UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant v. SOBEYS CAPITAL INCORPORATED, Respondent

LRB File No. 024-14; March 25, 2014
Chairperson, Kenneth G. Love, Q.C.; Members: Bert Ottenson and Laura Sommervill

For the Applicant: Heather Jensen
For the Respondent: Kevin Wilson, Q.C.

Unfair Labour Practice – Technological Change – Employer communicated to all employees, including those represented by the Union, that it intended to close grocery store in several months time – Work performed by employees was not going to be relocated but rather, Employer was abandoning market – Union asserted that closure was a technological change under s. 43 and that the Employer was required to commence collective bargaining – Board finds store closure was not technological change – Board's previous jurisprudence holds that technological change occurs where (1) work continues to be performed; (2) location of work is moved outside bargaining unit; and (3) work is now performed by employees of Employer in a different work location or by employees of a third party – In case at hand, work is not going to be continued, moved or performed by other employees.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Q.C., Chairperson:** United Food and Commercial Workers, Local 1400, (the "Union") is certified as the bargaining agent for a unit of employees of Sobeys West, a Division of Sobeys Capital Incorporated (the "Employer") by an Order of the Board dated May 23, 2002.

[2] On February 18, 2014, the Union filed an application with the Board alleging that the Employer engaged in an unfair labour practice in failing to provide ninety (90) days notice of a technological change as required by Section 43 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") and by refusing to bargain collectively with respect to the closure of its retail grocery store in Yorkton, Saskatchewan. In its Reply filed March 4, 2014, the Employer denied it had

engaged in any alleged unfair labour practices in relation to the closure of its retail store in Yorkton, Saskatchewan.

Facts:

[3] Sometime prior to January 20, 2014, the Employer determined that it would close permanently, its retail grocery store in Yorkton, Saskatchewan. On January 20, 2014, the Employer gave notice to all employees, including those represented by the Union, of the closure which was to be effective on March 20, 2014. The work performed by those employees would not be transferred anywhere by the Employer. Rather, it was abandoning the market and presumed that its former customers would shop for their groceries at other grocery retailers in Yorkton following the closure.

[4] Mr. Lester Ward, who testified for the Employer, testified that the closure of the store was done for two (2) reasons. Firstly, the lease of the store was expiring on April 30, 2014. Secondly, the location had not been financially successful.

[5] Mr. Darren Kurmey, the Secretary Treasurer of the Union, became aware of the pending closure through contact with the staff representative responsible for this location, Mr. Trevor Morin, on January 20, 2014. Mr. Morin had been advised of the pending closure by email from the Employer on that date as well.

[6] On January 21, 2014, Mr. Kurmey sent a letter to Mr. Craig Dubyk, the Saskatchewan Human Resources Manager for the Employer advising that the Union wishes to commence collective bargaining pursuant to Section 43 of the *Act*.

[7] On January 24, 2014, Mr. Lester Ward, the Director Labour Relations, Sobeys West responded to Mr. Kurmey advising that the store closure was not the result of technological change and that, in the Employer's opinion, Section 43 of the *Act* did not apply. He referred Mr. Kurmey to provisions in the collective bargaining agreement which provided for severance payments in the event of a store closure (Article 26.03).

[8] On January 27, 2014, Mr. Kurmey replied to Mr. Ward. He advised that the Union took the view that since the *Act* had been amended in 1994, that the proper interpretation of Section 43 was that it included a store closure. In support he cited *Saskatchewan Joint Board,*

Retail, Wholesale and Department Store Union v. Loraas Disposal Services Ltd[1] ("*Loraas*"), a decision of the Court of Appeal for Saskatchewan, that upheld an earlier ruling of the Board which had been quashed by the Saskatchewan Court of Queen's Bench.

[9] In the meanwhile, the Union had met with its members who were impacted by the closure. Those employees had elected some of their members to assist with bargaining with the employer respecting the closure. That meeting also provided the Union with input from its members as to the issues it should attempt to resolve in bargaining with the Employer.

[10] On February 5, 2014, after several attempts, Mr. Ward was able to contact Mr. Kurmey by telephone. Mr. Kurmey testified that he took the call while away from his office and did not have his files with him. Mr. Lester testified that he had no idea where Mr. Kurmey was when he took the call.

[11] During the telephone conversation, Mr. Ward asked Mr. Kurmey what the issues he wanted to negotiate. Mr. Kurmey responded with four (4) items (which he testified was off the top of his head and not a complete list of matters the employees wished to raise). These four (4) items were:

1. Making arrangements for someone from Human Resources and Skills Development Canada to address questions from Union members regarding benefits programs available to them upon termination.

2. The Employer providing some outplacement services for the employees.

3. The Employer making arrangements to permit final severance cheques to be paid on a separate cheque from regular pay to minimize tax that would have to be deducted and remitted.

4. Having someone from the Employer available to meet with the Union to discuss the above items.

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[1] [1998] 172 Sask. R. 227, [S.J. No. 783, 48 C.L.R.B.R. (2d) 219, 99 CLLC para. 220 – 027.

[12] Mr. Ward agreed that he could agree to the first two (2) items and that he would have to check on the last two (2) and get back to Mr. Kurmey. He made appropriate inquiries and later contacted Mr. Kurmey to advise that the Employer would agree to make separate direct deposits for employees (as distinct from separate cheques) for severance payments. He also advised that Mr. Craig Dubyk would be available to meet with the Union.

[13] Mr. Ward kept notes of his telephone conversation with Mr. Kurmey, and followed up with him by letter on February 10, 2014. That letter repeated the Employer's position that Section 43 of the *Act* did not apply in these circumstances. He also confirmed the agreement on the four (4) points outlined above. In his letter, sent both by email and regular mail, he stated:

> *I understand from our discussions on February 5, 2014 that in light of these steps [agreement on the 4 points], the Union will not be advancing the argument that this is a technological change under the Act or at least accepts these steps satisfy any such obligations it believes Sobeys may have in the circumstances.*

[14] No response was made by Mr. Kurmey until February 17, 2014. Mr. Kurmey testified that he was on holidays during that time period. He responded to the email which attached Mr. Lester's letter advising that "the Union maintains its position Section 43 applies. We will be responding accordingly…". That response was the filing of this application on February 18, 2014, which was sworn by Mr. Kurmey on February 17, 2014.

[15] A meeting was set up between Mr. Dubyk and the Union on February 20, 2014. That meeting was attended by Mr. Norm Nault, the President of Local 1400, Mr. Morin, and the members of the Union's negotiating team. No bargaining occurred at that meeting.

[16] Sobeys has continued to honour the commitments made by Mr. Ward, *albeit* on their own, without any input from the Union.

Relevant statutory provision:

[17] Relevant statutory provisions are as follows:

> *43(1) In this section "technological change" means:*
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> *(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;

(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.*
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> *(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.*

Union's arguments:

[18] The Union filed a written Brief and Book of Authorities which we have reviewed and found helpful.

[19] The Union argued that the purpose of Section 43 was to compel mid-term bargaining in situations where an employer seeks to initiate significant changes to the workplace. It argued that the provisions sought to maintain and foster industrial harmony by supporting the ability of employees to bargain collectively with respect to such significant changes.

[20] The Union referenced amendments to Section 43 made by the legislature in 1994. Those amendments, it argued extended and changed the definition of technological change to include a complete removal or relocation of work (i.e.: a closure situation as in this case).

[21] The Union relied heavily upon the Saskatchewan Court of Appeal decision in *Loraas* (*supra*) to support its arguments that earlier decisions of the Court of Queen's Bench can no longer be relied upon to guide the Board.

[22] The Union also cited other decisions which it argued supported its interpretation of Section 43 and its evolution before the Board. These included *Re: Off the Wall Productions,*[2] *Re: South Saskatchewan 911,*[3] *Re: 101109823 Saskatchewan Ltd. (cob Howard Johnson Hotel, Yorkton*[4] and *Re: Athabasca Health Authority Inc. (cob Athabasca Health Facility).*[5]

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[2] [2000] S.L.R.B.D. No. 13
[3] [2001] S.L.R.B.D. No. 11, at para 7
[4] [2013] S.LR.B.D. No. 31, at para 20
[5] [2007] S.L.R.B.B. No. 26, at para 74

Employer's arguments:

[23] The Employer also filed a written Brief and Book of Authorities, which we have reviewed and found helpful.

[24] The Employer advanced four (4) main arguments. The first of these was that a permanent closure of a business was not a technological change. In its argument, it traced the history of the technological change provision of the *Act* since its enactment in 1972. It relied upon a series of cases[6] decided by the Board and the Court of Queen's Bench, which had interpreted the provision.

[25] In support of its arguments that a complete closure did not give rise to a technological change pursuant to Section 43, the Employer cited an earlier Board decision which interpreted the provision in *R.W.D.S.U., Local 568 v. Sunshine Uniform Supply Services.*[7]

[26] The Employer also argued that the collective bargaining agreement between the parties addresses store closure issues which brings Section 43(11) of the *Act* into play. In support it referenced similar provisions to those in this collective agreement which were analyzed by Arbitrator Dan Ish in *Re: Macdonalds Consolidated.*[8]

[27] Thirdly, the Employer argued that there had been a settlement between the Employer and the Union concerning all of the issues surrounding technological change. The Employer argued that an agreement had been reached between Lester Ward and Darren Kurmey during their telephone conversation on February 5, 2014, which agreement they argued the Union was now repudiating, which it should not be permitted to do.

[28] Finally, the Employer argued that the Union should be estopped from commencing this application. It argued that the Employer had placed reliance upon the

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[6] See *Acme Video Inc. v. R.W.D.S.U.,* [1996] 146 Sask. R. 224, 64 ACWS (3d) 964 (QB); *Re: Regina Exhibition Assn. Ltd.* [43 CLRBR (2d) 161, 98 CLLC 220-039 (Sask LRB) and *Re: Regina Exhibition Assn. Ltd.,* [1998] 7 WWR 121 (QB); *Lorass*, Supra Note 1; *UFCW, Local 1400 v. Culinar Inc.,* [1999] Sask LRBR 97 at para 56, 99 CLLC 220-54; *Re: Con-Force Structures Ltd.,* [1999] 61 CLRBR (2d) 108, 2000 CLLC 220-020 (Sask LRB); *Re: 101109823 Saskatchewan Ltd. (cob Howard Johnson Hotel, Yorkton, Supra* Note 4; *Re: Beaver Foods Ltd.,* [2009] SLRBD No. 33, 172 CLRBR (2d) 133; and *Re: Off the Wall Productions*, *Supra* Note 2.

[7] [1978] SLRBD No. 1, 78 CLLC 16162 at paras 8-9.

promises made by the Union regarding the resolution of any issues. It argued that the Employer had agreed to make additional benefits available to employees affected by the closure in reliance upon the Union's agreements contained in the February 5, 2014 telephone call, which amounted to promissory estoppel. As such, the Board should dismiss the Union's application.

Analysis and Decision:

Does the definition of "technological change" in Section 43(1)(c) apply?

[29] As early as 1976, the Board had already determined in *Oil, Chemical and Atomic Workers International Union, Local 9-687 v. Northern Petroleum Division, Canadian Propane Gas & Oil (Sask.) Ltd.*[9] that the closure of a complete work, undertaking or business was not included under section 43. In that decision, the Board found:

> *...That Section 42[10], Subsection (1), clause (c) of the Trade Union Act, 1972, includes closure by an employee of any "part" of his work, undertaking or business**, but does not include closure of the complete work, undertaking or business as was the situation in the instant case**. Therefore, it is Hereby Ordered that the application be Dismissed.* [Emphasis added]

[30] However, the Board in the *Northern Petroleum* case did not provide reasons for its decision, apart from the comment above. In *Re: Sunshine Uniform Supply Services,*[11] the Board, Chaired by then Chairperson Sherstobitoff, after declaring the *Northern Petroleum* case to have been wrongly decided, went on to say:

> *8 …While the dictionary meaning of the word "removal" as used in Section 42(1)(c) is broad enough to include the term "closure", to interpret the word in that sense is to give the word an unusual meaning. The Board must consider the meaning of the word "removal" in the context in which it is used. The entire section deals with technological change and closure has nothing to do with "technological change". If the legislature had intended Section 42(1)(c) to cover closure it would have said so in clear, express and unambiguous terms.*
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> *9 The Board also notes that Section 42(1)(c) applies to only "any part" of an employer's work, undertaking or business. If the word "removal" was intended by the legislature to include "closure" it would have been illogical and irrational to restrict the application to only part of a work, undertaking or business as opposed to a whole. Section 42(1)(c) obviously contemplates the situation where an employer simply moves a part of this work from one place to another, or from one group of employees to another, or other similar circumstances.*

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[8] [1991] S.L.R.B.D. No. 30, 12 C.L.R.B.R. (2d) 212.
[9] LRB File No. 270-76.
[10] In 1976, Section 43 of the current *Act* was Section 42.
[11] [1978] S.L.R.B.D. No. 1.

[31] So, six (6) years after the introduction of the "technological change" provisions to the *Act* by *The Technological Change Rationalization Act, 1972,*[12] the Board's position was clear that a closure of an employer's business did not constitute a technological change.

[32] In 1994[13] the *Act* was amended to change subsection (c) of the definition of "technological change" from:

> *(c) the removal by an employer of any part of this work, undertaking or business.*

to:

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

The changes to the *Act* made in 1994 are bolded above.

[33] In *UFCW, Local 1400 v. Culinar Inc.,*[14] the Board summarized the key factual findings that are common among decisions of the Board prior to this decision. At paragraph 56, the Board says:

> *…The key factual findings that are common among these cases are (1) the work continues to be performed; (2) the location of the work is moved outside the bargaining unit; and (3) the work is now performed by employees of the Employer in a different work location or by employees of a third party.*

[34] All of the cases cited by the Union which followed the *Culinar, supra,* decision and which were decisions of the Board, where an interpretation of Section 43 of the *Act* was applied by the Board, followed these common factual determinations. In *Loraas*, *supra*, the work continued to be performed, the work was moved outside the bargaining unit, and was being performed by employees of a third party.

[35] Other cases cited by the Union did not invoke an interpretation of Section 43 because they were interim decisions of the Board which addressed mainly the issue of whether the applicant had established an arguable case, not whether such a case had been made successfully.

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[12] SS 1972 c 133.
[13] *The Trade Union Amendment Act*, *1994* SS 1994 c 47 s. 22.
[14] Supra Note 6 at para 54

[36] The Union argued that the Saskatchewan Court of Appeal in *Loraas, supra,* overruled lower court decisions, particularly the Court of Queen's Bench decision in *Regina Exhibition Assn. Ltd. v. Saskatchewan Joint Board Retail, Wholesale and Department Store Union*[15] where Mr. Justice Geatros, speaking to a situation involving a complete closure, overruled the Board in the following terms:

> *I have difficulty in accepting the notion that if "removal" can be interpreted to mean a "relocation", but not "the total cessation of work", as the Board points out it has found in the past, the addition of the words "or relocation outside of the appropriate unit" now serve to include closure or cessation as a "removal". Again I say that at the time of the amendment the legislature would have been aware of the past rulings of the Board. It follows, in the words of Chairman Sherstobitoff in Sunshine Uniform Supply Services, "If the legislature had intended s. 42(1)(c) to cover closure it would have said so in clear, express and unambiguous terms."*
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> *The Board says, "...there is no labour relations rationale for distinguishing between a closure caused by a relocation of work outside the bargaining unit and a total closure." For present purposes it is of no moment whether that is so. It is my view that the legislature in its wisdom has seen fit to make that distinction.*
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> …
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> *Not only do I merely disagree with the result by the Board, but I find there is no rational basis for its conclusion that the decision by REAL to permanently close the Silver Sage Casino was a technological change within the meaning of s. 43(1)(c) of the Act. To look upon the 1994 amendment as overriding a consensus held by the Board for twenty years lacks the faculty of reason. The Board, in my judgment, made a patently unreasonable error in the performance of its function. The "severe test" alluded to has been met. It follows that I am unable to defer to the decision of the Board on its interpretation of "technological change" in s. 43(1)(c) of the Act.*

[37] We do not agree with Union counsel that the Court of Appeal overruled Mr. Justice Geatros in *Loraas, supra.* At paragraph 10 of the Court of Appeal's decision, they made it clear that "it is neither necessary nor desirable for us to express any opinion about "the *Acme Video Case*[16] and the *Silver Sage Casino Case.*[17] It is important to note, as well, that the Court was not speaking of the Court of Queen's Bench decision, but rather, the Board decisions.

[15] Supra Note 6.
[16] [1995] 4th Quarter Sask. Labour Rep. 134, LRB File Nos. 179-95 to 182-95.
[17] [1997] October 30, 1997, LRB File No. 266-97.

[38] *Loraas,* as noted above, was not a situation which arose from a fact situation where a complete business closure had occurred. Additionally, the Court of Appeal in *Loraas* overturned the decision of the Court of Queen's Bench based solely upon its review of the decision based upon the standard, as it was then, of patent unreasonableness. At paragraph 17, the Court says:

> *Based on the standard of review and on the facts as found by the Board, we cannot say that the Board's application of s. 43(1)(c) in the instance before us is patently unreasonable.*

[39] Since the *Culinar, supra,* decision there has been little jurisprudence from the Board regarding Section 43. In *Off the Wall Productions Ltd.,*[18] the Board determined that a layoff of employees in the absence of evidence that the employer had determined to close part of the business or relocate that business was not a "technological change". Other decisions, as noted above, involved applications for interim relief without substantive findings concerning the applicability of Section 43.

[40] The Union argues that the Board's decision in *Loraas, supra,* and the Court of Appeal decision supporting that decision, shows that the Board has changed its interpretation of the provision so as to include a complete closure of a work, undertaking or business. As noted above, that proposition is not supported by the facts of the *Loraas* case, *supra*, which involved only a partial closure and transfer of business.

[41] As was the case in *UFCW, Local 1400 v. Culinar Inc.,*[19] "a finding of technological change depends greatly on how the facts of the present case are characterized". The tipping point appears to be whether or not the work previously performed by the employer continues to be performed elsewhere. In this case, the business in Yorkton is being permanently closed and the work is not being transferred. That business is being abandoned and customers will have to look to other grocery retailers in the City of Yorkton to fulfill their grocery needs.

[42] Since 1972, the definition of "technological change", related only to a **part** of the "work, undertaking or business, has remained unchanged. So has the Board's interpretation of that provision as not being applicable to permanent closures of the whole of an employer's work,

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[18] *Supra* Note 2.
[19] *Supra* Note 6 at para 54.

undertaking or business. Even *Acme Video,*[20] which decision was quashed by the Court of Queen's Bench related to a partial closure. *Re: Regina Exhibition Assn. Ltd.* was a complete closure situation which the Board held to be a "technological change". However, that decision was quashed on review by the Court of Queen's Bench as noted above.

[43] The principles annunciated by the Board in *Culinar* remain as the guiding principles today:

> *(1) the work continues to be performed; (2) the location of the work is moved outside the bargaining unit; and (3) the work is now performed by employees of the Employer in a different work location or by employees of a third party.*

[44] Applying those principles, the work of the Employer in this case is not going to continue. Nor is it being moved outside the bargaining unit, but rather is being abandoned. The work is not being performed in a different work location or by employees of a third party. Accordingly, this fact situation does not fit within these criteria and therefore the permanent closure of the Sobey's store in Yorkton is not a "technological change" within the meaning of Section 43 of the *Act.* We would dismiss the application.

<u>Would Section 43(11) apply?</u>

[45] The Employer argues in the alternative that Section 43(11) of the *Act* would apply in these circumstances to except the transaction from the provisions of Section 43. Given our conclusion above, it is unnecessary for us to make any definitive ruling on this issue.

[46] However, we would note the similarity in the provisions of the collective bargaining agreement in this case and the provisions of the collective agreement in *Re: Macdonalds Consolidated*[21] the Board, interpreting the 1972 "technological change" provision that the Employer's actions in that case did not amount to a "removal". It also went on to rule that if necessary, it would relieve the employer from the "obligation to bargain collectively" with respect to the change.

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[20] *Supra* Note 6.
[21] [1991] S.L.R.B.D. No. 30, 12 C.L.R.B.R. (2d) 212, LRB File No. 078-91.

(a) Was a settlement achieved between the parties in the February 5, 2014 telephone conversation?

(b) Did a promissory estoppel arise?

[47] Again, given our determination that this permanent closure does not give rise to a "technological change", these issues, which were raised by the Employer in the alternative, need not be determined.

[48] For the reasons outlined above, the application by the Union is dismissed. An appropriate Order will accompany these reasons.

DATED at Regina, Saskatchewan, this **25th** day of **March, 2014.**

LABOUR RELATIONS BOARD

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Kenneth G. Love, Q.C.
Chairperson