INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 2038, Applicant v PCL INTRACON POWER INC., Respondent

LRB File Nos. 258-16 & 075-17; September 18, 2017

Vice-Chairperson, Graeme G. Mitchell, Q.C.; Members: Maurice Werezak and Allan Parenteau

For the Applicant/Respondent: Crystal L. Norbeck
For the Respondent/Applicant: Larry F. Seiferling, Q.C.

Unfair Labour Practice – Union commences two unfair labour practice applications relating to matters to which it also filed grievances – Employer requested that hearing of the unfair labour practice applications be deferred pending completion of the grievance process – Board reviews relevant jurisprudence respecting deferral to arbitration.

Unfair Labour Practice – Deferral to Arbitration – Board determines that subject matter of Union's policy grievance is a pre-condition to determining one of the unfair labour practice applications – Policy Grievance involves an interpretation of collective grievance – Unfair labour practice application deferred to arbitration panel and hearing adjourned *sine die*.

Unfair Labour Practice – Deferral to Arbitration – Board determines that the second unfair labour practice application should be bifurcated - Termination grievance raises the same dispute as the unfair labour practice application, requests the same remedy and the collective agreement provides a complete remedy – Board exercises its discretion to defer those aspect of the unfair labour practice application to arbitration panel and hearing adjourned *sine die*.

Unfair Labour Practice – Board determines that remaining aspects of the second unfair labour practice application should proceed to hearing – The dispute relates to allegations of intimidation and improper communication by Employer – Subject-matter does not involved interpretation of collective agreement – Board has unique jurisdiction to protect collective bargaining relationship – Board directs hearing on these aspects to proceed as scheduled.

REASONS FOR DECISION

OVERVIEW

[1] Graeme G. Mitchell, Q.C., Vice-Chairperson: International Brotherhood of Electrical Workers, Local Union 2038 [Union] is certified as the bargaining agent for an unit consisting of all

journeyman electricians, electrical apprentices, electrical workers and electrical foremen employed by PCL Intracon Power Ltd. [PCL] in the Province of Saskatchewan, south of the 51st parallel.

[2] The Union, pursuant to section 6-62 of *The Saskatchewan Employer Act*, SS 2013, c S-15.1 [*SEA*], has filed two (2) unfair labour practice applications against PCL. The first, LRB File No. 258-16, was filed with this Board on November 22, 2016. The second, LRB File No. 075-17, was filed on May 3, 2017. The hearing of these applications is scheduled to take place on October 3 & 4, 2017.

[3] In addition to these unfair labour practice applications, the Union has also filed a series of grievances pursuant to Article 14 of the *Saskatchewan Provincial Electrical Agreement* [*Provincial Agreement*].

[4] Asserting that these grievances cover the same or similar factual matters which form the grounds for the two (2) unfair labour practice applications, and further, that those matters relate almost exclusively to interpreting certain provisions of the *Provincial Agreement*, PCL asked this Board to defer hearing of the Union's unfair labour practices until the various grievances have been resolved. This Board convened to hear PCL's deferral application on August 22, 2017. At its conclusion, the Board reserved its decision.

[5] These Reasons for Decision explain why the Board allows PCL's request for a deferral of the unfair labour practice applications in part. The Board has concluded that LRB File No. 258-16 should be deferred until the arbitral process has been completed. However, the Board concludes that LRB File No. 075-17 should proceed, save for matters in relation to the termination of Mr. Jaise Pieper.

FACTUAL BACKGROUND

[6] The hearing of PCL's preliminary objection proceeded without *viva voce* testimony. The materials before the Board were comprised of the formal Applications, Replies, a Book of Exhibits filed on behalf of PCL, Books of Authorities and written Briefs of Law, submitted by both parties. The following factual summary is gleaned from those materials, as well as oral argument of counsel at the hearing.

A. Events Prior to Union Filing First Unfair Labour Practice Application

[7] On October 3, 2016, PCL laid-off 14 electrical workers working at the Co-op Refinery site in the City of Regina. The Union alleged that PCL failed to provide these laid-off workers with termination pay as required under the *Provincial Agreement*.

[8] On or about October 11, 2016, PCL's site superintendent asked the Union's shop steward, Mr. Jaise Pieper, to announce publicly that he approved these lay-offs, and supported PCL's decision not to offer termination pay to the laid-off employees. Mr. Pieper declined to comply with this request.

[9] PCL's site superintendent reiterated this request again on October 12, 2015. And again, Mr. Pieper refused his request.

[10] On October 25, 2016, the Union filed a grievance against PCL in accordance with Article 14 of the Provincial Agreement.[1] This grievance pertained to PCL's alleged failure to comply with Articles 3:12 (a) and (c) relating to termination pay for laid-off employees. This particular grievance has, for the most part, been resolved between the parties.

[11] On November 3, 2016, PCL called a meeting of all employees to address the issue of start time. Apparently, employees were not arriving at the worksite and prepared to work by 7:00 a.m. each day, as set out in Article 5:01 of the Provincial Agreement. At that meeting, PCL's representatives advised the employees that they would be disciplined if they were not on-site and work-ready by 7:00 a.m. This meeting became somewhat heated as Union representatives believed PCL was threatening them with discipline if they failed to arrive early at the worksite, but without financial compensation for their early arrivals.

[12] Subsequently, on November 16, 2016, the Union filed a second grievance against PCL. This policy grievance alleged that PCL was refusing to follow the terms of the Provincial Agreement respecting hours of work.[2] A hearing of this grievance has not yet been scheduled.

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[1] PCL's Book of Exhibits, Tab 4 – Letter from the Union to PCL dated October 25, 2016.
[2] PCL's Book of Exhibits, Tab 3 – Grievance Form dated November 16, 2016.

B. Union's First Unfair Labour Practice Application

[13] On November 22, 2016, the Union filed its first unfair labour practice application – LRB File No. 258-16 – against PCL.[3] The Union pled the factual circumstances set out above and asserted:

> */Based on the above facts, PCL has committed unfair labour practices:*
>
> *a. By intimidating employees in their exercise of rights conferred by Part VI of the Saskatchewan Employment Act, including their right to union representation and their right to the enforcement of the Collective Bargaining Agreement;*
> *b. By attempting to engage in direct bargaining with employees, thereby failing or refusing to recognize IBEW 2038 as the certified bargaining agent; and*
> *c. By attempting to discourage employees' activity in IBEW 2038 and participation in proceedings pursuant to this Part.*

[14] In its Amended Unfair Labour Practice, the Union requests from this Board the following remedial relief:

> *a. A declaration that PCL has breached the SEA and committed unfair labour practices as set out above;*
> *b. An order prohibiting PCL from continuing to breach the SEA and commit unfair labour practices;*
> *c. A cease and desist order; and*
> *d. Such further and other relief as this Honourable Board deems just.*

[15] On April 21, 2017, PCL filed a formal Reply to this unfair labour practice application. In its Reply, PCL asserted as follows:

> *(a) The Employer says that the issues raised by the Unfair Labour Practice application have been raised in grievances filed under the Collective Bargaining Agreement between the parties and have been or are being dealt with in accordance with the grievance and arbitration procedure and Occupational Health and Safety ("OH&S") parts of The Saskatchewan Employment Act. The arbitrator and OH&S adjudicators have the power under the Act and Collective Agreement to adjudicate these disputes and to fashion a remedy for the issues that are raised Of the issues raised, all have been resolved except for one issue, which is set for arbitration. In order to resolve the Unfair Labour Practice, it would be necessary to interpret the provisions of the Collective Bargaining Agreement with regard to management rights, start times and the grievance and arbitration procedure itself. The Respondent says that the matter raised in the Application should be deferred to arbitration.*[4]

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[3] An Amended Unfair Labour Practice application was filed sometime later. For present purposes, the most important aspect of this document is the prayer for relief which not included in the original application.
[4] PCL's Reply in LRB File No. 258-16 dated April 21, 2017, at pp. 1-2.

C. Events Prior to the Union's Second Unfair Labour Practice

[16] On December 30, 2016, Mr. Pieper filed a harassment complaint against two (2) PCL representatives under Part III of the *SEA*.[5] After an investigation by officials from the Ministry of Labour Relations and Workplace Safety, he was advised by a letter dated March 7, 2017 that PCL had properly addressed his complaint, and nothing further was required.[6]

[17] On April 11, 2017, PCL terminated Mr. Pieper's employment allegedly for interfering in a workplace investigation. For purposes of this application it is not necessary to determine the veracity of these allegations.

[18] Subsequently, on April 14, 2017, the Union filed a termination grievance on behalf of Mr. Pieper.[7] This grievance alleged that PCL had breached the Provincial Agreement, as well as its own internal policies "by wrongfully dismissing the employment of Jaise Pieper". The Union requested that Mr. Pieper be reinstated, "made whole in all respects", and that PCL be ordered to pay "punitive and/or exemplary damages".

[19] At the hearing, Union counsel advised the Board that the arbitration of this is scheduled to take place on December 5, and 6, 2017.

D. Union's Second Unfair Labour Practice Application

[20] On April 28, 2017, the Union filed a second unfair labour practice application – LRB File No. 075-17 – against PCL. Much of this application relates to the events immediately leading up to Mr. Pieper's termination by PCL. However, commencing at paragraph 8, the Union asserts:

> *8. On April 12, 2017, following Pieper's termination and before it had been possible to appoint a replacement for Shop Steward, I [Jeff Sweet] attended the Site along with IBEW 2038's Business Manager, Moe Kovatch, during the normal lunch hour for purpose of discussing disputes and grievances with IBEW 2038 members.*
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> *9. Sam Emke, PCL's Construction Manager refused to allow us to meet with members in the absence of management.*

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[5] See: PCL's Book of Exhibits, Tab 5 – Letter from Ministry of Labour Relations and Workplace Safety to Mr. Pieper dated March 7, 2017.
[6] *Ibid*.
[7] PCL's Book of Exhibits, Tab 2 – Grievance Form dated April 11, 2017.

10 Instead, Emke accompanied us to meet with IBEW 2038 members, and began expressing his animus to IBEW 2038. In the course of his address to IBEW 2038 members who had no realistic opportunity to leave, Emke:

a. Told IBEW 2038 members to report issues only to PCL rather than their union, including where those issues involved harassment, intimidation and coercion by management;
b. Falsely stated that IBEW 2038 had intimidated and coerced members not to cross a picket line, under circumstances where nothing of the sort occurred;
c. Falsely asserted that PCL was entitled to require employees to assist in "investigations" of unspecified purpose without being able to consult with their union, and to automatically discipline employees who fail to do so;
d. Complained about efforts by IBEW 2038 to grieve matters in the workplace, including a wrongful and false insinuation that its previous grievance and complaints (including ones which resulted in payments to employees) were entirely without merit; and
e. Repeatedly referred to the actions of IBEW 2038 and its representatives as "bullshit", and accused IBEW 2038 of not representing the interests of its members.

11. Based on the above facts, PCL has committed unfair labour practices:

a. By intimidating employees in their exercise of rights conferred by Part VI of [T]he Saskatchewan Employment Act, including their right to union representation, to consultation with union representatives and their right to the enforcement of the Collective Bargaining Agreement;
b. By attempting to engage in direct bargaining with employees as to grievances in the workplace;
c. By failing or refusing to recognize IBEW 2038 as the certified bargaining agent, and failing to engage in collective bargaining (in good faith or at all) as to the resolution of disputes include [sic] Pieper's termination; and
d. By terminating Pieper's employment as punishment for, and for the purpose of generally discouraging, activity for IBEW 2038 and the exercise of employees' rights under the SEA.

12. IBEW 2038 therefore requests the following relief:

a. A declaration that PCL has breached the SEA and committed unfair labour practices as set out above;
b. An order prohibiting PCL from continuing to breach the SEA and commit unfair labour practices; and
c. The reinstatement of Pieper to his employment with PCL, with full back wages for all time missed and no disciplinary consequences for his actions taken in good faith as IBEW 2038's shop steward.

[21] At the hearing, Union counsel advised us that the Union was abandoning its request for Mr. Pieper's reinstatement.

[22] On June 8, 2017, PCL filed its formal Reply to this unfair labour practice application. In its Reply, PCL, in addition to disputing a number of the allegations set out in the Union's application, stated at page 3, subparagraph 4(b):

> *The Respondent says that all matters raised by the termination are more properly dealt with by arbitration. The issue of the meeting was merely communication of normal and required procedures and rights of management to communicate with the Union and its members, and as such the application should be dismissed.*

[23] As noted above, the hearing into these two (2) unfair labour practice applications is scheduled to take place on October 3 and 4, 2017. However, PCL wishes these applications to be deferred pending the disposition of the various grievances related to these events. Its' request will be addressed below.

RELEVANT STATUTORY PROVISIONS

[24] The provisions of the *SEA* most relevant on this application read as follows:

> ***6-45****(1) Subject to subsections (2) and (3), all disputes between the parties to a collective agreement or persons bound by the collective agreement or on whose behalf the collective agreement was entered into respecting its meaning, application or alleged contravention, including a question as to whether a matter is arbitrable, are to be settled by arbitration after exhausting any grievance procedure established by the collective agreement.*
> . . . . . .
> ***6-103****(1) Subject to subsection 6-97(3), the board may exercise those powers that are conferred and shall perform those duties that are imposed on it by this Act or that are incidental to the attainments of the purposes of this Act.*
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> *(2) Without limiting the generality of subsection (1), the board may do all or any of the following:*
> . . . . . .
> *(c) make any orders that are ancillary to the relief requested if the board considers that the orders are necessary or appropriate to attain the purposes of this Act[.]*
> . . . . . .
> ***6-111****(1) With respect to any matter before it, the board has the power:*
> . . . . . .
> *(k) to adjourn or postpone the hearing or proceeding;*
> *(l) to defer deciding any matter if the board considers that the matter could be resolved by mediation, conciliation or an alternative method of resolution[.]*

ISSUE

[25] The sole issue for decision on this preliminary matter is whether the Union's two (2) unfair labour practice applications should be deferred or postponed until the grievance arbitration process has been completed?

APPLICABLE JURISPRUDENCE

[26] The parties are agreed that for purposes of this preliminary application the foundational case remains *United Food and Commercial Workers, Local 1400 v Westfair Foods Ltd., et al.*[8] [*Westfair Foods*]. The factual circumstances in *Westfair Foods* resemble those in this case. The Union had filed two (2) grievances on behalf of one of its members. Subsequently, it filed an unfair labour practice application in relation to the same events. This Board decided to defer a hearing into the unfair labour practice application until the grievance arbitration was concluded. On appeal, the Saskatchewan Court of Appeal *per* Bayda CJS concluded the Board had erred in doing so, and directed it to proceed with the unfair labour practice application.

[27] In making this direction, the Court explained at paragraphs 16 and 17:

> *[Retail, Wholesale and Department Store Union v LRB (Sask) and Morris Rod-Weeder Co., 78 C.L.L.C. 14,960] speaks of "an alternative remedy of the same grievance" and makes clear the principle that where a trade union elects both the grievance-arbitration procedure provided for in the collective agreement between the parties and application to the Board for an unfair labour practice order to resolve the same dispute, the Board may consider the trade union's election to use the grievance-arbitration procedure as a relevant factor in determining whether to dismiss the application. The case is authority for the proposition that for such an election to constitute a relevant (as opposed to an "extraneous" or "irrelevant") consideration three preconditions must co-exist: (i) the dispute put before the Board in the application for an unfair labour practice order and the dispute intended to be resolved by the grievance-arbitration procedure provided for in the collective agreement must be the **same**, dispute; (ii) the collective agreement must make possible (i.e. empower) the resolution of the dispute by means of the grievance-arbitration procedure, and (iii) the remedy under the collective agreement must be a suitable alternative to the remedy sought in the application to the Board. . .*
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> *How does the situation respecting "relevance" change where there has been no election by the trade union but the employer asserts that the election was available to the trade union to make? In my respectful view, essentially the same three preconditions must coexist before it can be said that the availability of a grievance-arbitration procedure in a collective agreement is a "relevant" consideration. The approach for establishing that relevance is this. It is necessary first to delineate and define with some precision the dispute between the parties. Next, it is necessary to determine whether the collective agreement empowers the arbitrator to resolve the same dispute and to grant a suitable alternative remedy then the availability of a grievance-arbitration procedure in an agreement is a "relevant" consideration in much the same manner as an actual election was found to be in Morris Rod-Weeder. [Emphasis added.]*

[28] The soundness of the approach adopted by the Court in *Westfair Foods*, and the philosophy animating it, was subsequently confirmed by the Supreme Court of Canada in *Weber v*

[8] (1992), 95 DLR (4th) 541, 1992 CanLII 8286 (SKCA).

Ontario Hydro[9]. There the Supreme Court adopted an "exclusive jurisdiction model". This mode directs that if the essential character of the dispute in question, arises out of the interpretation, application or violation of a collective agreement, its resolution falls to be decided through the grievance arbitration process. It follows that courts or administrative tribunals like this Board must defer to that process. Writing for the majority, McLachlin J. (as she then was) stated:

> *To summarize, the exclusive jurisdiction model gives full credit to the language of s. 45(1) of the Labour Relations Act [of Ontario]. It accords with this Court's approach in [St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219, [1986] 1 S.C.R. 704]. It satisfies the concern that the dispute resolution process which the various labour statutes of this country have established should not be duplicated and undermined by concurrent actions. It conforms to a pattern of growing judicial deference for the arbitration and grievance process and correlative restrictions on the rights of parties to proceed with parallel or overlapping litigation in the courts.*[10]

[29] The Board elaborated on its deferral power in *Communications, Energy and Paperworkers Union of Canada, Local 911 v ISM Information Systems Management Canada Corporation (ISM Canada)* [*ISM Information Systems*][11]. There, Chairperson Love stated as follows:

> *[15] The Board, more recently, reviewed the principles and test for deferral to arbitration or other means of dispute resolution in Teamsters, Local 395 v. PCL Industrial Constructors Inc. [LRB File No. 019-10, 207 CLRBR (2d) 103]. The law and principles regarding the Board's discretion to defer to an arbitrator or "an alternative method of resolution" are equally applicable here. As noted in that case, the majority of the jurisprudence related to deferral by the Board to alternative means of adjudication was developed prior to the amendments to the Act which added section 18(l), which provided specific authority, and discretion, to the Board to "defer deciding any matter if the board considers the matter could be resolved by arbitration or an alternative method of resolution."*
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> *[16] The concept of deferral to arbitration was described by former Chairperson Ball (as he was then) in United Food and Commercial Workers, Local 1400 v. Westfair Foods Ltd., [2002 SKQB 154]. At paragraphs 90 – 92 of that decision, he says:*
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> > *[90] Labour relations boards defer to a labour arbitrator if the essential nature of the complaint arises out of the collective agreement and if an arbitrator can provide complete relief in response to the complaint. The board will hear the complaint if arbitration is unavailable or unsuitable for any reason such as a remedial limitation. The board's deferral does not prejudice the applicant's right to bring the matter back to the board if the arbitrator declines jurisdiction. By taking that approach the board ensures that it does not abdicate its statutory responsibility while recognizing and promoting arbitration as the statutorily mandated scheme for the resolution of employer/employee disputes. See, for example, U.F.C.W., Local 1400 v. Western Grocers, [1993] 1st Quarter Sask. Labour Rep. 195; Saskatoon (City) v. C.U.P.E., Local 59 (1990) 8 C.L.R.B.R. (2d)*

[9] [1995] 2 SCR 929.
[10] *Ibid.*, at para. 58. It should be noted that the section of Ontario's *Labour Relations Act* referred to in this passage is substantively identical to section 6-45 of the *SEA*.
[11] LRB File No. 149-12, 2013 CanLII 1940 (SK LRB).

> *310; Canadian Linen Supply Co. and R.W.D.S.U. (1990) 8 C.L.R.B.R. (2d) 228; Saskatchewan Government Insurance, Regina, Saskatchewan v. Saskatchewan Insurance Office and Professional Employees Union, Local 397 (1987), 15 C.L.R.B.R. (NS) 313; United Steelworkers of America, Local 4728 v. Willock Industries Ltd. (1980) 31 Sask. Labour Rep., No. 5, 72 and see also Valdi Inc., [1980] O.L.R.B. Rep. 1254.*
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> *[91] The deferral approach has not been confined to labour relations boards and is not revolutionary. It was recommended by Professors Swan and Swinton in 1983, when they pointed out the need for human rights' adjudicators to develop doctrines of deference to the decisions of other tribunals based on the same factual situations and commended the deferral approach taken by Professor Kerr in Singh v. Domglas Limited (1980), 2 C.H.R.R. D/285. (See K. Swan and K. Swinton, "The Interaction of Human Rights Legislation and Labour Law" in Studies in Labour Law (Toronto: Butterworths, 1983) 111 at 141).*
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> *[92] The deferral approach has also been recommended by R. H. Abramsky in "The Problem of Multiple Proceedings: An Arbitrator's Perspective" in W. Kaplan, et al., eds., Labour Arbitration Yearbook 1996-97 (Toronto: Lancaster House, 1996) 45 and suggested by The Honourable Mr. Justice William J. Vancise of the Court of Appeal for Saskatchewan in papers presented to the Canadian Bar Association in 1999 (see "Button, Button—Who gets the Button? Which Statutory Forum has Jurisdiction?" (Canadian Bar Association, Ottawa, Ontario, November 19, 1999)) and the University of Calgary, (see "Button, Button—Who gets the Button? Which Statutory Forum has Jurisdiction? (No. 2)" (University of Calgary, Labour, Arbitration and Policy Conference, June 7 and 8, 2000, Calgary, Alberta)).*

[17] The exercise of the Board's jurisdiction to defer to decide any matter as provided in s. 18(l) also aids in judicial efficiency as it avoids the multiplicity of proceedings which often result when parties take a shotgun approach to the remedy which they seek. That is, the aggrieved party files multiple proceedings in various forums seeking essentially the same relief. The difficulty, of course, which this approach presents, is that there is the potential for conflicting decisions to result from the various bodies from which relief has been sought.

[30] The Board has reiterated this position in a number of decisions, most recently: *Saskatchewan Crop Insurance Corporation v Saskatchewan Government and General Employees' Union*[12] [*SCIC*].

[31] In addition to authorities already cited in this Decision, the parties also relied on the following cases: *Administrative and Supervisory Personnel Association v University of Saskatchewan* [*ASPA, 2005*][13]; *Grain and General Services Union (ILWU Canada) v Western Producer Publications Partnership*[14]; *International Brotherhood of Electrical Workers, Local 2067 v Saskatchewan Power Corporation*[15]; *CUPE Local 59 v City of Saskatoon*[16]; *CUPE Local 59 v City of Saskatoon*[17], and *Teamsters Local 395 v PCL Industrial Constructers Inc.*[18].

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[12] LRB File No. 136-17 dated August 11, 2017.
[13] 2005 CanLII 63020, LRB File No. 070-05 (SK LRB).
[14] 2011 CanLII 75706, LRB File No. 043-11 (SK LRB)
[15] 2002 CanLII 52889, LRB File No. 010-02 (SK LRB)
[16] 2009 CanLII 67430, LRB File No. 186-08 (SK LRB)

[32] As often happens, while the applicable legal principles are settled and beyond dispute, the application of those principles to a particular factual situation becomes a source of serious contention between the parties. That is this case.

ANALYSIS

[33] As PCL contends that both unfair labour practice applications should be deferred or postponed until the grievance-arbitration process had been completed, the Board will deal with each application in turn.

A. LRB File No. 258-16

1. PCL's Position

[34] PCL states that at the heart – or as PCL's counsel called it, the "pith and substance" – of this particular application is the interpretation of Article 5:00 of the *Provincial Agreement* which relates to hours of work and overtime. The Union's core allegation is that PCL's representatives intimidated and threatened its members at a workplace meeting by telling them they would be subject to discipline if they were not at the worksite and ready to work by 7:00 a.m. each day. PCL states that it is necessary to determine what is meant by this particular article as a pre-condition to assessing the merits of this particular application. PCL cites section 6-45 of the *SEA* which, in its submission, statutorily removes from this Board's jurisdiction, issues pertaining to the "meaning, application or alleged contravention" of a collective bargaining agreement. An arbitration of the policy grievance[19] on this issue, it submits, may well settle the dispute.

[35] PCL submits further that the discussion which took place at the meeting referred to in this application was an appropriate exercise of the employers "management rights" in accordance with Article 19 of the *Provincial Agreement*.

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[17] 2011 SKCA 148.
[18] 2013 CanLII 1940, LRB File No. 019-10 (SK LRB)
[19] Grievance Form dated November 16, 2016, *supra* n. 2.

2. The Union's Position

[36] The Union takes the position that while the facts underlying both the policy grievance and this unfair labour practice application over-lap considerably, the issues presented in the unfair labour practice application are different and fall squarely within this Board's jurisdiction. In particular, the Union asserts that this application invites this Board to consider the question of whether PCL failed to respect its' role as the exclusive bargaining agent for its members. This involves overseeing the collective bargaining relationship between the parties, a jurisdiction "unique" to the Board which cannot "be assumed or resolved through the grievance process."[20]

[37] The Union asserts further that other allegations contained in this application pertain to the harassment of Mr. Pieper by PCL's representatives. It contends that these allegations will not be adjudicated by the grievance arbitrator.

3. Decision of the Board

[38] Applying the three-part test laid down by the Court of Appeal in *Westfair Foods*, the Board is of the view that, on balance, the unfair labour practice application designated as LRB File No. 258-16 should be deferred pending the resolution of the policy grievance.

3.1 Is the Dispute the Same Dispute?

[39] The Board agrees with PCL that in order to properly address this unfair labour practice application, it is necessary first to determine the proper interpretation to be given to Article 5 of the *Provincial Agreement*, more particularly whether PCL's edict that all employees must be present at the work site and ready to begin work promptly at 7:00 a.m. each day, is consistent with, or contravenes, the collective agreement. In our view, this is more appropriately a question for an arbitrator to resolve in accordance with the agreed upon process set out in Article 14.

[40] The Board acknowledges that other allegations set out in this unfair labour practice application relate to Mr. Pieper's claim that he was harassed by PCL's representatives. These allegations were addressed both by PCL and by Occupational Health and Safety Division of the Ministry of Labour Relations and Workplace Safety. More particularly, Ministry officials concluded that

nothing further should be done in respect of Mr. Pieper's complaint. However, it is possible that these allegations might also form part of Mr. Pieper's termination grievance, a matter squarely within the jurisdiction of an arbitrator.

[41] Consequently, the Board is of the view that, for all intents and purposes, the disputes are essentially the same, a factor that militates against us exercising our discretion to proceed with this unfair labour practice application at this time.

3.2 Can the Grievance Process Resolve the Dispute?

[42] At the outset, the Board observes that the Court of Appeal in *Westfair Foods* stated that this question only requires a consideration of whether an arbitrator is empowered to take up this dispute, and to attempt to resolve it. It does not require that the arbitrator must resolve the dispute in its entirety.

[43] In this particular unfair labour practice application, an arbitrator should be able to resolve most, if not all, of the issues between the parties. An arbitrator will have to determine what, at least in their opinion, the disputed articles of the *Provincial Agreement* mean. For example, should she decide that PCL's interpretation of the collective agreement is correct that could resolve the dispute entirely. This possibility is sufficient to answer this question in the affirmative.

3.3 Can the Grievance Process Provide a Suitable Remedy?

[44] On this aspect of the *Westfair Foods Ltd.* inquiry, it is important to remember that "the remedies available need not be the same in both forums but the remedies available through the grievance and arbitration process must be a suitable alternative to those the Union could obtain before the Board"[21]. This leaves open the possibility that should the remedy granted at arbitration not address all issues, a union is free to return to the Board with outstanding questions relating to the collective bargaining relationship.

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[20] *SCIC*, *supra* n. 12, at para. 31.
[21] *ASPA, 2005*, *supra* n. 13, at para. 40 (3).

[45] The Union's prayer for relief contained in its Amended Unfair Labour Practice application seeks an Order from this Board that PCL refrain from threatening or intimidating its members.[22] The policy grievance requests a finding that PCL is in violation of the *Provincial Agreement* and must compensate members "for their time and inconvenience, including but not limited to overtime for hours required to be worked outside the collectively-bargained regular work day."[23]

[46] The Board is of the view that the proper interpretation of Article 5 has to be ascertained at the very outset. Should an arbitrator agree with PCL's interpretation of the collective agreement, the dispute may very well be at an end. However, if an arbitrator sides with the Union, a suitable remedy likely will follow, at least as it pertains to the threats issued by PCL's representatives.

[47] As a result, this last factor also supports our decision to defer this unfair labour practice application until the arbitration process is concluded, one way or other.

4. Concluding Comments

[48] In conclusion, it is important to stipulate that while the Board has deferred the hearing of this unfair labour practice application, it does not follow we are dismissing it entirely or concluding we are without jurisdiction to address some aspects of it. This point was underscored by the Board in *ASPA, 2005*[24]. In that case, former Vice-Chairperson Zborosky stated as follows:

> *[42] In determining that the Board will defer to the jurisdiction of an arbitrator under the collective agreement, the Board is not making a final determination that it has **no** jurisdiction over the matters in dispute between the parties. In Canadian Union of Public Employees, Local 3736 v North Saskatchewan Laundry and Support Services Ltd., [1996] Sask. LRBR 54, LRB File Nos. 289-95 & 290-95, the Board after determining that it would not be possible to evaluate the allegations which were made in the application without having to interpret the collective agreement, a task which the parties had clearly agreed to place in the hands of an arbitration board, stated at 64:*
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> > *In our view, nearly all of the specific issues which are raised in the application are based on allegations of breaches of the collective agreement, and could be dealt with fully and adequately by the grievance procedure to which the parties have signified their agreement. If we are wrong about this- if an arbitration board declines jurisdiction concerning any of these allegations, or if the grievance procedure cannot provide an adequate remedy – it would be open to the Union, as always, to return to the Board for determination of nay issue. It would also be open to the Union at some future time to point to a pattern of breaches of the*

[22] Amended Unfair Labour Practice application, *supra* n. 3, at p. 4.
[23] Grievance Form dated November 16, 2016, *supra* n. 2, at p. 2.
[24] *Supra,* n. 13.

> *collective agreement as posing a more generalized threat to the Union as the bargaining agent for these employees.*

[43] Also, in Saskatchewan Union of Nurses v South Central District Health Board, [1995] 2nd Quarter Sask. Labour Rep. 281, LRB File No. 016-95, the Board deferred to the grievance procedure and acknowledged that it was possible that an arbitrator might find itself without jurisdiction to decide the dispute in question. The Board stated at 284:

> *Another feature of the approach followed by the Board which should be noted is the acknowledgment by the Board that an arbitrator may ultimately decline jurisdiction or decide that remedial power under the collective agreement is inadequate to address all of the issues in dispute between the parties. In the Western Grocers decision, supra, the Board made this comment:*
>
> > *…If the Board finds, as we do here, that the arbitration tribunal appears to be endowed with the power to decide all disputes which arise from the events on which the allegations are based, it is still open to the board of arbitration to decline jurisdiction on any particular question. Following a finding that any specific issue does not lie within the scope of the grievance and arbitration procedure, the parties can lay before this Board any questions addressed exclusively by The Trade Union Act.*
> >
> > . . . . .
> >
> > *. . .As we see it, this rationale applies not only to questions which are clearly within the jurisdiction of the arbitrator to decide – the possibility of concurrent jurisdiction derived from the collective agreement and The Trade Union Act means that jurisdiction itself will in many cases be in dispute. In our view we should also defer to an arbitrator when the arbitrator has been called upon to decide whether the dispute lies within the scope of the grievance procedure as defined in the collective agreement. As we have point out, in cases where an arbitrator decides that the grievance does not raise a matter which can be dealt with in terms of the collective agreement, it is still open to consider whether that aspect of the dispute which involves the provisions of The Trade Union Act should be addressed.*

[44] On occasion, the Board has issued an order adjourning a party's application sine die to be brought back to the Board at the conclusion of the grievance and arbitration process by either party on notice to the other party if there is any issues remaining that were not dealt with by the arbitration board which heard and decided the grievance. However, in this case for the administration convenience of the Board we are dismissing the application with the understanding that the Union can re-file the application if the grievance and arbitration process does not completely resolve the matter. The Union has not yet filed a grievance and it could take some time before the parties need to return to the Board, if they need to return to the Board at all. In addition should the parties return to the Board, the unfair labour practice application and the reply would likely require amendments in any event. [Emphasis added.]

[49] In our view, this particular application is distinguishable from *APSA, 2005*. Grievances have been filed, the process set out in Article 14:00 of the *Provincial Agreement* has been followed, and, in the case of the termination grievance, a hearing is scheduled for December 2017.

[50] Accordingly, the Board concludes that LRB File No. 258-16 should be deferred until the grievance-arbitration process is concluded. Further, the Board orders that the hearing should be

adjourned *sine die* with the proviso that this unfair labour practice application may be brought back to the Board by either party on notice to the other side should there be outstanding issues remaining between them that were not decided by the arbitration board. The Board makes this Order to preserve the parties' rights, and to ensure this unfair labour practice application is not statute-barred by virtue of sub-section 6-111(3) of the *SEA*.

B. LRB File No. 075-17

1. PCL's Position

[51] PCL contends that this unfair labour practice application should also be deferred until the arbitration process has run its course. It contends that this application, too, involves the interpretation of the *Provincial Agreement*, particularly as it relates to the alleged improper termination of Mr. Pieper.

[52] Furthermore, in relation to the allegations relating to the meeting that took place at the worksite on April 12, 2017, PCL's counsel notes that the Union is not complaining about a meeting taking place. Rather, the Union is asserting it was the discussion which occurred at that meeting, and the fact representatives of management attended this meeting that contravened the *SEA*. PCL's contends that this was an "information meeting" for PCL's employees, and was conducted in accordance which Article 19:00 of the *Provincial Agreement*.

2. The Union's Position

[53] As mentioned earlier, the Union withdrew its remedial request that Mr. Pieper should be reinstated "with full back wages for all time missed and no disciplinary consequences for his actions taken in good faith as IBEW 2038's shop steward"[25].

[54] The Union urged the Board to proceed with a hearing of this unfair labour practice application for two (2) reasons. First, the firing of Mr. Pieper has had a chilling effect on employee's participation in union activities both at, and outside of, the workplace. The Union conceded that the legitimacy of Mr. Pieper's termination is a matter for an arbitration panel. However, it maintained that the effect of his termination on the collective bargaining relationship between the Union and PCL, and

more particularly the impact it has had on the Union's status as the exclusive bargaining agent for the employees, can only be assessed and corrected by this Board.

[55] Second, the Union asserts that the intimidating manner in which the meeting was conducted as well as the demeaning statements about the Union made by a PCL representative are matters for this Board, and not an arbitration panel. The issues generated by this meeting go to the heart of the collective bargaining process and must be decided by us. On this point, counsel for the Union relied upon the following statement from the Board's very recent decision in *SCIC*[26]:

> *[30] Collective bargaining is one of the underlying objects of the SEA and its various provisions. The Board must be diligent to insure that its role in sponsoring and fostering collective bargaining is maintained. If, as alleged by SGEU, the discipline was an attempt to disrupt or influence the collective bargaining process, the Board cannot ignore such activity and defer tis jurisdiction over such an important aspect of the labour relations scheme set out in the SEA to another forum.*

3. Analysis and Decision

[56] Upon reviewing the Union's allegations set out in LRB File No. 075-15, the Board determined that, in fact, there are two (2) claims being made. First, the Union claims that Mr. Pieper's allegedly illegitimate termination contravened the *SEA*. Second, the Union claims that the nature and content of the meeting that took place on April 12 of this year, contravened the *SEA*. Furthermore, the Union has withdrawn any request for a remedy in relation to Mr. Pieper's termination.

[57] For the following reasons, the Board is of the view that this unfair labour practice application can be effectively bifurcated. The allegations pertaining to Mr. Pieper's termination will be deferred to the arbitration panel scheduled to hear his termination grievance in December 2017. However, those allegations relating to the April 12th meeting at the worksite set out in this unfair labour practice application can proceed to a hearing on October 3 and 4, 2017, as scheduled.

3.1 Is the Dispute the Same Dispute?

[58] This inquiry may be quickly answered. The allegations relating to Mr. Pieper's termination are the same as those raised in the termination grievance, a point conceded by the Union.

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[25] LRB File No. 075-17, Union's Unfair Labour Practice Application, at p. 3.
[26] *Supra* n. 12.

The circumstances surrounding his termination allege a violation of the collective agreement and, as a consequence, should be addressed by an arbitration panel. As a consequence, the answer is "yes" respecting the unfair labour practice allegations based on Mr. Pieper's termination.

[59] However, respecting the unfair labour practice allegations pertaining to the April 12th meeting, the answer to this inquiry is "no". An arbitration panel does not have the jurisdiction to determine whether the conduct and behavior of PCL's representatives at that meeting contravene section 6-62 of the *SEA*. Rather, the question of whether PCL's communications with its employees amounts an unfair labour practice engages the "unique jurisdiction granted to the Board to oversee the collective bargaining relationship"[27].

[60] Accordingly, these considerations persuade this Board that this unfair labour practice application should be bifurcated.

3.2 Can the Grievance Process Resolve the Dispute?

[61] As with the previous inquiry, the Board concludes that in respect of the termination grievance, the arbitration panel can and, very likely, will resolve that aspect of the dispute between the Union and PCL.

[62] However, the grievance procession cannot resolve those aspects of the unfair labour practice application relating to the April 12th meeting. As already noted, the Board is of the view that an arbitration panel has no jurisdiction to adjudicate those allegations. Rather, the Union must come to the Board to seek a resolution to this dispute.

3.3 Can the Grievance Process Provide a Suitable Remedy?

[63] Again, this Board concludes that in relation to Mr. Pieper's termination grievance, an arbitration panel will provide not only a suitable remedy, but also a complete one. Our conclusion is underscored by the fact that Union counsel withdrew its request for Mr. Pieper's full reinstatement as part of the remedy it requested on the Unfair Labour Practice application.

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[27] *Supra* n. 12, at para. 31.

[64] However, it is not possible for an arbitration panel to provide any remedy respecting the Union's allegations of an unfair labour practice flowing from the events that occurred at the April 12th meeting.

4. Conclusion

[65] Accordingly, for the foregoing reasons, the Board concluded that the hearing of LRB File No. 075-17 should be bifurcated. The allegations of unfair labour practices in relation to the termination of Mr. Jaise Pieper should be deferred until the arbitration scheduled for December 2017 has been concluded. However, the hearing into allegations of unfair labour practices flowing from the meeting held on April 12, 2017 should proceed on October 3 and 4, 2017 as scheduled.

[66] In addition, the Board directs, as it did in relation to LRB File No. 258-16, that the hearing respecting the allegations relating to Mr. Pieper's termination should be adjourned *sine die* with the proviso that those aspects of this unfair labour practice application may be brought back to the Board by either party on notice to the other side should there be outstanding issues remaining between them that were not decided by the arbitration board. The Board makes this Order to preserve the parties' rights, and to ensure this unfair labour practice application is not statute-barred by virtue of sub-section 6-111(3) of the *SEA*.

ORDERS OF THE BOARD

[67] The Board makes the following Orders pursuant to section 6-103; clause 6-111(1)(k), and clause 6-111(1)(l) of the *SEA*:

1. **THAT** the Union's unfair labour practice application designated LRB File No. 258-16 should be deferred until the grievance process is concluded. The hearing of this application is adjourned *sine die* with the proviso that it may be renewed before the Board by either party on notice to the other side should there be outstanding issues remaining between them that were not resolved by the grievance process.

2. **THAT** the aspects of the Union's unfair labour practice application designated LRB File No. 075-17 relating to Mr. Jaise Pieper's termination should be deferred to the arbitration panel scheduled to adjudicate his termination grievance in December 2017. The hearing of those aspects of LRB File No. 075-17 is adjourned *sine die* with the provision that it may be renewed before the Board by either party on notice to the other side should there be

outstanding issues remaining between that were not resolved by the arbitration panel.

3. **THAT** the hearing of those aspects of the Union's unfair labour practice application designated LRB File No. 075-17 relating to the meeting held on April 12, 2017 should proceed on October 3 and 4, 2017 as scheduled.

[68] An appropriate Board Order will accompany these Reasons for Decision

[69] The Board extends its gratitude to counsel for their written and oral submissions. They were very helpful to us in our deliberations.

[70] This is a unanimous decision of the Board.

DATED at Regina, Saskatchewan, this **18th** day of **September, 2017**.

LABOUR RELATIONS BOARD

Graeme G. Mitchell, Q.C.
Vice-Chairperson