The Labour Relations Board
Saskatchewan

SASKATCHEWAN POLYTECHNIC FACULTY ASSOCIATION, Applicant v. SASKATCHEWAN POLYTECHNIC, Respondent

LRB File No. 229-15; August 2, 2016
Vice-Chairperson, Graeme G. Mitchell, Q.C.; Members: Maurice Werezak and Greg Trew

For the Applicant: Gordon D. Hamilton
For the Respondent: David M.A. Stack, Q.C.

Unfair Labour Practice – Time limitation for filing – Employer contends that Unfair Labour Practice application filed outside time limit provided in *The Saskatchewan Employment Act* – Board determines that application was not filed within time period provided for in statute.

Unfair Labour Practice – Exercise of Board Discretion – Board considers its authority to excuse delay in filing Unfair Labour Practice application under Section 6-111(3) of *The Saskatchewan Employment Act* – Board considers principles engaged in the exercise of its discretion – Board determines that application should be allowed to proceed.

Unfair Labour Practice – Failure to Bargain Collectively – Board reviews prior jurisprudence and determines that Employer did not fail to bargain collectively with respect to parking rates charged to employees.

Unfair Labour Practice – Failure to Bargain Collectively – Board reviews jurisprudence with respect to mid-term bargaining – Board confirms that mid-term bargaining not permitted under *The Saskatchewan Employment Act* absent the agreement of the parties to re-open negotiations, or unless there is a contractual right to re-open negotiations.

REASONS FOR DECISION

OVERVIEW

[1] Is parking a term and condition of employment for members of the Saskatchewan Polytechnic Faculty Association [“SPFA”]? If so, is Saskatchewan Polytechnic [the “Employer”] obliged to negotiate a settlement of this issue during the life

of a collective bargaining agreement that is silent on the issue of parking? These questions lie at the heart of this unfair labour practice application which SPFA commenced against the Employer under subsection 6-62(1)(d) of *The Saskatchewan Employment Act*, S.S. 2013, c. S-15.1 (the "*SEA*"). Since October 30, 2012, the Association is the certified bargaining representative for all employees of the Employer.[1]

[2] SPFA asserts that the Employer unilaterally increased parking fees at all of its campuses in Saskatchewan[2] on July 1, 2015. It perceived this increase to be substantial and formally requested that the Employer negotiate a reduction of this change prior to it taking effect. Moreover, SPFA asserted that because the fees were automatically withdrawn from the employees' monthly pay cheques, this involuntarily deduction significantly reduced wages agreed to in the current collective agreement.

[3] The Employer rejected SPFA's invitation. It contended that parking had not been a subject of collective bargaining during the most recent round of negotiations which culminated in a collective agreement which took effect on July 12, 2012 and does not expire until June 30, 2017. They asserted that because parking is absent from this collective agreement, that a parking space cannot be characterized as a term or condition of employment for SPFA's members. At bottom, the Employer contends that this unfair practice application is an attempt by SPFA to engage in mid-contract bargaining; something that it is neither obligated nor prepared to do. Accordingly, the Employer urges the Board to dismiss this application.

[4] These Reasons explain why this Board unanimously agrees with the Employer. It is clear that by this application SPFA seeks an order from this Board compelling the Employer to engage in mid-contract bargaining, contrary to the well-known rule discouraging it.

[5] Prior to turning to a substantive analysis of the issue, however, it is necessary for the Board to consider a preliminary objection to us accepting jurisdiction over SPFA's application, namely that it was initiated outside of the 90 day limitation period for commencing unfair labour practice applications set out in subsection 6-111(3) of the *SEA*.

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[1] *Saskatchewan Institute of Applied Science and Technology Faculty Association v Saskatchewan Government and General Employees' Union*, LRB File No. 106-12; 2012 CanLII 65539 (SK LRB).

[2] The Employer has campuses in Moose Jaw, Prince Albert, Regina and Saskatoon. For purposes of this Decision, it should be noted that prior to September 2014, Saskatchewan Polytechnic was known as Saskatchewan Institute of

PRELIMINARY ISSUE – DELAY IN COMMENCING APPLICATION

Relevant Statutory Provisions and the Submissions of the Parties

[6] This preliminary issue engages subsections 6-111(3) and (4) of the *SEA* which read as follows:

> ***6-111(3)*** *Subject to subsection (4), the board may refuse to hear any allegation of an unfair labour practice that is made more than 90 days after the complainant knew or, in the opinion of the board, ought to have known of the action or circumstances giving rise to the allegation.*
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> ***6-111(4)*** *The board shall hear any allegation of an unfair labor practice that is made after the deadline mentioned in subsection (3) if the respondent has consented in writing to waive or extend the deadline.*

[7] SPFA did not commence its unfair practice application until October 14, 2105. The Employer asserts that SPFA learned of the unilateral change in the parking policy no later than June 8, 2015, when formal notification of the increase was sent to all employees.[3] If that is the case, a simple computation of the time reveals that SPFA's unfair labour practice application should have been filed on or before September 8, 2015.

[8] However, the Employer goes further and contends that since 2013 SPFA ought to have known about the Employer's intentions to increase parking fees unilaterally. On July 19, 2013, the Employer's Vice-President, Administrative Services sent an e-mail to all staff advising that a series of annual graduated parking fee increases would commence on September 1, 2013 and continue through to 2015-16.[4] As a result, the Employer submits the clock for commencing an unfair labour practice application started to run on that date. Were this accurate, SPFA delayed for approximately two (2) years before initiating this application.

[9] SPFA acknowledges that its' application is out-of-time; however, it offers a rationale for the delay and asks this Board to exercise its discretion under subsection 6-111(3) of the *SEA* to allow it to proceed. At the hearing of this application on May 24 and 25, 2016, Mr. Warren White, SPFA's President, testified at length about, among other things, the origins of SPFA, its emergence from the Saskatchewan Government and General Employees Union

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Applied Science and Technology ["SIAST"] and the Union was known Saskatchewan Institute of Applied Science and Technology Faculty Association ["SIASTFA"].

[3] Exhibit U-18, E-mail dated June 8, 2015 from Mark Fachada to all employees.

[4] Exhibit U-12, E-mail dated July 19, 2013 from Audrey Neilson on behalf of Cheryl Schmitz to all employees.

("SGEU") bargaining unit, its organizational travails in the early months of its existence and its more conciliatory philosophy to industrial relations disputes with the Employer than SGEU's. This philosophy, he suggested, may be encapsulated in the phrase "negotiate first, grieve later".

[10] SPFA offered two principal reasons why this Board should exercise its discretion to hear the application. First, it argued that 2013 is not the relevant date against which to measure the delay occasioned by SPFA's late filing. At that time, SPFA was in its early days as the collective bargaining representative, finding its way and unfamiliar with how SGEU had conducted earlier collective bargaining negotiations. Counsel for SPFA submitted that it should not be penalized for what he described as SPFA's "flat footedness".

[11] Second, SPFA stated that although it became aware in June 2015 of the change in the parking fees which would take place on July 1, 2015, it chose to engage the Employer in negotiations about the increase rather than immediately file an unfair labour practice application. In a series of e-mail exchanges with Mr. Mark Fachada, the Employer's Associate Vice-President, Facilities Management, Mr. White obtained further information regarding the reason for this sizeable increase. Finally, on September 30, 2015, Mr. White communicated with Mr. Don Soanes, the Employer's Director, Employee Relations requesting the Employer to begin collective bargaining on the parking fees. He requested a response to this request no later than October 14, 2015.[5]

[12] At the time, Mr. Soanes was on vacation leave and Mr. White's e-mail did not come to his attention until after he returned. By this point, however, the two (2) week time frame had elapsed and Mr. White had not received a reply to his e-mail. SPFA filed this application on October 14, 2015.

[13] In its Reply, the Employer acknowledged that it had not responded formally to this request but indicated if it had, it would have told SPFA "it was not prepared to open up the collective agreement and engage in mid-term bargaining."[6]

Analysis and Application of Relevant Legal Principles

[14] For all intents and purposes, subsections 6-111(3) and (4) of the *SEA* are identical to section 12.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*TUA*"). The

[5] Exhibit U-29, E-mail dated September 30, 2015 from Warren White to Don Soanes.
[6] See: Reply dated October 27, 2015 at para. 4(d).

Saskatchewan Legislature enacted section 12.1 only in 2008. In light of the provision's recent vintage, there is little case law from this Board considering it. To date, the leading cases are: *Saskatchewan Government and General Employee's Union v The Government of Saskatchewan*[7]; *Dishaw v Canadian Office & Professional Employees Union Local 397*[8], and *Peterson v Canadian Union of Public Employees, Local 1975-01 and University of Regina*[9]. Neither *Dishaw* nor *Peterson* dealt directly with the application of section 12.1 of the *TUA* as those cases involved duty of fair representation claims and not unfair labour practice applications. Nevertheless, in those Decisions the Board made statements of general principle regarding undue delay in commencing labour relations applications which were quoted with approval in *SGEU*, the only decision of the Board to interpret section 12.1.

[15] More significantly, *SGEU* adopted the analytical framework identified by the Alberta Board in *Neville Toppin v United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 488*[10] as appropriate for adjudicating claims under section 12.1 of the *SEA*. In 2000, Alberta's *Labour Relations Code*[11] was amended to include a section which provided:

> ***16(2)*** *The Board may refuse to accept any complaint that is made more than 90 days after the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint.*

[16] This section is substantially the same as section 12.1 of the *TUA* save that it is not limited to unfair labour practice applications. Over the years inconsistencies in its application emerged, and in *Toppin*, the Alberta Board established an analytical framework "that best reflects [the Alberta] Board's actual practice".[12] This framework is comprised of five (5) considerations or guidelines. These guidelines, which Chairperson Love for the Board, endorsed in *SGEU*[13] are:

> 1. *The 90-day time limit is a legislative recognition of the need for expedition in labour relations matters.*

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[7] LRB File No. 009-09, 2009 CanLII 30466 (SK LRB) ["*SGEU*"].
[8] LRB File No. 164-08, 2009 CanLII 507 (SK LRB) ["*Dishaw*"].
[9] LRB File No. 156-08, 2009 CanLII 13052 (SK LRB) ["*Peterson*"].
[10] [2006] Alta. L.R.B.R. 31, 123 C.L.R.B.R. 253.
[11] R.S.A. 2000, c. L-1.
[12] *Supra* n. 10, at 265, para. 30.
[13] *Supra* n. 7, at para. 27.

> 2. *"Labour relations prejudice" is presumed to exist for all complaints filed later than the 90-day limit.*
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> 3. *Late complaints should be dismissed unless countervailing considerations exist.*
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> 4. *The longer the delay, the stronger must be the countervailing considerations before the complaint will be allowed to proceed. There is no separate category of "extreme" delay.*
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> 5. *Without closing the categories of countervailing considerations that are relevant, the Board will consider the following questions:*
>
>> *(a) Who is seeking relief against the time limit? A sophisticated or unsophisticated applicant?*
>>
>> *(b) Why did the delay occur? Are there extenuating circumstances? Aggravating circumstances?*
>>
>> *(c) Has the delay caused actual litigation prejudice or labour relations prejudice to another party?*
>>
>> *(d) And, in evenly balanced cases, what is the importance of the rights asserted? And what is the apparent strength of the complaint?*[14]

[17] This case presents the Board with its first opportunity to interpret and to apply subsections 6-111(3) and (4) of the *SEA*. To begin, the text of these provisions deviates only slightly and inconsequentially from the text of section 12.1 of the *TUA.* As there is no discernible substantive difference between these various provisions, we conclude that the principles announced in these cases are equally relevant under the *SEA*.

[18] From these cases, and the relevant statutory provisions, the following salient principles emerge:

- Applications alleging an unfair labour practice must be filed within 90 days after the applicant knew or ought to have known about the misconduct giving rise to the allegation (ss.6-111(3)).
- The 90 day limitation period reflects the fact that time is of the essence in addressing labour relations disputes and timely resolution of such disputes is essential to ensuring amicable labour relations in Saskatchewan (*Dishaw*, at para. 36; *Peterson*, at para. 29; *SGEU*, at paras. 13-14).

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[14] *Supra* n. 10, at 265-66, para. 30.

- It is important to identify with precision when the 90 day limitation commences. Typically, the alleged misconduct will be founded upon a particular fact situation and the clock starts running from that date (*SGEU*, at para. 29).
- A complaint may be based on a "continuing policy or practice rather than a discrete set of events". This fact makes it more difficult to ascertain the commencement of the 90 day limitation period and may make it easier to justify a delay (*Toppin*, at para. 29; *SGEU*, at para. 30).
- The Board will adjudicate applications filed outside the 90 day limitation period provided the other party consents or otherwise waives the application of the limitation period (ss. 6-111(4)).
- Where no such consent or waiver is given, the Board possesses discretion to adjudicate the application (ss. 6-111(3); *SGEU*, at para. 24).
- When exercising this discretion, the Board should apply the non-exhaustive list of counter-vailing factors identified in *Toppin* (*SGEU*, at paras.26-27; *Toppin*, at para. 30)
- Prejudice is presumed in all late filings; however, if actual prejudice could result from hearing the application it will be dismissed.

[19] Turning to the application of these principles, the first question to be addressed is when did the 90 day limitation period begin? From the submissions presented to the Board, it would seem that there are three (3) possible dates: July 19, 2013 (the day the Employer first notified its employees of the three year graduated parking fee increases); June 8, 2015 (the date the Employer notified employees of the parking fee increase to take effect on July 1), and July 1, 2015 (the date the impugned parking fee increase took effect). Regardless of which date the Board determines to be the operative one, it is plain that SPFA filed its unfair labour practice application outside the 90 day limitation period.

[20] The Board rejects the Employer's submission that the relevant limitation period commenced on July 19, 2013. It is true that the Employer's e-mail issued that day did alert all employees and SPFA of the parking policy and the three (3) year increase in parking fees. The degree of these increases was not set out in the document. This case involves the kind of "continuing policy or practice" identified in both *Toppin* and *SGEU*.

[21] We might surmise that the initial increase was not a matter of great concern to employees; however, there is no evidence to this effect. What is significant, and in our view

determinative, is that the amount of the increase which would took effect on July 1, 2015 for SPFA's members was nowhere disclosed in this e-mail.

[22] Similarly, the Board rejects July 1, 2015 as the operative date. This was the date the impugned parking fee increase came into effect; however, SPCA knew about its' imminence, and the difficulties certain of its members might experience because of it, a number of weeks prior to that date. It would be contrary to the clear direction of subsection 6-111(3) of the *SEA* for this Board to select a date other than the date when SPFA knew of the Employer's unilateral decision to impose a significant increase in its parking fees.

[23] Accordingly, for these reasons the Board determines that the 90 day limitation period for filling an unfair labour practice application commenced on June 8, 2015.

[24] With June 8, 2015 having been selected as the operative date, it is apparent that SPFA's application should have been commenced no later than September 8, 2015. SPFA failed to comply with this statutory requirement. The next question is should the Board exercise its discretion under subsection 6-111(3), and hear SPFA's application.

[25] To begin, it is significant that the delay at issue in this case is approximately five (5) weeks, *i.e.* September 8, 2015 to October 14, 2015. It is true that labour relations prejudice is presumed in all cases of delay. However, we must conclude that this delay is slight and no evidence was presented to indicate that proceeding to adjudicate this application would prejudice the Employer in any way.

[26] Applying the other *Toppin* counter-vailing factors to the present matter, the first one inquires whether the Applicant is sophisticated or unsophisticated in labour relations matters. On balance, we conclude that SPFA is a sophisticated applicant. It emerged out of a SGEU bargaining unit and its executive members had been active in union matters for some time prior to the certification of SIASTFA, the predecessor to SPFA. At all relevant times, it was represented by an experienced and respected labour lawyer who could provide advice on matters relating to unfair labour practice applications, including statutory pre-conditions. For these reasons, SPFA must be classified as a sophisticated applicant, a conclusion which militates against allowing this application to proceed to a hearing.

[27] The next factor asks why did the delay occur? In particular, it asks the Board to weigh aggravating considerations against mitigating ones. In his testimony, Mr. White indicated

that SPFA consciously adopted a more conciliatory approach to labour relations disputes than had its predecessor, SGEU. It was their practice, he testified, to attempt to discuss issues and disputes with the Employer prior to taking formal action. The evidence in this case shows this was the practice followed here. Moreover, this approach was complicated because it took place over the summer months of 2015, a time which SPFA's counsel characterized the Employer's main campus in Saskatoon as a "ghost town".

[28] SPFA's counsel submitted further that were the Board to dismiss SPFA's application as being out-of-time, it would discourage conciliatory attempts to resolve industrial relations disputes rather than immediately initiating adversarial processes such as grievance arbitrations or applications to the Board. The Board accepts counsel's submission to a point. At the same time statutorily imposed time lines are there for a reason, namely to ensure the expeditious resolution of such disputes. In *SGEU*, for example, the Board repeated the oft-quoted maxim that "labour relations delayed are labour relations defeated and denied".[15] Even the best of intentions cannot displace the operation of a stringent statutory requirement like that found in subsection 6-111(3) of the *SEA*.

[29] On balance, the Board concludes that taking into consideration these factors we should exercise our discretion under subsection 6-111(4) and adjudicate SPFA's unfair labour practice application. While labour relations prejudice attaches to the late filing of this application, the five (5) week delay is minimal. Furthermore, it would appear that the Employer did not experience any real litigation prejudice, a conclusion borne out by the fact that even though Mr. Stack, counsel for the Employer, maintained his objection to the late filing, he did not press the argument strongly in his oral submissions.

[30] Finally, we are satisfied that SPFA did not intentionally ignore the statutory limitation period, but rather made a sincere effort to investigate a possible compromise before filing its unfair labour relations application, an effort that was hindered – but only in part – by the summer months. However laudable the approach adopted by SPFA in this matter may be, in future they must be mindful of, and respect, statutory pre-requisites to the commencement of applications of this kind.

[31] Accordingly, the Board now turns to SPFA's unfair labour practice application.

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[15] *SGEU*, *supra* n. 7 at para 13 quoting *Consolidated-Bathurst Packaging Ltd. v I.W.A., Local 2-69* (1984), 2 O.A.C. 277 (Ont. C.A.). See also: *Dishaw*, *supra* n.8, at para. 29.

UNFAIR LABOUR PRACTICE APPLICATION

[32] As stated above, the hearing of this application took place in Saskatoon on May 24 and 25, 2016. Two (2) witnesses testified on behalf of SPFA: Mr. Warren White, President of SPFA since October 31, 2012, and Ms. Karine Coombes. Mr. Don Soanes, Director of Employee Relations at Saskatchewan Polytechnic Institute – a position he has held since 2007 – testified on behalf of the Employer.

[33] Over those two (2) days, the Board heard a great deal of testimony respecting such matters as the evolution of SPFA, its organizational development after it became the sole bargaining representative for employees of then SIAST, its first experience in bargaining the most recent collective agreement, a process it took over once SPFA was certified and the subsequent negotiation of various memoranda of agreement on issues flowing from that collective agreement. The Employer's counsel questioned the relevance of much of this evidence. Counsel for SPFA submitted that this detailed evidence was necessary to provide the Board sufficient context to understand the relationship between the parties as well as the issues presented in this application. The Board agreed to allow this evidence. That said, we do not propose to rehearse all of this evidence in this Decision.

[34] As the evidence relating to the issues most central to this application was not seriously contested, it will be summarized below.

Factual Background

[35] Disputes about parking vexed the Employer's relationship with its employees in the past.

[36] As recently as 2011, the Employer and SPFA's predecessor, SGEU, were involved in a long and contentious dispute respecting a number of matters, including the cost of parking for its members. In January of that year, the Employer introduced a parking fee for all employees. The fee schedule at that time was $35 per month for electrified stalls and $30 per month for non-electrified stalls. Prior to the imposition of this fee schedule, parking at all of the Employer's campuses was free and available on a first-come, first-serve basis.

[37] At this time the Employer was also in the throes of collective bargaining with SGEU, a process that had been on-going for approximately one (1) year. As the parking issues

could not be resolved at that table, a number of policy grievances and an unfair labour practice application were initiated as a consequence of the unilateral imposition of the parking fees. Ultimately, SGEU took strike action commencing on September 9, 2011 and lasting approximately ten (10) days.

[38] Earlier in December 2010, the parties had mutually agreed to mediate this issue along with a number of the other outstanding matters. The mediator, Tom Hodges, released his report on September 16, 2011. He accepted a proposal to settle this particular dispute through "a one-time lump sum payment of $420 per employee (prorated for other than full-time employees) in return for [SGEU's] agreement to withdraw all policy grievances and Unfair Labour Practice complaints regarding the parking issue."[16] A modified version of this proposal was subsequently incorporated into Mr. Hodges' Interest Arbitration Award dated March 28, 2012 as binding.[17]

[39] After all of this, however, the Collective Agreement dated May 28, 2012 achieved between the Employer and SPFA's predecessor, SIAST-ABU, did not contain any clause pertaining to parking rates or reference parking in any of its Articles. Mr. Soanes testified that once the one-time refund was made to the employees, the issue of parking did not arise again, and from the Employer's perspective it was settled. He stated that the Employer felt confirmed in its view by virtue of the fact that the SPFA did not contest the unilateral increase in parking fees, which took effect in 2013.

[40] Collective bargaining towards the current Collective Agreement had already commenced in January 2012, prior to SPFA becoming the collective bargaining agent in late October 2012. Mr. White testified that when SPFA assumed carriage of those negotiations, it was over-whelmed by the number of potential issues in play, of which parking was only one. As well, certain members of SPFA's Executive and bargaining committee had little, if any, experience with such a process and were somewhat intimidated by it. Negotiation preparations were further complicated by the fact that at that time relations between SPFA and SGEU were extremely hostile and communication between these two organizations was non-existent.

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[16] Exhibit U-2 – "Mediation Report: In the Matter of A Dispute Between The Saskatchewan institute of Applied Science and Technology (SIAST) and The SIAST Academic Bargaining Unit (SGEU-ABU) represented by Saskatchewan Government and General Employees' Union" dated September 16, 2011 at 8. In his testimony, Mr. Soanes stated that this proposal originated with the Mediator even though in the Mediator's Report it is characterized as being the Employer's proposal.

[17] Exhibit U-4 – "In the Matter of An Interest Arbitration Between [SIAST] and [SGEU-ABU] A Dispute Regarding Unresolved Issues From the Mediation Report of September 16, 2011", at 9-10. The modifications to the parking proposal contained in this Award are immaterial for purposes of this Decision.

[41] He testified that SPFA chose not to raise parking fees as an issue during that round of collective bargaining principally for two (2) reasons. First, SPFA felt that for the time being the parking issue appeared to have been resolved by the Mediator's Report and his subsequent Award. As well, the vast majority of faculty members seemed content with the current arrangement as they all had only recently received the refund of previously paid parking fees.

[42] Second, SPFA strongly desired to appear collaborative in the bargaining process. The bargaining committee believed that if SPFA put parking fees on the list of the issues to be bargained it would lose credibility with the Employer. There were many significant issues needing to be raised at the table and difficult choices had to be made. SPFA determined that matters of more paramount concern than parking had to be settled at the bargaining table and, as a consequence, it deliberately chose not to raise parking as a bargaining issue.

[43] In December 2013, the Employer revised its parking policy which had originally been issued in September 2010. Under the heading "Parking Rates", it set out the following stipulations:

> *2.1 [The Employer] established parking rates are available on [the Employer's] website.*
>
> *2.2 Parking rates for students and the general public are posted on-site or are available through [the Employer's] website.*
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> . . . . . .
>
> *2.4 Parking rates will be reviewed annually and adjusted as necessary. Notification of pricing adjustments will be provided to parking users.*[18]

[44] As recounted in the previous part of this Decision, the Employer, acting in accordance with this policy, unilaterally decided to increase parking rates in early 2015. It notified all employees by an e-mail dated June 8, 2015 of the increases that would take effect July 1, 2015. Mr. White testified about the various initiatives he undertook to engage the Employer in some form of negotiations in an attempt to mitigate the impact these increases would have on SPFA's members.

[45] The Employer rebuffed SPFA's request to negotiate these fee increases. As a consequence, this Unfair Labour Practice application was commenced on October 14, 2015.

Issue

[46] The Board has concluded that the various issues presented by the parties may be distilled into one (1) principal issue, namely was the Employer required to negotiate the 2015 increases to the parking fees with SPFA during the life of a collective bargaining agreement that was silent respecting parking fees and their mode of payment? Put another way, was the Employer in the circumstances of this case, obligated to engage in mid-term bargaining over parking?

Relevant Statutory Provisions

[47] In its Unfair Labour Practice Application, SPFA invokes subsection 6-62(1)(d) of the *SEA*. This section reads as follows:

> ***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:*
> *. . . . . .*
>
> *(d) to fail or refuse to engage in collective bargaining with representatives of a union representing the employees in a bargaining unit whether or not those representatives are the employees of the employer[.]*

[48] Two (2) other provisions of the *SEA* are also relevant. Section 6-7 contains the statutory obligation of both unions and employers to bargain collectively in good faith. It reads as follows:

> ***6-7*** *Every union and employer shall, on good faith, engage in collective bargaining at the time and in the manner required pursuant to this Part or by an order of the board.*

[49] The term "collective bargaining" is defined in subsection 6-1(1)(e) as follows:

> *(e) "collective bargaining" means:*
> *(i) negotiating in good faith with a view to the conclusion of a collective agreement or its renewal or revision;*
> *(ii) putting the terms of an agreement in writing if those terms were arrived at in negotiations or are required to be inserted into a collective agreement by this Part;*
> *(iii) executing a collective agreement by or on behalf of the parties; and*
> *(iv) negotiating from time to time the settlement of disputes and grievances of employees covered by a collective agreement or represented by a union.*

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[18] Exhibit U-17 – 'SIAST Policy and Procedure Statement – Parking – No. 505", at 2.

Arguments of the Parties

1. **SPFA's Position**

[50] Mr. Hamilton on behalf of SPFA made four general arguments. First, he asserted that the Employer unilaterally increased parking fees, an increase which came into effect on July 1, 2015. Moreover, when SPFA attempted to engage the Employer in negotiations respecting this increase, the Employer refused. He submitted that a finding of fact on this point was necessary to support SPFA's application.

[51] Second, Mr. Hamilton maintained that parking fees are a proper subject for collective bargaining. Mr. Hamilton pointed to the dispute over parking fees which resulted in a mediator's report, a binding arbitration award, and, ultimately a Memorandum of Agreement which formed part of the 2009-2012 Collective Agreement between the Employer and SIAST-ABU. He submitted that in light of this it was reasonable for SPFA then to assume that parking would remain a topic amenable to bargaining collectively between the parties. The fact that SPFA did not contest the increase imposed in 2013 he contended does not diminish the reasonableness of this position.

[52] Third, Mr. Hamilton submitted that parking is a term and condition of SPFA's members' employment and any unilateral alteration to the fees charged for amounted to a decrease in employees' wages agreed to in the collective agreement. This particular argument tied parking to the particular method of payment for it. He cited a number of arbitral decisions supporting this position for the Board's consideration.[19]

[53] Fourth, in the event the Board upholds SPFA's unfair labour practice application, Mr. Hamilton asked that we direct the following remedial relief:

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[19] These decisions included: *Council of Atlantic Telecommunications Unions v Aliant Telecom Inc.*, 2005 CIRB 310 (Canadian Industrial Relations Board); *Air Canada v CUPE (Air Canada)*, 2015 CanLII 15593 (ON LA); *Re St. John's Convalescent Hospital and Canadian Union of Public Employees, Local 790*, 1983 CarswellOnt 2438, 11 L.A.C. (3d) 278 (Devlin); *Re Matsqui-Sumas-Abbotsford General Hospital and Hospital Employees' Union*, 1996 CarswellBC 3190, 44 C.L.A.S. 3190, 44 C.L.A.S. 31, 55 L.A.C. (4th) 242, *Gimli (Rural Municipality) v SEIU, Local 308*, 2003 CarswellMan 548, 119 L.A.C. (4th) 97 (Werier).

- That the 2015 parking fee increase be rolled back to the 2013 rate;
- That all employees be reimbursed for the parking fee increases paid by them;
- That the Employer be directed to bargain collectively with SPFA a resolution to the parking fee dispute, and
- That parking fees remain at the 2013 rate until such time as the Employer and SPFA have negotiated a mutually acceptable resolution of the parking fee dispute.

2. The Employer's Position

[54] Mr. Stack, on behalf of the Employer, stated it was their principal position that SPFA, through this application, is attempting to compel it to enter into mid-term bargaining something which the Employer is neither legally obligated nor willing to do. He offered a number of bases for this position.

[55] First, Mr. Stack points to the complete absence of any reference to parking or parking fees in the current collective agreement. Accordingly, it is apparent, he submits, there is no basis upon which this Board should compel the Employer to now embark on mid-contract collective bargaining. Mr. Stack relied heavily on this Board's decision in *Canadian Union of Public Employees, Local 600-3 v Government of Saskatchewan (Community Living Division, Department of Community Resources)*[20] to support this argument.

[56] Second and building on this argument, Mr. Stack submitted that because the current collective agreement is silent respecting parking, it cannot be characterized as a term and condition of employment for SPFA's members. Rather, he argued, parking was a service the Employer offered to its employees and for which it set the appropriate fee for its utilization. He directed the Board to section 14 of *The Saskatchewan Polytechnic Act*[21] as authorizing charges of this kind. Employees were then free to pay for this service if they wished to utilize it. Like Mr. Hamilton, he, too, cited a number of arbitral decisions which he submitted supported his position.[22]

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[20] LRB File No. 238-05, 2009 CanLII 49649, 178 C.L.R.B.R. (2d) 195 ("*Saskatchewan (Community Living Division)*").
[21] SS 2014, c S-32.21. The most pertinent subsection is subsection 14 (1)(c) which authorizes Saskatchewan Polytechnic to "sell, lease or otherwise dispose of any of its property" subject to certain conditions not relevant here.
[22] These decisions included: *Manitoba Housing Authority v International Union of Operating Engineers, Local 827*, 1994 CarswellMan 649, 41 L.A.C.(4th) 225 (Scurfield); *Ontario Public Service Employees Union v Ontario (Ministry of Finance)*, [2015] O.G.S.B.A. No. 119 (Petryshen); *Ontario Public Service Employees v Oshawa General Hospital,*

[57] Third, Mr. Stack took exception to Mr. Hamilton's arguments that the payroll deduction for parking fees should form the basis for an unfair labour practice application. Mr. Stack submitted that this issue was more appropriately the subject matter for a grievance and cannot be included in this application.

Analysis and Application of Principles

[58] The general principles respecting mid-term bargaining are well known and have been stated by this Board of a number of occasions. In *Saskatchewan (Community Living Division)*, one of the most recent Board decisions addressing the issue, Chairperson Love referenced this Board's earlier Decision in *Grain Services Union (ILWU – Canada) v Saskatchewan Wheat Pool, Heartland Livestock Services (324007 Alberta Ltd.) and GVIC Communications Inc*[23]. Relying upon the legal analysis undertaken in *Heartland Livestock Services*, the Board in *Saskatchewan (Community Living Division)* summarized the relevant principles as follows:

> *[26] One of the principle tenets of [The Trade Union Act, R.S.S. 1978, c. T-17 ("TUA")] is that the parties are only required to bargain collectively during the open period provided for in ss. 33(4) of [the TUA]. Furthermore, pursuant to s. 44 of [the TUA], there can be no strike or lock-out during the term of a collective agreement. Nor is there any general requirement in Saskatchewan, that once a collective agreement has been reached, that the parties must re-open that agreement to deal with any issue that may arise. Where an issue arises, it may be dealt with in a number of ways. These are:*
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> *(a) by virtue of the "technological change" provisions of s. 43 of [the TUA];*
> *(b) by virtue of a re-opener provision in the collective agreement;*
> *(c) by voluntary agreement to re-negotiate between the parties; or*
> *(d) by submission by way of the grievance procedure where the issue impacts upon the already agreed upon provisions of the collective agreement.*[24]

[59] Earlier the Board in *Heartland Livestock Services* reviewed the circumstances where mid-term bargaining may be appropriate as follows:

York Finch Hospital, 1985 CarswellOnt 1138, [1985] O.L.R.B. Rep. 98 (Mitchnick), *Ontario Public Service Employees Union v Ontario (Ministry of Government Services)*, 2012 CarswellOnt 9508, 111 C.L.A.S. 422 (Petryshen).

[23] LRB File No. 003-02, 2003 CanLII 62870, 2003 CarswellSask 396 ("*Heartland Livestock Services*"), at para. 89.
[24] *Supra* n. 20, at para. 26. See also: *United Steel, Paper and Forestry, Rubber, Manufacturing Energy Allied Industrial and Service Works International Union (United Steelworkers), Local 7458 v Potash Corporation of Saskatchewan (Cory Division)*, LRB File No. 026-09, 2010 CanLII 13386 (SK LRB), at paras. 41-43; aff'd *United Steel Workers, Local 7458 v Potash Corporation of Saskatchewan (Cory Division)*, 2011 SKQB 86, and further aff'd: *United Steel Workers, Local 7458 v Potash Corporation of Saskatchewan (Cory Division)*, 2013 SKCA 86.

> *[89] In certain cases a refusal to bargain may be a breach of an extant collective agreement, as where the agreement contains a provision for mid-term bargaining in certain circumstances. However, with few exceptions – for example, negotiating for the settlement of disputes and grievances, failure to comply with which is a violation of s. 11(1)(c) of [The Trade Union Act, R.S.S. 1978, c. T-17 ("TUA"), now s. 6-62(1)(d) of the SEA], and pursuant to s. 43 [of the TUA, now section 6- 54 of the SEA], the technological change provisions of the Act – the Act does not expressly require an employer to bargain collectively with a certified union during the term of a collective agreement. Otherwise, under the Act, the parties are bound to bargain collectively only upon notice during the "open period" in the circumstances described in s. 33(4) [now s.6-26 of the SEA] for the renewal or revision of the agreement, or in the case of a first collective agreement imposed by the Board, s. 26.5(9) [now s. 6-24 of the SEA].*[25]

[60] In both *Saskatchewan (Community Services Division)* and *Heartland Livestock Services* the Board expressly recognized the "harshness"[26] which may be visited upon a party by the general prohibition against collective bargaining outside the "open period" provided for in sections 6-24 and 6-26 of the *SEA*. Yet, this is a collateral effect of the necessary trade-off or *quid pro quo* occasioned by the Wagner model in order to ensure industrial relations peace during the life of a collective agreement. As a consequence, it is an accepted reality for employers and unions alike.

[61] Of the limited mechanisms identified in these cases during which mid-term bargaining may be permissible, only two (2) would seem relevant here: a "re-opener clause" in the collective agreement, or the negotiation of a settlement of dispute. We deal with each of these two possibilities in turn.

1. Is there a "Re-opener Clause" in SPFA's Collective Agreement Permitting Mid-Term Bargaining in This Matter?

[62] The short answer to this question is "No". SPFA's current collective agreement with the Employer does contain a "re-opener clause"; however, it cannot authorize the kind of mid-term bargaining SPFA's wants to commence in this matter, absent the consent of the Employer.

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[25] *Supra* n. 23, at para. 89,
[26] *Saskatchewan (Community Services Division)*, *supra* n. 20, at para. 32; *Heartland Livestock Services*, *supra* n. 23, at para. 94.

[63] Under the heading "Duration of the Agreement" can be found Articles 28.1 and 28.2.[27] These Articles read as follows:

> *28.1 This agreement between [the Employer] and the academic unit shall be binding and remain in effect from July 1, 2012 to June 30, 2017, and shall continue from year to year thereafter unless either party gives to the other party notice in writing to negotiate amendments at least thirty (30) days prior to the anniversary date.*
>
> *28.2 Any changes deemed necessary in this agreement may be made by mutual agreement at any time during the existence of this agreement.*

[64] Article 28.2, in particular, contemplates mid-term bargaining on any topic the parties may deem appropriate with one significant pre-requisite, namely such bargaining must be undertaken by "mutual agreement" of both parties. Indisputably, this critical element is not met in this case. It is plain that the Employer was unwilling to engage in any negotiations respecting the 2015 parking fee increase. This fact was explicitly stated in the Employer's Reply dated October 27, 2015, and reiterated by Mr. Soanes in the course of his testimony before the Board as well as Mr. Stack's written submission on behalf of the Employer.

[65] Article 28.2 accordingly, has no relevance to this application. It was the Employer's prerogative not to accede to SPFA's request to commence collective bargaining respecting parking fees and their mode of payment. In *Heartland Livestock Services*, this Board candidly acknowledged that voluntary mid-term bargaining is possible, although it is by no means obligatory. As Chairperson Seibel explained[28]:

> *[90] …While the parties to a collective agreement may voluntarily bargain during the term of the agreement, they are not required to do so, even if it would make eminent good sense. In L.U.N.A., Local 183 v Residential Low-Rise Contractors Assn. of Metropolitan Toronto & Vicinity, [1990] O.L.R.B. Rep. 553 (Ont. L.R.B.), the Ontario Board observed as follows:*
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> > *[10] When bargaining a collective bargaining agreement, an employer takes into account its current and expected costs of doing business and a trade union takes into account the current and expected costs of living and working of the employees it represents. Once agreement is reached, ensuing economic and social changes may create differences between expected and actual costs of doing business and costs of living and working.*

[27] Exhibit U-10 – "Saskatchewan Institute of Applied Science and Technology and SIAST Faculty Association, Collective Agreement – July 1, 2012 to June 30, 2017", at 109.
[28] *Supra* n. 23, at para. 90.

> *Changes in income taxes and other taxes many and often do have that effect, as may changes in government economic and social programs. The bargain the parties make must nevertheless stand for a period of time before either party can require the other to renegotiate it. [Emphasis added.]*

[66] SPFA argues, however, that the Employer's failure to bargain these issues amounts to an unfair labour practice because the *SEA* defines collective bargaining in subsection 6-1(1)(e) as including:

> *(iv) negotiating from time to time the settlement of disputes and grievances of employees covered by a collective agreement or represented by a union.*

It is to this issue we now turn.

2. Is the Employer Required to Bargain Collectively a Settlement of the Parking Fee Dispute with SPFA?

[67] This issue illustrates another exception to the general rule against mid-term bargaining identified by the Board in *Heartland Livestock Services*, namely the requirement to bargain mid-term a settlement of a dispute or grievance brought by employees covered by the collective agreement. For the reasons that follow, the Board concludes that the dispute which lies at the heart of this unfair labour practice application does not fall within the definition of collective bargaining found in subsection 6-1(1)(e)(iv) of the *SEA* because it does not relate to subject-matter covered in the collective agreement.

[68] This Board very recently considered the scope of subsection 6-1(1)(e) in *Moose Jaw Firefighters' Association Local 533 v The City of Moose Jaw*[29], particularly at paragraphs 92-94 of that Decision. For present purposes, it is not necessary to rehearse that analysis here. Rather it is sufficient to note that *Moose Jaw Firefighters' Association* adopted the interpretation given by this Board to a precursor of subsection 6-1(1)(e) in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Regina Exhibition Association Ltd.*[30] There the Board stated:

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[29] LRB File No. 219-15, 2016 CanLII 36502 (SK LRB)
[30] [1993] 4th Quarter Sask. Labour Rep. 216, LRB File Nos. 256-93 to 260-93.

> *The general obligation to bargain which is imposed upon an employer by the certification order is not, as counsel acknowledged, limited to the negotiation or administration of a collective agreement. It embraces all aspects of the relationship between an employer and employees which may affect their terms and conditions. [Emphasis added.]*[31]

[69] It is apparent that the general rule against mid-term bargaining may be relaxed if a dispute arises relating to an employee's terms and conditions of employment.

[70] In *United Steel Workers, Local 7458 v Potash Corporation of Saskatchewan (Cory Division)*[32], a case in which the central issue also involved mid-term bargaining, the Queen's Bench Judge commended the following two-step analytical approach for determining whether mid-term bargaining was appropriate:

> 1. *Does the employers' proposed action amount to a term or condition of employment?*
> 2. *If the proposed action is a term or condition of employment, is it one that the employer must negotiate with the union?*[33]

[71] SPFA argued strenuously that for many of its members parking was not a luxury, it was a necessity. It maintained that oftentimes individual faculty members are required to leave campus and attend at other venues to fulfill their academic responsibilities. In addition, many of its members travel long distances to the Employer's various campuses and it is essential that they have access to parking in order to maintain their employment. Factors such as these, SPFA urges, demonstrate that parking is a term and condition of its members' employment.

[72] The Board concludes that this line of argument suffers from the same infirmity that defeated unfair labour practice claims in other cases involving mid-term bargaining, most notably *Saskatchewan (Community Living Division)*[34], and *Potash Corporation of Saskatchewan (Cory Division)*[35].

[73] In *Saskatchewan (Community Living Division)*, for example, at issue was a policy unilaterally imposed by the Employer requiring all new hires and many current employees to

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[31] *Ibid*, at 224.
[32] 2011 SKQB 86.
[33] *Ibid*, at para. 19. This analytical approach has been utilized by the Board at least since *Saskatoon City Police Association v Saskatoon Board of Police Commissioners*, [1993] 4th Qu. Sask. Lab. Report 158, LRB File No. 240-93.
[34] *Supra* n. 20.

undergo a criminal record check. This policy was not discussed during collective bargaining and came into effect shortly after a new collective agreement had been ratified. CUPE, Local 600-3, the Union representing affected employees, alleged the imposition of this policy amounted to an unfair labour practice because it had not been collectively bargained.

[74] Initially, this Board concluded that the Employer had committed an unfair labour practice in these circumstances.[36]

[75] The Employer applied for a reconsideration of this ruling. A differently constituted panel of this Board agreed to reconsider the matter and, ultimately, came to the opposite conclusion. The essence of its ruling and the aspect most relevant to this discussion is found at paragraph 34 of the Board's Decision which reads as follows:

> *[34] In the present case, the original panel got off course when it began its inquiry by answering the question "Is the CRC policy a term or condition of employment?" There is little doubt that such a policy could properly be the subject of collective bargaining between the parties. However, it is, we believe an erroneous "leap of logic" to use that analysis to then conclude that the fact that it can be a subject of collective bargaining means that it must be a subject of collective bargaining; and to then determine the failure to reopen negotiations outside the open period amounts to an unfair labour practice is contrary to both the provisions of [the TUA] and to the Board's previous jurisprudence[.]*

[76] More recently in *Potash Corporation of Saskatchewan (Cory Division)*, it was argued that by bargaining the waiver of vacation leave entitlements directly with it employees the Employer had engaged in not only "mid-term bargaining" but also "direct bargaining". This Board dismissed the Union's unfair labour practice application based on that alleged misconduct.

[77] Addressing the mid-term bargaining complaint, Vice-Chairperson Schiefner invoked *Saskatchewan (Community Services Division)* and stated:

> *[42] As this Board found in Saskatchewan (Community Services Division)…the Employer's proposal could certainly have been the subject of collective bargaining; certainly the parties had negotiated and agreed to similar workplace issues. However, it would be an erroneous leap of logic to conclude that allowing employees to waive or [forego] all or portion of their accumulated vacation entitlement must be the subject of collective bargaining outside of the statutory "open period" provided for [the TUA].*[37] *[Emphasis in original.]*

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[35] *Supra* n. 23.
[36] *Canadian Union of Public Employees, Local 600-3 v Government of Saskatchewan (Community Living Division, Department of Community Resources*, 2008 CanLII 61009 (SK LRB)
[37] *Supra* n. 23.

[78] The Union sought judicial review of the Board's Decision in *Potash Corporation of Saskatchewan (Cory Division)*, and ultimately appealed the Queen's Bench judgment[38] to the Saskatchewan Court of Appeal[39]. It failed in both courts to have the impugned Decision overturned. Speaking for the Court of Appeal, Jackson J.A. quoted the above-cited paragraph *verbatim* and concluded that this statement of principle is "obviously reasonable"[40]. She then ruled as follows:

> *[35] Given that a failure to bargain collectively encompasses an employer's actions in direct bargaining, the Board's determination that the employer had not failed to bargain collectively constitutes a finding by the Board that the employer did not engage in direct bargaining as that term is understood by the Supreme Court jurisprudence. [Emphasis added.]*

[79] These authorities clearly demonstrate that while a particular subject matter may qualify as a term and condition of employment, in order to compel an employer to collectively bargain the issue outside the "open period" provided for in subsection 6-26 of the *SEA,* it must already be included in the current collective agreement. The failure to have addressed the matter in the bargaining process and provide for it in the collective agreement will defeat any claim that it qualifies as a "dispute" which must be negotiated mid-term.

[80] Indeed, the arbitral jurisprudence cited by both counsel during the hearing underscores this reality. Cases in which arbitrators have upheld grievances, the collective agreement under consideration contained articles relating specifically to parking. See *e.g.*: Re *Matsqui-Sumas-Abbotsford General Hospital*[41]. Cases in which arbitrators dismissed grievances challenging an employer's ability to impose fees for parking, the collective agreement in issue made no reference to parking. See *e.g.*: *St. John's Health Care London*[42]; *O.P.S.E.U. v Ontario (Ministry of Government Services)*[43], and *Manitoba Housing Authority*[44].

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[38] *Supra* n.
[39] 2013 SKCA 86
[40] *Ibid*., at paras. 33 and 34.
[41] *Supra* n. 19.
[42] *Supra* n. 22.
[43] *Ibid*.
[44] *Ibid*.

[81] Despite counsel for SPFA's valiant attempt to argue the contrary, the Board finds that parking is not a term and condition of employment for SPFA's members. We acknowledge that parking could be an issue for future collective bargaining. However, as SPFA did not raise it in the last round of bargaining and as there is no reference to parking in the current collective agreement, there is no basis upon which the Board can find that parking is a term and condition of employment.

[82] Respecting SPFA's arguments that the automatic debiting of employees' wages to pay for their parking, we agree with counsel for the Employer that if this is an issue, it should be addressed under the grievance procedure contained in the collective agreement. The Board makes no determination as to whether it is grievable.

[83] In view of the Board's conclusion on this question, it is not necessary for us to consider the second issue identified in *Potash Corporation of Saskatchewan (Cory Division)*, namely whether the employer was obliged to engage in mid-term bargaining in respect of this parking dispute.

CONCLUSION

[84] Accordingly, for all of these reasons this Unfair Labour Practice application brought pursuant to subsection 6-62(1)(d) of the *SEA* must be dismissed.

[85] The Board thanks counsel for their helpful oral submissions and written Briefs. They were of great assistance to us in arriving at our decision.

DATED at Regina, Saskatchewan, this 2nd day of **August, 2016**.

LABOUR RELATIONS BOARD

Graeme G. Mitchell, Q.C.
Vice-Chairperson
Per: Kenneth G. Love Q.C. Chairperson