 667, LRB File No. 266-97; United Brotherhood of Carpenters and Joiners of America, Local 1985 v. Con-Force Structures Limited, [1999] Sask. L.R.B.R. 599, LRB File No. 248-99; and International Association of Fire Fighters, Local 1318 v. South Saskatchewan 911, [2001] Sask. L.R.B.R. 97, LRB File No. 037-01. In assessing the relative labour relations harm, the Board is particularly sensitive to the potential for irreparable or non-compensable harm. See: Retail, Wholesale and Department Store Union, Local 455 v. Tai Wan Pork Inc., [2000] Sask. L.R.B.R. 219, LRB File No. 076-00.*

[26] In making its determination of whether to grant interim relief, the Board takes a myriad of considerations into account. These include the factual circumstances, the general goals of the *Act*, the particular policy objectives of the provisions of the *Act* under consideration, and the nature of the relief sought.

[27] As noted in *Saskatchewan Government and General Workers Union v. The Government of Saskatchewan*[9], the policy objective of section 43 of the *Act* is

> *…to ensure that members of organized bargaining units receive prior notice of a technological change intended to be implemented by an employer that is anticipated to affect the terms and conditions of employment (and/or tenure of employment) of a significant number of employees in the workplace".*

[28] However, as noted later in that paragraph, "[S]ection 43 does not prevent an employer from implementing technological change". It does, however, provide additional obligations upon the employer, including notice requirements and an obligation to engage in collective bargaining with respect to a workplace adjustment plan.

[29] Here, the Employer argues that it has complied with those requirements and has been unable to negotiate a workplace adjustment plan. The Union argues that it did not provide the proper notice as required by section 43 and did not bargain in good faith.

[30] In this case, however, the balance of convenience is not the determining factor as to whether the Board should act to provide interim relief. Rather, it is the nature of the relief sought by the Union.

[31] We have not embarked on a lengthy discussion of the various factors at play in this particular case, because the analysis is unnecessary, since we have concluded that the application cannot succeed since the relief requested would have the practical effect of granting the applicant most of what he seeks in the main unfair labour practice applications.

[32] In *Retail, Wholesale and Department Store Union, Local 455 v. Tai Wan Pork Inc.,*[10] the Board said:

> *If an interim Order was granted by the Board, the remedial consequences of the main application would be complete, except perhaps for an assessment of some aspects of the monetary claim. This result dissuades the Board from proceeding solely on the basis of affidavit material and brief oral arguments. The issues are more complex both factually and legally and deserve a full hearing before remedial relief of this magnitude is granted.*

[9] Supra, at paragraph 35.
[10] [2000] Sask. L.R.B.R. 219, LRB File No. 076-00.

[33] These words are equally apt in this case. As was the case in Tai Wan Pork, we would normally have ordered that this matter be heard on an expedited basis. Dates for the main hearing have already been set for some 6 weeks from now, and there is little likelihood that earlier dates could be found.

[34] We are not unmindful of the impact that the layoffs will have on the employees impacted by this decision to close the restaurant at the Howard Johnson Hotel in Yorkton. However, that concern is mitigated somewhat by the fact that, notwithstanding what the union believes is improper notice, the employees were aware that their employment would be impacted. The restaurant closure was originally scheduled to occur on July 15, 2013. That date was later changed to November 30, 2013. The original notification was given on April 15, 2013. The Union met with the Employer to discuss workplace adjustment on July 2, 2013 and July 7, 2013 and again on October 24, 2013. No explanation was given as to why the parties had not met more often than this, nor was the large gap between July and October explained in any way. It is clear that the employees and the Union had notice (proper or not) of the impending closure of the restaurant since at least July 2, 2013. Appropriate remedial action, if warranted, can be taken once the full evidence has been heard on the main applications.

[35] For these reasons, the application for interim relief is dismissed.

DATED at Regina, Saskatchewan, this **19th** day of **December, 2013.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson