UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant v. SECURITAS CANADA LIMITED, Respondent

LRB File No. 165-14; June 3, 2015
Vice-Chairperson, Steven D. Schiefner; Members: Bert Ottenson and Steven Seiferling

For the Applicant Union: Ms. Dawn McBride
For the Respondent Employer: Mr. Gordon D. Hamilton

Unfair Labour Practice – Communication – Employer provides security services at various locations throughout the province - Following an impasse in collective bargaining, employer sends several communications to employees – In its communications, employer informs employees that it has performance commitments in its contracts and that work stoppage could result in cancellation of its contracts – Employer tells employees of its previous experience in Alberta where a contract was cancelled following a strike by its employees - Union argues that communications were threatening, coercive and/or intimidating – Union not disputing that employer had performance guarantees in its contract or employer's past experience in Alberta – Union arguing that threat of potential job loss ought to be viewed as objectionable by the Board – Board finding that potential of job loss arising out of a work stoppage was factual and relevant information for employees under the circumstances – Board satisfied that employees of reasonable intelligence and resilience would be capable of receiving this information without necessarily being threatened, intimidated or coerced – Board not satisfied that communicating this information to employees was objectionable under the circumstances.

Unfair Labour Practice – Communication – Employer provides security services at various locations throughout the province - Following an impasse in collective bargaining, employer sends several communications to employees – In its communications, employer informs employees that it has performance commitments in its contracts and that work stoppage could result in cancellation of its contracts – Employer tells employees of its previous experience in Alberta where a contract was cancelled following a strike by its employees - Employer also advises employees that, if there is a work stoppage and the employer loses its contract, the employees might experience difficulty finding new employment because other employers may be reluctant to hire them – Union argues that this information was threatening, coercive and/or intimidating for employees – Board noting that employer had not tendered evidence to support its assertion that other employer would be reluctant to hire employees who had engaged in lawful strike activity – Board not satisfied that communication was protected by

employer's right to communicate facts and opinions – Board also concludes that, even if there had been factual basis for employer's views, the coercive effect of information outstripped the informational value of communication - Board concluding that the probable effect of communicating this information was to infringe the ability of the affected employees to exercise their collective bargaining rights – Application granted in part.

***The Saskatchewan Employment Act*, ss. 6-62(1)(a) & (2).**

REASONS FOR DECISION

Background:

[1] **Steven D. Schiefner, Vice-Chairperson:** The United Food and Commercial Workers, Local 1400 (the "Union") is the certified bargaining agent for certain employees of Securitas Canada Limited (the "Employer"). These proceedings were commenced on August 1, 2014 when the Union filed an application with the Saskatchewan Labour Relations Board (the "Board"). While other issues were raised by the Union in its application, at the hearing the Union limited its argument to one (1) issue; whether or not the Employer had violated the restrictions on permissible communication directed to employees. The impugned communications occurred following an impasse in bargaining and the Union took the position that these communications were contrary to the restrictions set forth in *The Saskatchewan Employment Act*, S.S. 2013, c.S-15.1 (the "*Act*").

[2] The gravamen of the Union's argument was that the impugned communications were intimidating, threatening or coercive and beyond the sphere of permissible employer communications permitted by s. 6-62(2) of the *Act*. The Union asserted that, through the impugned communications, the Employer threatened that the employees could lose their jobs if they exercised their collective bargaining rights and engaged in strike activities. The Union also asserted that the Employer threatened or implied that the employees could potentially be "*blacklisted*" by other employers if they engaged in strike activities.

[3] The Employer took the position that all of its communications were factual, balanced, and fell within the range of permissible employer communications. The Employer noted that everything it put in its communications had been said at the bargaining table and that

its primary purpose in communicating with its employees was to correct and response to misinformation being spread in the workplace.

[4] Evidence in the within application was heard by this Board on November 24, 2014. On March 25, 2015, the Board heard argument from the parties and, on that same day, the Board issued the following decision:

> ***ORDER***
>
> ***THE LABOUR RELATIONS BOARD,*** *pursuant to Sections 6-104(2)(b) & (c) [of The Saskatchewan Employment Act],* ***HEREBY ORDERS****:*
>
> *(a) that the Respondent, Securitas Canada Limited, committed an unfair labour practice within the meaning of clause 6-62(1)(a) of The Saskatchewan Employment Act in a manner that would reasonably interfere with, intimidate or coerce its employees in the exercise of their rights under The Saskatchewan Employment Act when it made the following statement in written communication to its employees on July 17, 2014:*
>
> > *"1.* ***Does Securitas Canada want a strike?***
> >
> > *No, there is no desire for a strike or lockout. Strikes and lockouts are always lose-lose outcomes for everyone. The last talk of a strike that involved UFCW and Securitas was in Fort McMurray, Alberta. The result of this was that Securitas lost its contract with clients and employees lost their jobs. Securitas does not have any contracts today in Fort McMurray and its former employees were forced to find new jobs. Securitas has learned that this has been difficult for some employees, once other employers realize where they have previously worked and why their employment ended." (Bolding and underline by Board)*
>
> *(b) that the Respondent cease and desist from the conduct described in paragraph (1);*
>
> *(c) that the Respondent post a copy of this Order within the workplace for the employees to view for a period of no less than thirty (30) days.*

[5] These are our Reasons for the above captioned decision.

Facts:

[6] The facts relevant to these proceedings were largely not in dispute. The Employer provided security services and had a Canada-wide presence. In Saskatchewan, the Employer provided security services on a fee for service basis to approximately ten (10) clients at various

locations throughout the Province. Most of the security services provided by the Employer are the result of the Employer being the successful bidder in a competitive bidding process. Typically, these services are provided for a specific term. Although a client could elect to award a series of contracts to the same service provider, the more common practices in the security business is for the client to undertake another competitive bidding process at the end of each term. As a consequence, the security services and the locations at which these services are provided by the Employer change over time depending on the company's success in the bidding process.

[7] At times relevant to these proceedings, the Employer had contracts for the provision of security services in five (5) areas of the province, including:

- in and around the City of Saskatoon.
- in and around the City of Regina.
- at the Poplar River Power Plant owned by SaskPower Corporation and located near Coronach.
- at the Legacy Project owned by K+S Potash Canada and located near Bethune.
- at the Rocanville potash mine owned by the Potash Corporation and located near Rocanville.

[8] While the Union is the certified bargaining agent for certain of the Employer's employees, at the time of the hearing, it was not certified to represent them all. At the time of the hearing, the Union had two (2) certification Orders covering approximately half of the Employer's employees. See: LRB File Nos. 149-03 & 244-03. Nonetheless, the Employer had recognized the Union as the bargaining agent for all of its employees and only recently did these circumstances change.

[9] The parties had a mature bargaining relationship. While at times the relationship has been difficult, the parties had concluded a number of collective agreements. The events relevant to these proceedings occurred while the parties were attempting to negotiate a new collective agreement. The parties began bargaining in January of 2014. While they met on several occasions, they were unable to agree on the terms of a new collective agreement even with the assistance of a conciliator. It should be noted that, at the time, the parties had been negotiating toward a provincial agreement covering all of the Employer's employees.

[10] On July 3, 2014, the Employer presented a last offer to the Union and asked that they take the offer to the membership for consideration. The Union felt that the Employer's offer contained unacceptable language, which the Employer agreed to remove. As a consequence, a revised last offer was provided to the Union on July 11, 2014. It should be noted that, at this point in time, the Employer's offer covered all of its employees not just the employee's covered by the Union's two (2) certification Orders.

[11] On July 17, 2014, the Employer provided two (2) written communications to its employees. The first communication described the Employer's most recent offer and essentially conveyed the same message that the Employer had given to the Union's representatives at the bargaining table. The second communication was as follows:

Securitas Canada

Frequently Asked Questions – Bargaining Impasse with UFCW 1400

July 17, 2014

1. *Does Securitas Canada want a strike?*

   No, there is no desire for a strike or lockout. Strikes and lockouts are always lose-lose outcomes for everyone. The last talk of a strike that involved UFCW and Securitas was in Fort McMurray, Alberta. The result of this was that Securitas lost its contracts with clients and employees lost their jobs. Securitas does not have any contracts today in Fort McMurray and its former employees were forced to find new jobs. Securitas has learned that this has been difficult for some employees, once other employers realized where they had previously worked and why their employment had ended.

2. *At what stage is Collective Bargaining?*

   UFCW 1400 has filed a notice of impasse to the Minister of Labour, who ordered the Company and UFCW to participate in mandatory conciliation. Concilliation was unsuccessful when the UFCW negotiator rejected the Last Offer but agreed to take it to the employees for a vote.

3. *What happens if the Last Offer is not accepted by the employees?*

   If employees reject the Last Offer, UFCW 1400 may ask employees for a strike mandate.

4. *How soon can a strike take place?*

   Today, July 15, 2014, the 14-day cooling off period begins. This means there can be no strike until August 1st. If UFCW obtains a strike mandate, it can provide 48-hour notice of a strike, but the strike cannot begin before August 1st at the earliest.

5. *Can a Client cancel a contract with Securitas because of a Strike?*

   Most client contracts permit the cancellation of a contract on thirty (30) days' notice for any reason. At many sites where Securitas employees work, there are other unionized workers who may sympathize with UFCW strikers. These clients will not want to have their operations adversely impacted by a strike and the logical reaction is to cancel the contracts as soon as an alternative non-union security service is found – which is what happened in Fort McMurray, Alberta.

6. *What are the issues in Collective Bargaining?*

   Attached is a copy of the latest Company offer that was presented to the Union. A separate FAQ document outlines the bargaining issues in dispute.

7. *What are your rights as an employee?*

   You are entitled to freely vote on both the Company's Last Offer and on your desire to commence a strike if you wish. These rights are guaranteed by law. Once you provide a strike mandate to UFCW, it will decide when to start the strike without any requirement or obligation to ask you for additional input or advice.

8. *What does a strike mean to you, as an employee?*

   It means that you will be without income from the first day of the strike. Normally, strike pay is a small percentage of what you would normally earn, and requires you to walk the picket line in order to earn strike pay that day.

9. *What will Securitas do, in the event of a strike?*

   Securitas must honour its contractual commitments to clients. It has already identified those security staff from other provinces that will be trained and relocated to Saskatchewan, so that our clients can continue to have security services at their sites. This will be a costly endeavor for the Company and the UFCW bargaining committee has been advised about this costly financial reality.

10. *Does Securitas make loads of money in Saskatchewan?*

    With the monetary amounts that were proposed in the Last Offer, the Company makes Two cents in profit for every revenue dollar received from clients. This is a very slim profit margin on which to run a business.

11. *Questions? Who should you call?*

    Call Perry Clarke at 204-391-1838 or 204-391-1838, Area Vice President, Western Canada (Prairies & BC) for Securitas Canada. He started as a security guard, just like you. He has walked the walk, and he talks straight and plain. He will answer any questions you have…OR…

    Call John Coletti, Vice President, Human Resources for Securitas Canada, who can be reached at 416-774-2540 or 416-624-3133.

[12] On July 29, 2014, the Employer sent two (2) more communications to its employees:

July 29, 2014

To: All Securitas Employees

Re: Bargaining Update

Dear valued employee I wanted to take this time to give you an update and respond to what I am hearing back from the sites.

First off please do not listen to people who are spreading rumors about what the union can and can't do to you; these people are just spreading false rumors. I know that most of you do not believe what is being said about being fined, because it is just not fact. I encourage you to do some research (Call the Labor Board if you need to ask a question).

I can tell you though that I will never lie to you, my style is to be fair and as I started in the company as a security guard making $5.00 per hour in 1990. I can understand that you want to make more money for you and your family but you need to be fair and realistic as I am. You will read throughout my communication where I talk about a major client giving us a $.35 cents per hour increase to our Bill Rate so we can only give you so much as we are at the mercy of the clients and if we do not accept they will just get someone else to do it. I know deep down that you understand that and I do not think that you will act unfair when voting, I can tell you that your bargaining committee bargaining hard for you but I can also tell you that there is no more than I can give you and still stay in business (Remember what I said I do not lie) so please let's get this done and move on with providing services to our clients "YES" our clients because they make it so that you and I can have jobs, let's not let a non-union company come in a take the business away from us.

Thank You

Yours Truly

Perry Clarke
Area Vice President
Securitas Canada

SECURITAS CANADA

FREQUENTLY ASKED QUESTIONS – BARGAINING IMPASSE WITH UFCW 1400

Update July 29, 2014

1. *Does Securitas Canada want a strike?*

   Nothing has changed since the last FAQ update – Securitas does NOT want a strike. A strike will likely result in the same outcome as the talk of a strike involving UFCW and Securitas in Fort McMurray, Alberta. <u>What was that outcome in Alberta</u>? The clients cancelled their contracts with Securitas as soon as the talk of a strike heated up, and

EVERYONE LOST – Securitas lost business, employees lost jobs, and the union lost dues revenue.

2. *Final Offer Vote – What is it?*

   Today, Securitas filed an application with the Labour Relations Board for a board-supervised vote on the company's final offer. An employer is allowed to request this under Saskatchewan laws. When conciliation failed on July 4th, the Union promised to take the offer to employees for a vote. As far as the company knows, nothing has happened (except for the union negotiator going on vacation).

   Details will come shortly from the Labour Relations Board, about when and where you can vote.

3. *Why is Securitas requesting a Final offer vote?*

   As of July 31, 2014, UFCW 1400 will be in a legal strike position. The clients who have contracts with Securitas know this. The uncertainty of a possible strike may cause some of them to hedge their bets and provide 30 days' notice of the cancellation of contracts. There are non-union security companies out there who are willing to being work on 30 days' notice. Securtas is trying to prevent this by being proactive to reduce the uncertainty. Clients need to find out what Securitas employees want to do – accept the offer or commence a strike so they can start their action plan.

4. *What do I need to know about the Offer?*

   The offer had been previously provided to you. Another copy (with a summary document) is attached for you to review and consider for the upcoming Board-supervised vote.

5. *The Mis-Information about the Offer has already started!*

   Last week, Securitas obtained information being circulated among employees (all of it wrong) in a deliberate attempt to confuse people and create fear & uncertainty.

   a) *FALSE: Security is trying to intimidate or threaten employees.*
      TRUTH: Employees should know how clients have reacted elsewhere where a strike arises (i.e. they find another company to do the work).
   b) *FALSE: Securitas must be lying about how much extra money they make on a contract.*
      TRUTH: UFCW was given the chance to 'look at the books' – it refused, but now says it can't believe what it is being told.
   c) *FALSE: Securitas wants the flexibility to pay less.*
      TRUTH: The collective agreement contains minimum rates – Securitas cannot pay less than these. Securitas wants the ability to pay MORE when it can! (Why? Because it is better for recruitment and retention of employees in a tough economy)
   d) *FALSE: Securitas is lying about the minimum wage issue.*
   e) *TRUTH: The minimum wage gap language is there to protect employees making a lower hourly wage rate. I recommend that you ask some of your friends, who receive an hourly rate of pay of $14/$16 or $26 if they automatically receive an increase when the provincial minimum wage go's up? Like most people earning a higher*

wage rate they do not, because they already have a big gap between their wage rate and the provincial minimum wage.

f) *FALSE: The Union will fine you a day's wages if you cross the picket line.*
TRUTH: in Ontario, this was tried, but the Union was unable to collect the fine through the courts. The Union fought the issue all the way to the Supreme Court of Canada, and lost!

6. *What will Securitas do, in the event of a strike?*

Securitas must honour its contractual commitments to clients. It has already completed the training of security staff, from other provinces, so that our clients can continue to have security services at their sites in the event of a strike.

7. *Why does Securitas think this is a reasonable offer?*

Securitas must honour its contractual commitments to clients. It has already completed the training of security staff, from other provinces, so that our clients can continue to have security services at their sites in the event of a strike.

8. *Can Securitas pay more money?*

Not if it wants to stay in business! Securitas recently signed a contract with a large client where the increase revenue worked out to an extra 35 cents per hour. With a 30 cent per hour increase in wages plus additional CPP and EI premiums for the increased earnings, Securitas is working with a new contract profit margin of mere pennies per hour. Securitas has offered to review its books with UFCW during bargaining, but UFCW was not interested.

9. *Questions? Who should you call?*

Securitas must honour its contractual commitments to clients. It has already completed the training of security staff, from other provinces, so that our clients can continue to have security services at their sites in the event of a strike.

Call Perry Clarke at 204-391-1838 or 204-391-1838, Area Vice President, Western Canada (Prairies & BC) for Securitas Canada. He started as a security guard, just like you. When he started, he made $5.00 an hour. He understands the business and understands what you do on a daily basis. He will answer any questions you have…OR…
Call John Coletti, Vice President, Human Resources for Securitas Canada, who can be reached at 416-774-2540 or 416-624-3133.

[13] The Employer's chief negotiator was Mr. Perry Clark. Mr. Clark was the Employer's Vice-President for Western Canada. During collective bargaining, Mr. Clark expressed his concerns to the Union's negotiating team that any form of work stoppage could have a negative impact on the company's contracts. Mr. Clark indicated that, under its contracts for the provision of security services, no disruption in its services was permitted. In the event of a service disruption, the client had the right to terminate its contract with the Employer. Mr. Clark felt that this was important information and he communicated his concern to the Union's bargaining team that any disruption in service could result in loss of contracts for the company.

To emphasize the point, Mr. Clark relayed the company's experience in Fort McMurray, Alberta, wherein the company lost one of its contracts following a strike by its employees. In addition, Mr. Clark testified that, since losing this contract, the Employer has not been successful in re-acquiring any security work at this particular location.

[14] Mr. Clark also testified that, during the previous round of collective bargaining, the Union went on strike with little notice to the Employer. As a result, the Employer did not have time to bring in and train replacement workers and the Employer was at risk of losing a contract for non-performance. During this round of collective bargaining, the Employer wanted to know when employees would be voting on the Employer's offer and whether or not there was a risk of strike action by its employees. Mr. Clark testified that, by July of 2014, the Employer believed that strike action was possible. As a result, the Employer brought in replacement workers from Manitoba and began training them at various locations so that they would be available in the event of a work stoppage by the Union.

[15] Finally, Mr. Clark testified that, during this period, he got calls from employees asking questions about the status of collective bargaining and the Employer's contractual relations with owners. Mr. Clark indicated that, as a result of these inquiries and the questions being asked by employees, the Employer concluded that there was misinformation being spread about the Employer's position at the bargaining table, the status of collective bargaining, and the implications of a work stoppage on the Employer's contracts. Mr. Clark testified that the purpose of the Employer's communications was to clarify the misinformation spreading in the workplace and to provide more accurate information for employees.

[16] The Union's chief negotiator was Ms. Lucy Figueiredo. Ms. Figueiredo testified that the Union felt that many of the Employer's communications to its members following the bargaining impasse were inflammatory and misleading. However, the Union's primary concern was that some of these communications contained subtle (and in some cases not-so-subtle) threats of potential job losses and/or blacklisting of employees if they went on strike. In cross-examination, Ms. Figueiredo confirmed that Mr. Clark had outlined the Employer's experience in Alberta at the bargaining table and that the Union did not dispute the accuracy of Mr. Clark's statements as to what happened to the Employer in Alberta. Nonetheless, Ms. Figueiredo testified as to the Union's belief that the way this information was communicated to employees was threatening; particularly so when the Employer was training replacement workers.

[17] Ms. Melady Stark also testified on behalf of the Union. Ms. Stark was an employee of the Employer and was part of the Union's bargaining team. Ms. Stark testified that she was intimidated at the bargaining table by the intensity of Mr. Clark's actions. Ms. Stark testified that Mr. Clark was loud, he used profanity, and that he openly speculated as to whether or not the employees would have jobs if they went on strike during their bargaining sessions. In cross-examination, Ms. Stark admitted that Ms. Figueiredo was the Union's chief spokesperson and that she spoke up when necessary.

[18] On July 30, 2014, the Employer terminated its voluntary recognition of the Union with respect to those employees falling outside the scope of the Union's two (2) certification Orders. On July 31, 2014, the Employer revised its last offer to apply only to its organized employees (i.e.: those employees working in and around the cities of Regina and Saskatoon). In early August of 2014, the Union conducted a ratification vote on the Employer's revised last offer. The result of this vote was to reject the Employer's offer. At the time of the hearing, the parties had not yet achieved a new collective agreement. However, the Union had been certified to represent the Employer's employees at two (2) more workplaces; namely the Legacy Project and the Rocanville potash mine site. See: LRB File Nos. 172-14 & 187-14.

Relevant statutory provision:

[19] The relevant provisions of *The Saskatchewan Employment Act* include the following:

> ***6-62****(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:*
>
> > *(a) subject to subsection (2), to interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by this Part;*
> >
> > . . .
>
> *(2) Clause (1)(a) does not prohibit an employer from communicating facts and its opinions to its employees.*

Argument on behalf of the Applicant Union:

[20] The Union took the position that the Employer intentionally threatened its employees following an impasse in bargaining. The gist of the Union's argument was that

specific portions of various communications conveyed (intentionally or otherwise) threats of job loss and blacklisting of its members and were thus intimidating and coercive. For example, the Union referred to the following portion of the Employer's July 17, 2014 communication violated the *Act*:

> *1. Does Securitas Canada want a strike?*
>
> *No, there is no desire for a strike or lockout. Strikes and lockouts are always lose-lose outcomes for everyone. The last talk of a strike that involved UFCW and Securitas was in Fort McMurray, Alberta. The result of this was that Securitas lost its contracts with clients and employees lost their jobs. Securitas does not have any contracts today in Fort McMurray and its former employees were forced to find new jobs. Securitas has learned that this has been difficult for some employees, once other employers realized where they had previously worked and why their employment had ended. (Underline added for emphasis)*

[21] In addition, the Union argued that the last sentence of Mr. Clark's letter of July 29, 2014 fell outside the sphere of permissible communications. This portion of the letter read as follows:

> *I know deep down that you understand that and I do not think that you will act unfair when voting, I can tell you that your bargaining committee bargaining hard for you but I can also tell you that there is no more than I can give you and still stay in business (Remember what I said I do not lie) so please let's get this done and move on with providing services to our clients "YES" our clients because they make it so that you and I can have jobs, let's not let a non-union company come in a take the business away from us. (Underline added for emphasis)*

[22] As well, the Union argued that the following information contained in the Employer's July 29, 2014 communication to employees was in contravention of the *Act*:

> *1. Does Securitas Canada want a strike?*
>
> *Nothing has changed since the last FAQ update – Securitas does NOT want a strike. A strike will likely result in the same outcome as the talk of a strike involving UFCW and Securitas in Fort McMurray, Alberta. What was that outcome in Alberta? The clients cancelled their contracts with Securitas as soon as the talk of a strike heated up, and EVERYONE LOST – Securitas lost business, employees lost jobs, and the union lost dues revenue. (Underline added for emphasis)*
>
> *5. The Mis-Information about the Offer has already started!*
>
> *. . .*
>
> *(a) FALSE: Security is trying to intimidate or threaten employees.*

> *TRUTH: Employees should know how clients have reacted elsewhere where a strike arises (i.e. they find another company to do the work). (Underline added for emphasis)*

[23] In its argument, the Union acknowledged that the impugned communications must be evaluated within the context they occurred. The Union also acknowledged that, as these communications occurred during collective bargaining and following an impasse at the table, the Board will generally adopt a more *laissez fair* approach in its evaluation of the Employer's conduct. Nonetheless, the Union took the position that an employer's right to communicate facts and opinions does not give an employer the right to threaten and intimidate its employees; especially with a threat of potential job losses. The Union took the position that the Employer's communications went well beyond relevant facts and opinions and that the probable effect of these communications was to interfere with the exercise of protected rights by its members.

[24] The Union took the position that the Employer's explanation that the information was merely factual and relevant to the matters in issue between the parties was not credible. To the contrary, the Union argued that, when viewed objectively, the impugned communications went well beyond the sphere of permissible communications. In particular, the Union noted that there was no evidence to establish the truth of the Employer's comments that other employers had blacklisted employees following the Employer's Fort McMurray incident.

[25] Finally, the Union argued that this Board should use extreme caution whenever any employer threatens loss of employment for employees. The Union noted that the actual loss of employment is devastating for most employees and their families. As a consequence, the Union encouraged this Board to recognize that any threat related to the potential loss of jobs should be viewed merely as a tool to bend employees to the employer's view. In taking this position, the Union relied upon the decision of this Board in *International Brotherhood of Electrical Workers, Local 2067 and Saskatchewan Power Corporation, et. al.*, [2000] Sask. L.R.B.R. 30, LRB File No. 207-98, and the decision of the Ontario Labour Relations Board in *United Brotherhood of Carpenters & Joiners of America v. Viceroy Construction Company*, [1977] OLRB Rep. September 562, 1977 CanLII 516 (ON LRB).

[26] Counsel on behalf of the Union filed written submissions, which we have read and for which we are thankful.

Argument on behalf of the Respondent Employer:

[27] The Employer, on the other hand, took the position that it did not violate any provision of *The Saskatchewan Employment Act* in any of its communications with its employees. The Employer noted that the impugned communications occurred between parties with a mature bargaining relationship, after collective bargaining had occurred, and after an impasse had been reached at the bargaining table. In addition, the Employer noted that its communications were factual and responsive to events occurring in the workplace. The Employer argued that the purpose of its communications was merely to correct misinformation that was being communicated in workplace and to answer legitimate questions being asked by employees. In this regard, the Employer noted that everything it told employees in its communications had been said to the Union at the bargaining table. In the context and when viewed objectively, the Employer argued that none of its communications could reasonably be viewed as coercive, threatening or intimidating; nor could they have impaired the ability of the affected employees to exercise their collective bargaining rights.

[28] For these reasons, the Employer asks that the Union's application be dismissed. Counsel on behalf of the Employer filed a brief of law, which we have read and for which we are thankful.

Analysis:

[29] As indicated, by the conclusion of the hearing only one (1) issue remained in dispute between the parties; namely whether or not the Employer's written communications or any of them fell outside the sphere of permissible employer communications.

[30] In its application, the Union alleged that a number of the Employer's communications to employees were unlawful. Having considered the evidence in these proceedings, together with the arguments of able counsel, it was our conclusion on March 25, 2015 that only one (1) aspect of one (1) communication fell outside the sphere of permissible communication; namely the inference of potential blacklisting of employees by other employers. While various aspects of the Employer's communications may well have come close to the line, we were not satisfied that the Employer violated the restrictions on permissible communications to employees set forth in *The Saskatchewan Employment Act* with these other communications. In particular, we were not satisfied that the Employer's reference to the potential for job loss was inappropriate under the circumstances. Simply put, we were satisfied that the information

communicated to employees about the implications of a work stoppage on its contractual relations was factual and relevant under the circumstances. We disagree with the Union that any reference by an employer to the potential for job loss is insidious and ought to be viewed as objectionable by this Board regardless of the circumstances.

[31] By way of background, the substantive test for determining whether or not impugned communications by an employer represents a violation of s. 6-62(1)(a) of *The Saskatchewan Employment Act* involves a contextualized analysis of the probable consequences of the employer's conduct on employees of reasonable intelligence and fortitude. In other words, if the Board is satisfied that the probable effect of the impugned communications of an employer would have been to interfere with, restrain, intimidate, threaten or coerce that employer's employees, the communications are unlawful and a violation can be sustained. This test is an objective one. The Board's approach is to determine the likely or probable effects of impugned employer communications upon a so-called "reasonable" employee; being someone of reasonable intelligence and possessed of reasonable fortitude and resilience.

[32] While employers continue to be prohibited from interfering with, intimidating, threatening and coercing their employees, the Board is much less paternalistic in our presumptions as to vulnerability and/or susceptibility of employees to the views and opinions of their employers. In our opinion, the inclusion of the words "*Clause (1)(a) does not prohibit an employer from communicating facts and its opinions to its employees"* in *The Saskatchewan Employment Act* signals a greater tolerance by the Legislature for the capacity of employees to receive information and views from their employer without being threatened, intimidated or coerced. As noted by this Board in *Service Employees International Union (West) v. Saskatchewan Association of Health Organizations, supra*¸ to fall outside the sphere of permissible communications, an employer must do more than merely influence its employees. Improper communications requires conduct that is capable of infringing upon, compromising or expropriating an employee's free will. For example, the mere fact that an employer has communicated facts and its opinions to its employees and those employees may have been influenced by those views and opinions, should not now automatically lead to a finding of interference, let alone employer coercion or intimidation. Simply put, the prohibited effect targets a higher threshold than merely "*influencing*" employees in the exercise of their rights.

[33] While employers now enjoy a greater capacity to communication facts and their opinions to employees, there continues to be a number of important limitations on an employer's so-called "*free speech*". As noted by the Saskatchewan Court of Appeal in *Saskatchewan Federation of Labour v. Saskatchewan, et. al.,* 2012 SKQB 62 (CanLII), the inclusion of the right to communicate "*facts*" and "*opinions*", does not give employers an unrestricted right to do so. *The Saskatchewan Employment Act* (as did its predecessor *The Trade Union Act*) seeks to balance a number of laudable, yet clearly competing, interests in dealing with communications by an employer, including; the interests of employers (the right to freely communicate with its employees regarding matters directly affecting its business interests, its current activities, and its plans for the future); the interests of employees (the right to exercise their associational rights free from coercion, intimidation or interference); and the interests of trade unions (the right to be the exclusive bargaining agent for organized employees). See: *Service Employees International Union (West) v. Saskatchewan Association of Health Organizations, supra*. While employers may communicate with their employees, they may not do so in a manner that infringes upon the ability of those employees to engage and exercise their collective bargaining rights.

[34] To fall outside the sphere of permissible employer communications, the Board must be satisfied that the probable effect of an impugned communication would be to compromise or expropriate the free will of a reasonable employee. Obviously, the challenge for the Board is differentiating between those communications by an employer that are permissible (because they contain useful and helpful information for employees; information that is merely "*influential*") and prohibited communications that stray into the prohibited grounds of threats, intimidation and coercion. To guide in this evaluation, the Board will generally examine:

1. Evidence, if any, of a particular vulnerability of the subject employees to the views and opinions of their employers. As indicated, absent evidence of a particular susceptibility of employees, we start from the presumption that employees are capable of receiving and weighing a broad range of information about matters affecting their workplace and of making rational decisions in response to that information. See: *Service Employees International Union (West) v. Saskatchewan Association of Health Organizations, supra*.

2. The maturity of the bargaining relationship between the parties. Generally speaking, in a mature bargaining relationship, employees are less vulnerable to the views and options of their employer.

3. The context within which the impugned communication occurred. Almost as much as the words themselves, context is important in understanding the meaning and significance of an impugned employer communication. The events occurring in the workplace; the timing of the communication(s) relative to those events; the audience; and status of the bargaining relationship; are all factors to be considered by the Board. For example, context can help the Board determine if otherwise ambiguous statements may convey a subtle message or have a different meaning for the affected employees. Similar, context can also help the Board determine if a seemingly threatening communication may, in fact, contain useful and helpful information for employees. Finally, the context in which impugned communication(s) occur guides the Board in the restraint applied to its intervention. Historically, the Board has been the most interventionist when the representational question is before employees. On the other hand, the Board has adopted a more *laissez faire* approach to communications by the parties when they are engaged in collective bargaining; particularly so with respect to communications that occur at the table. See: *Service Employees International Union (West) v. Saskatchewan Association of Health Organizations, supra*.

4. The evidentiary basis for and value of the impugned communication. To fall within the protection of s. 6-62(2) of the *Act*, there must be an evidentiary basis for the facts and opinions expressed by an employer and, generally speaking, the genesis of the information must be within the business knowledge of the employer and/or the personal experience of the communicator. Furthermore, the facts and opinions communicated by or on behalf of the employer must be relevant and useful to the subject employees. The greater the utility of the information being conveyed to employees, the more likely such information will fall within the sphere of permissible communications. See: *International Brotherhood of Electrical Workers Local 2038 v. Clean Harbours Industrial Services Canada & BCT Structures Inc.*, 2014 CanLII 76047 (SK LRB), LRB File Nos. 063-14, 071-14, 096-14, 105-14 & 106-14.

5. The balance or neutrality demonstrated by an employer in communicating impugned information. While a certain degree of "*spin*" and/or self-promotion may be anticipated in employer communications (particularly with respect to collective bargaining proposals), if an impugned communication contains misinformation or unnecessary amplification or spin, the more likely it will be to stray outside the sphere of permissible communication. See: *Service Employees International Union (West) v. Saskatchewan Association of Health Organizations, supra*. Furthermore, there are certain subjects, such as the representational questions, with respect to which the Board expects the most balance and patent neutrality from employers.

[35] There was no evidence of any particular vulnerability of the subject employees to views and opinions of the Employer. The parties have a mature bargaining relationship and have negotiated a number of collective agreements.

[36] While there is no doubt that many of the Employer's communications pushed the envelope of permissible communications, it was our opinion, after considering the evidence presented by the parties and the fulsome argument of able counsel, that only one (1) of the Employer's communications was contrary to the *Act*. The Employer's assertion in its communication of July 17, 2014 of potential blacklisting of employees by other employer was not supported by the evidence. In the absence of evidence to support the assertion that other employers were reluctant to hire employees that had previously engaged in strike activity, the information cannot be said to be protected by s. 6-62(2) of the *Act*.

[37] Even if the Employer had a valid basis for its belief that other employers might react in this way, the coercive effect of the information far outstripped any informational utility for the affected employee. It was an unnecessary amplification of the Employer's legitimate concern about the potential for the cancelation of its contract(s) in the event of a work stoppage. Furthermore, the Employer was relaying information about the conduct of other employers. Even if there was basis for its belief, the Employer's caution to its employees was speculative and potentially misleading. It was our opinion that the probable effect, if not the intent, of communicating the potential of blacklisting by other employers was to pressure employees to accept the Employer's contract offer and to undermine their willingness to engage in strike

activity. Simply put, in light of the coercive nature of the information, the lack of basis for the Employer's speculation, and the remoteness of the information to the Employer's own business activities, it was very difficult to characterize the Employer's caution about the potential of blacklisting by other employers as useful and helpful information. Rather, we were satisfied that this particular information would have been intimidating, threatening and/or coercive for employees of reasonable intelligence and resilience. For this reason, we found the Employer's communication to its employees on July 17, 2014 to be unlawful.

[38] On the other hand, in light of the performance expectations in the Employer's contracts and the Employer's previous experience in Alberta, the potential of job loss arising out of a work stoppage was factual and relevant information. The Employer shared this information with the Union's bargaining team and the Employer had the right to share this information with employees when the potential for work stoppage arose. We were not satisfied that any information about potential job losses is, by definition, a prohibit subject for employers. Rather, in this particular context, it is an example of information (because it is factual and relevant) that employees were capable of receiving from the Employer; of evaluating (even being influenced by that information); without necessarily being threatened, intimidated or coerced. In light of the performance expectations in the Employer's contracts, this was important information for most of the employees to have. We are also satisfied that the information provided by the Employer was reasonably balanced. The Employer explained its rationale for how job losses might occur. The Employer neither amplified the facts nor misled its employees in commenting upon potential job losses in the event of a work stoppage (with the exception of the Employer's comments about blacklisting by other employers). Simply put, we were not satisfied that, after receiving this information, that the affected employees would have been rendered incapable of making rational decisions in the exercise of their collective bargaining rights.

[39] In coming to this conclusion, we acknowledge that some of the Employer's employees; namely those falling outside the scope of the only two (2) certification Orders held by the Union at that time (i.e.: these employees working at the Poplar River Power Plant, the Legacy Project and the Rocanville potash mine site) did not need to know about the potential for job losses in the event of a work stoppage because they would never have been in a position to engage in a work stoppage. During the collective bargaining process and in the events leading up to the Employer's last offer, both parties conducted themselves in accordance with the assumption that all of the employees were covered by the Union's certification Orders. Granted,

with the benefit of hindsight, we now know that only certain of the Employer's employees would have been entitled to engage in a work stoppage and yet the Employer's communication went to all its employees. Simply put, we do not place too fine a distinction on this fact. The Employer's communications were consistent with the understanding of the parties at the time. In our opinion, a communication does not fall outside of sphere of s. 6-62-(2) because the factual basis for an employer's views or opinions ultimately turns out to be erroneous; provided the employer's original belief in the state of facts at the time of its communication was reasonable under the circumstances. In July of 2014, the Employer understood that a work stoppage was a potential alternative to acceptance of its last offer and neither the Union nor the Employer were distinguishing between who was and who was not covered by certification Orders.

[40] With respect to the balance of the content of the Employer's communications, we were not satisfied that they fell outside the sphere of permissible communications. The parties were at impasse and the Employer had made a last offer. In this context, it is not surprising that the Employer wanted to comment on the status of collective bargaining, to comment on the issues in dispute between the parties, and to encourage its employees to consider its offer. While not devoid of spin, we were not satisfied that these communications were contrary to the restrictions set forth in *The Saskatchewan Employment Act* save the one exception we noted on March 25, 1015 regarding the Employer's communication of July 17, 2014.

[41] Board member Bert Ottenson concurs with these Reasons for Decision.

DATED at Regina, Saskatchewan, this **3rd** day of June**, 2015.**

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson

Dissent:

[42] I have reviewed the reasons of the Vice-Chair, and concur in every respect but one. With respect to the one impugned communication, I respectfully disagree that the following communication amounts to an unfair labour practice under s. 6-62 of *The Saskatchewan Employment Act*:

> *The result of this was that Securitas lost its contracts with clients and employees lost their jobs. Securitas does not have any contracts today in Fort McMurray and its former employees were forced to find new jobs. Securitas has learned that this has been difficult for some employees, once other employers realized where they had previously worked and why their employment had ended.*

[43] With respect, I disagree with the characterization of the impugned communication as a potential "*blacklisting*" of employees. Mr. Clark, the Employer's witness, testified that the information contained in the communications provided to employees was true, and accurately reflected the issues that the Employer experienced with respect to its operations in Alberta. The communication states that the Employer has learned that certain employees had trouble finding jobs after the Employer lost its contacts in Alberta. This is nothing more than the communication of a fact – the Employer is not threatening to blacklist employees, and is simply saying that the Employer has learned that certain former employees were having trouble finding work.

[44] In my view, nothing in the impugned statement goes beyond the facts and opinions that an employer is permitted to communicate in the course of labour relations or collective bargaining, and nothing in that statement rises to the level of coercion, threat, interference, restraint, or intimidation of the reasonable employee, given the factors that the Vice Chair outlined in paragraph 34 of this decision. In addition, I disagree with the Vice Chair's assertion, in paragraph 36, that the Employer's communications "*pushed the envelope of permissible communications*" – either a communication is permissible under the *Act*, or it is not. In the present case, the Employer's communications were limited to facts and opinions, and did not constitute an unfair labour practice contrary to s. 6-62 of *The Saskatchewan Employment Act*.

[45] Accordingly, I would dismiss the application in its entirety.

Steven J. Seiferling,
Board Member