Saskatchewan
Labour Relations Board

CALOKAY HOLDINGS LTD., WHITE SAND ENTERPRISES LTD., KKCLG HOLDINGS LTD. and GANDKO HOLDINGS LTD,, operating as BEST WESTERN SEVEN OAKS INN, Applicant v. UNITED FOOD and COMMERCIAL WORKERS, LOCAL 1400, Respondent

- and -

UNITED FOOD and COMMERCIAL WORKERS, LOCAL 1400, Applicant v. CALOKAY HOLDINGS LTD., WHITE SAND ENTERPRISES LTD., KKCLG HOLDINGS LTD. and GANDKO HOLDINGS LTD,, operating as BEST WESTERN SEVEN OAKS INN, Respondent

LRB File Nos.: 034-16 & 039-16; April 28, 2016
Chairperson, Kenneth G. Love, Q.C.; Members: Jim Holmes and Mike Wainwright

For the Union: Mr. Sachia Longo
For the Employer: Ms. Chantel Kassongo

Vote on last offer – Employer applies to the Board to conduct vote on last offer made to Union – Union objects to vote being conducted and files interim application requesting that the vote not be conducted, or, if conducted, that the vote be sealed pending determination by the Board of Unfair Labour Practice applications by Union.

Vote on last offer – Board reviews provision of *The Saskatchewan Employment Act* and previous legislation – Board notes purpose of legislation changed somewhat to allow employers, union, or union members to request vote rather than former legislation which required a recommendation from a special mediator.

Vote on last offer – Board reviews Section 6-35 and finds that the Board has no discretion with respect to the ordering of a vote if conditions precedent to application are met. However, the Board cautions that last offers must be sufficiently comprehensive to allow conclusion of a collective agreement should the vote affirm support for the final offer.

Practice and Procedure – Conditions precedent for ordering of a last offer vote – Board cautions that conditions must be met and that last offer will allow conclusion of a collective agreement should the vote affirm support for the final offer.

Interim Relief – Board confirms test to be applied for interim relief – Finds that Union has demonstrated an arguable case and that the balance of labour relations harm favours granting of interim relief.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love Q.C., Chairperson:** CALOKAY HOLDINGS LTD., WHITE SAND ENTERPRISES LTD., KKCLG HOLDINGS LTD and GANDKO HOLDINGS LTD., operating as BEST WESTERN SEVEN OAKS INN, (the "Employer") applied[1] to the Board on March 1, 2016, requesting the Board to conduct a supervised vote on its last offer to the UNITED FOOD and COMMERCIAL WORKERS, LOCAL 1400 (the "Union"). The Union is the certified bargaining representative for employees of the Employer at its hotel in Regina, Saskatchewan.

[2] On March 4, 2016, the Union applied[2] to the Board for interim relief in respect of the Employer's application for a last offer vote. In its application, it alleged irregularities in the last offer document given to the Board for the purposes of the vote with the Employer's application. The Union also alleged that the list of employees who should be eligible to vote on the last offer was incomplete and/or inaccurate.

[3] In its application for Interim Relief, the Union also noted that there were five (5) outstanding unfair labour practice applications filed with the Board, some of which alleged that the employees had been subject to threats to withhold or suspend benefits during the strike, by employees as well as violence toward and intimidation of employees on the part of the Employer. Taken together, these facts, they alleged would call into question the legitimacy and validity of any vote.

[4] In its prayer for relief in its Interim Relief application, the Union requested that the Board decline to order the requested vote, or alternatively, that the results of the vote be sealed pending the Board's determination of several outstanding unfair labour practice applications.

Facts:

[5] The facts in these matters, apart from some issues, related to the form of the Employer's last offer and the list of employees eligible to vote are not in dispute. The form of the last offer was basically resolved at the hearing of this matter. Nor is the list of employees eligible to vote in dispute, which list was agreed at the hearing.

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[1] LRB File No. 034-16
[2] LRB File No. 039-16

[6] Any other facts which are relevant to the issues to be determined will be considered and discussed in the Analysis portion of this decision.

[7] On March 22, 2016, the Board issued its Order with respect to both the application for a last offer vote and with respect to the application for interim relief. These are the reasons for that Order.

Relevant statutory provision:

[8] *Relevant statutory provisions are as follows:*

> ***6-35****(1)At any time after the parties have engaged in collective bargaining, any of the following may apply to the board to conduct a vote among the employees in the bargaining unit to determine whether a majority of employees voting are in favour of accepting the employer's last offer:*
>
> > *(a) the union;*
> >
> > *(b) the employer;*
> >
> > *(c) any employees of the employer in the bargaining unit if those employees represent at least 45% of the bargaining unit or 100 employees, whichever is less.*
>
> *(2) On receipt of an application pursuant to this section, the board shall direct that a vote be taken.*
>
> *(3) Only one vote with respect to the same dispute may be held pursuant to this section.*
>
> *(4) On the recommendation of a labour relations officer, a special mediator or a conciliation board or if the minister considers it to be in the public interest, the minister may require the board to order a vote on the employer's last offer.*
>
> *(5) A vote required in accordance with subsection (4) may be in addition to a vote taken on an application pursuant to subsection (1).*
>
> *(6) If a majority of votes cast favour acceptance of the employer's last offer:*
>
> > *(a) a collective agreement is thereby concluded between the parties; and*
> >
> > *(b) the collective agreement is to consist of the terms voted on and any other matters agreed to by the union and the employer.*
> >
> > *. . .*
>
> ***6-103****(2) Without limiting the generality of subsection (1), the board may do all or any of the following:*
>
> > *. . .*
> >
> > *(d) make an interim order or decision pending the making of a final order or decision.*

Employer's arguments:

[9] In its written Brief and during oral argument, the Employer argued that the Board had no discretion with respect to the ordering of a last offer vote under Section 6-35 of the *SEA*. The Employer argued that the language used in the statute had changed when the *SEA* was enacted by the Legislature such that the requirement to issue a vote was now mandatory rather than permissive based upon the use of the word "shall" in place of the word "may" as contained in the prior legislation.

[10] In respect of the Union's application for interim relief, the Employer argued that the Union had failed to meet the test for issuance of interim relief.

Union's arguments:

[11] In its written brief, and during oral argument, the Union did not take issue with the Employer's arguments concerning the mandatory nature of section 6-35 of the *SEA* and the issuance of a last offer vote.

[12] In respect of the interim relief application which it made, the Union outlined the following issues:

1. *Policy considerations at stake in this matter.*
2. *Relevant decisions from:*
   - *(a) The Ontario Labour Relations Board; and*
   - *(b) The British Columbia Labour Relations Board.*
3. *Has the Union demonstrated an arguable case?*
4. *Does the balance of convenience favour the issuance of an interim order?*
   - *(a) With respect to delaying the vote pending determination of the three outstanding unfair labour practice applications?*
   - *(b) With respect to delaying the vote pending resolution of the issues with respect to the content of the last offer?*

[13] In respect of these identified issues, the Union cited *Canada Cement Lafarge Ltd. v. United Cement, Lime and Gypsum Workers International Union and its Local 368*[3], *United Food and Commercial Workers, Local 1227 v. Maple Leaf Pork*[4], *Hembruff v. United Food & Commercial Workers Union, Local 175*[5], *Horizon Operations (Canada) Ltd.v. C.E.P., Local 25-C*[6], *Open Learning Agency and Faculty Association of the Open Learning Agency*[7], *Westfair Foods and Kelly Douglas & Company Limited and Loblaws Inc. and 459966 B.C. Ltd. v. United Food and Commercial Workers Union, Local 1518*[8] and *Saskatchewan Government and General Employees' Union v. The Government of Saskatchewan.*[9]

[14] The Union argued that where there is a connection between an alleged unfair labour practice and a last offer vote such that the reliability and validity of that vote is called into question, the Board has the jurisdiction to delay or seal the results of the vote until a determination is made in respect of the unfair labour practices.

Analysis:

Issues to be determined:

[15] There are a number of issues to be determined in this matter. They are:

1. Is the Board required to direct a vote of the striking employees?
2. Should the Board grant interim relief as sought by the Union?
3. If interim relief is granted, what relief should be granted?

Should the Board direct a vote of the striking employees?

[16] The Employer argues that the Board has no discretion with respect to the ordering of a vote when an application is made for a supervised vote by the Board pursuant to section 6-35 of the *SEA*. The Employer also argued that any such vote could be conducted and the employees' wishes determined without any intimidation on the part of the Employer. Furthermore, it argued, the Board should not deprive the employees of their rights to vote on the Employer's last offer in keeping with the policy objectives of section 6-35 of the *SEA*.

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[3] [1980] OLRB Rep. Nov. 1583
[4] [1998] CanLII 18433 (ONLRB)
[5] [2002] CanLII 41977 (ONLRB)
[6] {2000] CanLII 27532 (BCLRB)
[7] [2002] CanLII 52973 (BCLRB)
[8] [2010] 4575 (BCLRB)

[17] The provision of *The Trade Union Act*[10] which was repealed when the *SEA* was proclaimed in force is similar to section 6-35 of the *SEA*. The major difference was that under *The Trade Union Act*, a vote would be recommended by a special mediator appointed to assist the parties, when that mediator considered a vote to be advisable. Section 6-35 no longer requires the participation of a special mediator in the process to trigger a request for a vote to be conducted. Under that provision, a supervised vote may be requested by:

> *(a) The union involved;*
> *(b) The Employer involved; or*
> *(c) Any employees of the employer in the bargaining unit if those employees represent at least 45% of the bargaining unit or 100 employees, whichever is less.*

[18] However, there are other requirements that must be present before an application can be made under section 6-35. These are that the parties (1) must have engaged in collective bargaining and (2) there must have been a last offer presented on which the employees can be expected to vote.

[19] There is no issue between the parties with respect to whether or not collective bargaining had occurred. However, there was an issue between the parties as to the nature and content of what the Board should consider as the last offer on which the employees should vote.

[20] This issue was resolved somewhat at the hearing when the Board adjourned to allow the Union the opportunity to review the Employer's latest response to questions which surrounded the last offer. After a brief adjournment, the Union agreed that the Employer's response satisfied their concerns and that there was a final offer on which the employees could express their opinion.

[21] However, before proceeding further with this analysis, the Board wants to point out to both parties and to others who may seek to make applications in the future under section 6-35 that the Board is concerned about the formulation of the last offer in this case and wants to advise any future applicant that there must be a clear, definitive and unequivocal last offer from the employer, which offer would resolve all matters remaining in dispute between the parties,

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[9] [2010] CanLII 81339 (SKLRB)

and which has been presented to the union as a last offer, before the Board will be called upon to order a vote. The rationale for this is simple. Employees must know what terms and conditions of their employment will be impacted by their vote, as the result of a vote in favour of the last offer crystalizes a collective agreement between the parties. If the employees vote to accept the last offer, there is no refining of that last offer once the vote has been conducted and the employees have voted in favour. It is a demonstration of the old maxim, "Be careful of what you want, because you may end up getting it".

[22] In this case, the Board was not certain that the parties had completely addressed the nature of the last offer to be voted on by the employees. For that reason, the Board allowed the parties to attempt to resolve any outstanding issues before the last offer would be presented to the employees. The parties failed to reach any agreement and accordingly, the last offer as agreed between them at the hearing of this matter was presented by the employees for acceptance or rejection.

[23] Returning to the issue of the requirement to issue a vote, we agree that, presuming the conditions precedent for the issuance of a vote are met, then the Board has no discretion with respect to the issuance of a vote on the last offer. This is consistent with both the purpose of section 6-35 which is to provide a form of safety valve for negotiations between a union and the employer.

[24] In this fact situation, the Board has determined that notwithstanding the vagueness of the Employer's last offer, that it would nevertheless order the requested vote. There may, however, be situations where such a request may be considered to lack sufficient clarity, definition or be so equivocal that a final collective agreement could not result if the vote was to be determined to be in favour. Where a last offer is such that, does not address all of the matters in issue between the parties and, if it is accepted, the result would not be a collective agreement may not be permitted to proceed and should, in our opinion be adjourned by the Board pending resolution of a last offer which does not contain the defects outlined above.

[25] Nevertheless, as shown by our earlier issued order, the Board is of the view that this last offer is not so deficient that it cannot result in a collective agreement being concluded should the vote affirm the Employer's last offer.

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[10] *See former Section 45*

Should the Board allow the Union's request for interim relief?

[26] The test for granting of interim relief is well settled. It was outlined by the Board in paragraphs [30] to [34] of *Saskatchewan Government and General Employees' Union v. The Government of Saskatchewan.*[11]

> ***[30]*** *Interim 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. Because of time constraints, interim applications are typically determined on the basis of evidence filed by way of certified declarations and sworn affidavits without the benefit of oral evidence or cross-examination. As such, the Board is not in a position to make determinations based on disputed facts; nor is the Board able to assess the credibility of witnesses or weigh conflicting evidence. Because of these and other limitations inherent in the kind of expedited procedures used to consider interim applications, the Board utilizes a two-part test to guide in its analysis: (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. See: 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. See also: Canadian Union of Public Employees, Local 4973 v. Welfare Rights Centre, 2010 CanLII 42668 (SK LRB), 2010 CanLII 42668, LRB File No. 083-10. As with any discretionary authority under the Act, the exercise of the Board's authority to grant interim or injunctive relief must be based on a sound labour relations footing in light of both the broad objectives of the Act and the specific objectives of the section allegedly offended.*
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> ***[31]*** *In the first part of the test, the Board is called upon to give consideration to the merits of the main application but, because of the nature of an interim application, we do not place too fine a distinction on the relative strength or weakness of the applicant's case. Rather, the Board seeks only to assure itself that the main application raises, at least, an "arguable case". See: Re: Regina Inn, supra. See also: Canadian Union of Public Employees, Local 4973 v. Welfare Rights Centre, 2010 CanLII 42668 (SK LRB), 2010 CanLII 42668, LRB File No. 083-10. The Board has also used terms like whether or not the applicant is able to demonstrate that a "fair and reasonable" question exists (which should be determined after a full hearing on the merits) to describe this portion of the two-part test. See: Re: Macdonalds Consolidated, supra. Simply put, an applicant seeking interim relief need not demonstrate a probably violation or contravention of the Act as long as the main application reasonably demonstrates more than a remote or tenuous possibility.*
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> ***[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*

[11] [2010] CanLII 81339, (SKLRB), [2010] S.L.R.B.D. No. 20

> *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.*
>
> ***[33]*** *In addition, the Board had enunciated certain policy restrictions on when interim relief should be granted (or rather should not be granted). For example, the Board has stated that the relief sought may not be granted were doing so would have the practical effect of granting what the applicant might hope to obtain on the main application. See: Tai Wan Pork Inc., supra.*
>
> ***[34]*** *While the Board uses a two-part test to aid in its consideration (and for ease of reference), each application for interim relief involves a matrix of considerations involving the factual circumstances of the application, the general goals of the Act, the policy objectives of the particular provision alleged to have been violated, and the nature of the relief being sought.*

[27] In summary, the two-part test utilized by the Board involves a review of the facts of each case can be summarized as an investigation of whether or not the applicant can demonstrate an arguable case for the relief sought which does not subsume the relief sought in the final application and that the balance of labour relations convenience favours the grant of the interim relief sought.

Is there an arguable case?

[28] The Union alleged that the Employer had engaged in numerous unfair labour practices during the time that the Union was negotiating and during the time that the Union members had been on strike. It argued that the conduct of the Employer was such that employees were intimidated respecting loss of their jobs and benefits.

[29] On the face of the applications which the Union has filed for the numerous unfair labour practice applications, the Board is satisfied that an arguable case exists that the employees may have been intimidated or coerced to such a degree that a reasonable employee,

that is someone of reasonable intelligence and possessed of reasonable fortitude and resilience would not be able to freely express their opinion on the proposed last offer. In an application for interim relief, it is not necessary that the Board find as a fact that this behavior exists, but merely that there is an arguable case for such conduct to be found.

[30] It is a touchstone of the *SEA* as there was under the former *Trade Union Act* that employees are free to exercise their rights without fear, without intimidation, without coercion, or other external pressures. Whether or not such influences are present in this case will be for another day. However, we are satisfied that an arguable case exists.

[31] We concur with the British Columbia Labour Relations Board[12] that conduct which gives rise to an unfair labour practice may well have the effect of impacting a reasonable employee in the exercise of his/her right to freely express their opinion on the proposed final offer.

Does the Balance of Labour Relations Harm Favour Provision of Interim Relief?

[32] Each of the parties argued that the balance of labour relations harm that would arise if relief were granted favoured their position. We disagree and say that the harm, in this case, is equal, insofar as the strike will continue and the economic consequences of that strike will impact on both the Employer and the employees. It is, of course, arguable that the impact, depending on your point of view, will fall more severely upon one party than the other. However, the blunt instrument of strike and lockout tends to injure both parties and arguably the public as a whole who are impacted by the labour dispute.

[33] However, the tipping factor, in our opinion, is the damage that may occur to the rights of employees which are protected both by the provisions of the *SEA* and *The Canadian Charter of Rights and Freedoms* to associate for the purposes of collective bargaining with their employer. Interference with those rights cannot be lightly countenanced by this Board.

[34] Accordingly, we find that interim relief is warranted in this case.

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[12] See *Horizon Operations (Canada) Ltd. v. Communications Energy and Paperworkers Union of Canada, Local 2000* [2000] CanLII 27532 (BCLRB) and *Open Learning Agency v. Faculty Association of the Open Learning Agency* [2002] CanLII 52973

The Nature of the Relief to be Granted

[35] In our Order, we granted the following by way of interim relief:

> 1. *Upon completion of the vote, the ballot box shall be sealed and shall remain in the possession of the Board's Agent pending further Order of the Board with respect to the counting of the ballots.*
>
> 2. *That LRB File Nos. 002-16, 013-16, 029-16, 035-16 and 044-16 shall be heard by a panel of the Saskatchewan Labour Relations Board on April 20, 21, 22, 28 & 29, 2016 at the offices of the Board at 1600 – 1920 Broad Street, Regina, Saskatchewan, commencing at 9:30 AM on each date.*

[36] The sealing of the ballot box was in furtherance of the relief sought by the Union in respect of their unfair labour practice applications. It was in response to the concerns outlined above regarding the expression of a free vote by a reasonable employee. However, in granting the Union's request that the ballot box be sealed, the Board was concerned that the limbo that resulted from the sealing of the ballot box would not be long standing and the second portion of the relief was provided which was to bring forward the hearing of the unfair labour practice applications to a more reasonable date than the dates originally scheduled for the hearing of those matters. That would allow the Board to hear and determine those matters expeditiously and if there was no substantial interference with employees free expression of their wishes then the ballots could be unsealed, the ballots counted and the results made known.

[37] As a result of the Board's order, we believe that the matter can be heard expeditiously, and a permanent order can be made based upon the determinations made by the Board in respect of the unfair labour practice applications advanced by the Union.

[38] As noted above, however, the current situation leads the Board to advance the hearing and resolution of this matter. The employees remain on strike and the economic cost to both parties and the general public continues. There are also costs with respect to the long standing relationship in collective bargaining between the parties which the Board also seeks to protect as much as possible.

[39] This panel will not remain seized of this matter. This is a unanimous decision of the Board.

DATED at Regina, Saskatchewan, this **28th** day of **April, 2016.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson