SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE and DEPARTMENT STORE UNION, LOCAL 568, Applicant v. SIGNAL INDUSTRIES (1998) LTD, Respondent

LRB File No. 201-18; November 5, 2018

Vice-Chairperson, Kenneth G. Love Q.C.; Members: Aina Kagis and Mike Wainwright

For the Applicant:	Larry Kowalchuk
For the Respondent:	Larry Seiferling Q.C. and Steven Seiferling

Interim Relief – Union applies for interim relief respecting an announced closing of the employer's business. Board reviews facts and its jurisprudence. Board finds that an arguable case is made out, but finds that the balance of convenience does not favour the grant of interim relief.

Interim Relief – Board reviews relief sought in interim application. Board finds that relief sought on interim basis amounts to the same relief as being sought in the underlying application. Board declines to provide interim relief in the circumstances.

Arguable Case – Board reviews its usual test for interim relief. Board finds that the application and affidavits give rise to an arguable case.

Balance of Convenience – Board reviews its usual test for interim relief. Board finds that the balance of convenience does not favour grant of interim relief.

REASONS FOR DECISION

Background:

[1] This is an application by the Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 568 ("RWDSU" or the "Union"). RWDSU has applied for interim relief against the intended closure of the business operations of Signal Industries (1998) Ltd.

("Signal" or the "Employer") at 1300 8th Avenue, Regina, Saskatchewan. For the reasons which follow, we decline to order any interim relief in this case.

Facts:

[2] RWDSU was designated by this Board as the bargaining representative for employees of Signal Industries Ltd. by Order dated December 9, 1971. On or about January 5, 1998, the ATS Group of Companies purchased Signal Industries Ltd, and continued to operate the business through Signal. The parties have bargained collectively since 1998, reaching several collective agreements, the last of which was set to expire on February 29, 2019.

[3] On August 21, 2018, Signal advised the Union that it would be closing the Regina location effective November 30, 2018. In that letter, Signal served notice of the closure of the Regina location and advised employees that their employment would end on November 30, 2018. Signal also advised the Union of the closure by letter dated August 21, 2018. In that letter, Signal noted that 14 union members were impacted by the closure decision.

[4] Also on August 21, 2018, Signal advised the Minister of Labour Relations and Workplace Safety of the impending closure of the business effective on November 30, 2018. Attached to that letter was a complete listing of the employees affected by the closure.

[5] On September 5, 2018, the Union wrote to Signal giving notice of its desire to negotiate a workplace adjustment plan due to the impending closure of the operations in Regina. On September 5, 2018, Signal responded acknowledging receipt of the notice to bargain collectively to develop a workplace adjustment plan. While reserving its right to challenge the applicability of the technological change sections of *The Saskatchewan Employment Act* (the "*SEA*"), Signal agreed to meet with the Union.

[6] In its letter, the Union also requested that Signal provide disclosure of certain documents. In its reply, Signal declined to provide the requested documents.

[7] On September 5, 2018, representatives of Signal met with the Union. At that meeting Signal deposed that it informed the Union that the closure of the Plant "was final and permanent, and that Signal was going to be wound up". Signal deposed that it also advised the Union that the business premises occupied by the business would be sold as a part of the closure.

[8] By an email dated September 18, 2018, the Union again requested that Signal provide information to it concerning the business of Signal. In its response dated September 20, 2018, Signal again declined to provide any information to the Union. It also advised the Union that no Saskatchewan Employees would be performing bargaining unit work in Saskatchewan following the closure on November 30, 2018.

[9] On September 19, 2018, the Union filed a grievance against Signal pursuant to the Collective Bargaining Agreement alleging a violation of the agreement with respect to the termination of all of the unionized employees.

[10] The Union then filed this application for interim relief requesting an Order that:

> *The Respondent not proceed with the closure of the plant in Regina whose employees are represented by the Applicant until the Board has heard and determined the matter alleged in LRB File Nos. 199-18 and 200-18 and issued Orders in those matters.*

Relevant statutory provision:

[11] The following provisions of the *SEA* are relevant to this proceeding:

> ***Unfair Labour Practices***
>
> ***Unfair labour practices – employers***
>
> ***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:*
>
> *(g) to discriminate with respect to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including termination or suspension or threat of termination or suspension of an employee, with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in a proceeding pursuant to this Part;*
>
> …
>
> *(r) to contravene an obligation, a prohibition or other provision of this Part imposed on or applicable to an employer.*
>
> *(4) For the purposes of clause (1)(g), there is a presumption in favour of an employee that the employee was terminated or suspended contrary to this Part if:*

(a)an employer or person acting on behalf of the employer terminates or suspends an employee from employment; and

(b)it is shown to the satisfaction of the board or the court that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right pursuant to this Part.

(5) For the purposes of subsection (4), the burden of proof that the employee was terminated or suspended for good and sufficient reason is on the employer.

Technological Change and Organizational Change

Technological change and organizational change

6-54*(1) In this Division:*

(a) ***"organizational change"*** *means the removal or relocation outside of the bargaining unit by an employer of any part of the employer's work, undertaking or business;*

(b) ***"technological change"*** *means:*

(i) the introduction by an employer into the employer's work, undertaking or business of equipment or material of a different nature or kind than previously utilized by the employer in the operation of the work, undertaking or business; or

(ii) a change in the manner in which the employer carries on the work, undertaking or business that is directly related to the introduction of the equipment or material mentioned in subclause (i).

(2) An employer whose employees are represented by a union and who proposes to effect a technological change or organizational change that is likely to affect the terms, conditions or tenure of employment of a significant number of the employees shall give notice of the technological change or organizational change to the union and to the minister at least 90 days before the date on which the technological change or organizational change is to take effect.

(3) The notice mentioned in subsection (2) must be in writing and must state:

> *(a) the nature of the technological change or organizational change;*
>
> *(b) the date on which the employer proposes to effect the technological change or organizational change;*
>
> *(c) the number and type of employees likely to be affected by the technological change or organizational change;*
>
> *(d) the effect that the technological change or organizational*

change is likely to have on the terms, conditions or tenure of employment of the employees affected; and

(e) any other prescribed information.

(4) The Lieutenant Governor in Council may make regulations specifying the number of employees that is deemed to be "significant" for the purpose of subsection (2) or the method of determining that number.

Application to board for an order re technological change or organizational change

6-55*(1) A union may apply to the board for an order pursuant to this section if the union believes that an employer has failed to comply with section 6-54.*

(2) An application pursuant to this section must be made not later than 30 days after the union knew or, in the opinion of the board, ought to have known of the failure of the employer to comply with section 6-54.(3)On an application pursuant to this section and after giving the parties an opportunity to be heard, the board may, by order, do all or any of the following:

(a) direct the employer not to proceed with the technological change or organizational change for any period not exceeding 90 days that the board considers appropriate;

(b) require the reinstatement of any employee displaced by the employer as a result of the technological change or organizational change;

(c) if an employee is reinstated pursuant to clause (b), require the employer to reimburse the employee for any loss of pay suffered by the employee as a result of the employee's displacement.

(4) A board order made pursuant to clause (3)(a) is deemed to be a notice of technological change or organizational change given pursuant to section 6-54.

Workplace adjustment plans

6-56*(1) If a union receives notice of a technological change or organizational change given, or deemed to have been given, by an employer pursuant to section 6-54 or 6-55, the union may serve notice on the employer in writing to commence collective bargaining for the purpose of developing a workplace adjustment plan.*

(2) The written notice mentioned in subsection (1) must be served within 30 days after the date on which the union received or was deemed to have received the notice.

(3) On receipt of a notice pursuant to subsection (1), the employer and the

union shall meet for the purpose of collective bargaining with respect to a workplace adjustment plan.

(4) A workplace adjustment plan may include provisions with respect to any of the following:

> *(a) consideration of alternatives to the proposed technological change or organizational change, including amendment of provisions in the collective agreement;*
>
> *(b) human resource planning and employee counselling and retraining;*
>
> *(c) notice of termination;*
>
> *(d) severance pay;*
>
> *(e) entitlement to pension and other benefits, including early retirement benefits;(f)a bipartite process for overseeing the implementation of the workplace adjustment plan.*

(5) Not later than 45 days after the union received a notice of technological change or organizational change pursuant to section 6-54, the employer or the union may request the director of labour relations to direct a labour relations officer to assist the parties in collective bargaining with respect to a workplace adjustment plan.

(6) If a union has served notice to commence collective bargaining pursuant to subsection (1), the employer shall not effect the technological change or organizational change with respect to which the notice has been served unless:

> *(a) a workplace adjustment plan has been developed as a result of collective bargaining;*
>
> *(b) the minister has been served with a notice in writing informing the minister that the parties have engaged in collective bargaining and have failed to develop a workplace adjustment plan; or*
>
> *(c) a period of 90 days has elapsed since the notice pursuant to subsection (1) has been served.*

When Division does not apply

6-57*(1) This Division does not apply if:*

> *(a) a collective agreement contains provisions that are intended to assist employees affected by any technological change or organizational change to adjust to the effects of the technological change or organizational change; or*
>
> *(b) subject to subsection (2), on the application of the employer, the board relieves the employer from complying with this Division.*

(2) The board may make an order pursuant to clause (1)(b) only if the board is satisfied that the technological change or organizational change must be implemented promptly to prevent permanent damage to the employer's operations.

General powers and duties of board

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 attainment of the purposes of this Act.*

(2) Without limiting the generality of subsection (1), the board may do all or any of the following:

(a) conduct any investigation, inquiry or hearing that the board considers appropriate;

(b) make orders requiring compliance with:

(i) this Part;

(ii) any regulations made pursuant to this Part; or

(iii) any board decision respecting any matter before the board;

(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;

(d) make an interim order or decision pending the making of a final order or decision

Union's arguments:

[12] The Union argued that the work which was being done by the Employer's plant in Regina would continue to be done in Alberta by non-union workers. That work, it argued, was primarily providing signage for the Government of Saskatchewan. It also argued that previously, the Employer had closed another unionized plant in Manitoba.

[13] The Union argued that the Employer was refusing to bargain collectively with respect to the closure of the facility in Regina. The Union also argued that by virtue of the closure of the Employer's business that the employees would lose their right to bargain collectively or exercise their rights of association. This it argued, created irreparable harm to the affected employees and outweighed any harm to Signal.

[14] In support of its arguments, the Union relied upon *United Food and Commercial Workers Union, Local 649 v. Federated Co-operatives Limited*[1], *Canadian Union of Public Employees, Local 1949 v. Legal Aid Saskatchewan*[2], *Elmwood Residences Inc. v. SEIU-West*[3] *International Brotherhood of Electrical Workers, Local 2038 v. Active Electric*[4], *RWDSU v. 101109823 Saskatchewan Ltd.*[5], *RWDSU v. 101109823 Saskatchewan Ltd.*[6], *RWDSU v. Saskatoon Co-operative Association Limited and United Food and Commercial Workers Union, Local 1400*[7], and *RWDSU v. Regina Exhibition Association*[8]

Employer's arguments:

[15] The Employer provided a written brief and case authorities which we have reviewed and found helpful.

[16] The Employer argued that no unfair labour practice could be founded on section 6-62(1)(g) of the *SEA* as alleged in one of RWDSU's underlying applications. In support of its position, the Employer cited *Societe de la Place des Arts de Montreal v. International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Stage Local 56*[9] and *Plourde v. Wal-Mart Corp*[10], arguing that the closure of a business is a complete answer to the issue of discrimination based on union activity.

[17] The Union also argued that this Board had, in its decision in *RWDSU v. 101109823 Saskatchewan Ltd.*[11], already dealt with the issue of whether a technological change or business shutdown would trigger a violation of section 6-62(1)(g) of the *SEA*. The Employer argued that it had provided all required statutory notices, all of which pre-dated the Union's underlying applications.

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[1] LRB File No. 171-17 & 232-17 Letter decision dated July 18, 2018, 2018 CanLII 68445 (SK LRB)
[2] 2018 CanLII 91940 (SK LRB)
[3] 2018 CanLII 38246 (SK LRB)
[4] 2018 CanLII 38245 (SK LRB)
[5] 2013 CanLII 83711 (SK LRB)
[6] 2014 CanLII 64280 (SK LRB)
[7] 2018 CanLII 68443 (SK LRB)
[8] [1997] S.L.R.B.D. No. 66, LRB File Nos. 256-97, 266-97, 308-97, 321-97 & 279-97
[9] 2004 SCC 2
[10] 2009 SCC 54, [2009] 3 S.C.R. 465
[11] 2014 CanLII 64280 (SK LRB)

[18] The Employer also argued that the closure did not give rise to an organizational or technological change as spelt out in the *SEA*. It relied upon the decision of our Court of Queen's Bench in *Regina Exhibition Association and Doug Cressman v. RWDSU*[12].

[19] Even had there been a technological or organizational change, Signal argued that it had fully complied with all of the relevant provisions of the *SEA.*

[20] Signal argued that the application for interim relief should be determined based upon the considerations set forth by the Supreme Court in *RJR MacDonald Inc. v. Canada (Attorney General)*[13]. It argued that to succeed, the Union needed to show a strong *prima facie* case, irreparable harm, and that the balance of convenience favours the granting of the requested relief. It argued that the Union had failed to provide evidence sufficient to satisfy any of these criteria.

Analysis:

[21] The Board's jurisprudence and the test it utilizes in its analysis of whether or not to grant interim relief is well established. The onus of proof falls upon the party seeking the interim relief to satisfy the Board that interim relief is appropriate and should be granted. Most recently, the Board spelled out the test in its decision in *Canadian Union of Public Employees, Local 1949 v. Legal Aid Saskatchewan*[14]. What the applicant is required to show is that it has an arguable case and that balance of convenience[15] favours the grant of the interim relief.

Has an Arguable Case Been Demonstrated?

[22] As noted in the *Legal Aid* decision, the test for an arguable case is not a rigorous one. At paragraph [29], the Board says in part regarding this test:

> *[29] The Board has often stated that this is not a rigorous standard. An applicant "need not demonstrate a probable violation of the Act, as long as the main application reasonably demonstrates more than a remote or tenuous possibility.*

[12] 1998 CanLII 13912
[13] 1994 CanLII 117 (SCC), 111 D.L.R. 94th) 385, [1994] S.C.J No. 17
[14] 2018 CanLII 91940 (SK LRB)
[15] Sometimes referred to by the Board as the "balance of labour relations harm"

[23] Our long standing jurisprudence does not support the more rigorous standard of review advocated by Signal based on *RJR Reynolds*. The Board has had considerable opportunity since *RJR Reynolds* was determined to adopt this more stringent standard and has not done so. Nor are we convinced in this case to do so.

[24] The Board's jurisprudence established a two-part test for the granting of interim relief. Those two components are the demonstration by the Applicant of an arguable case and a demonstration that the balance of convenience favours the grant of the interim relief or, as it is sometimes referred to as the labour relations harm to one party over the other should the requested relief be granted.

[25] Additionally, the Board will not grant interim relief which tantamount to giving the Union most, if not all, of the relief it seeks on the main application.[16]

[26] In its determination of whether or not the Union has demonstrated an arguable case, the Board does not attempt to determine if the demonstrated case will, in the final result, be well founded. Rather, it seeks to insure that there is an issue between the parties that deserves to be determined by the Board. In its decision in *SGEU v. The Government of Saskatchewan*[17], at paragraph 31, the Board says:

> *[31] In the first part of the test, the Board is called upon to give consideration to the merits of the main application but, because of the nature of an interim application, we do not place too fine a distinction on the relative strengths or weakness of the applicant's case. Rather, the Board seeks only to assure itself that the main application raises, at least, an "arguable case.*

[27] In this case, the Union's case is based upon 2 Applications LRB File No. 199-18 alleges an Unfair Labour Practice against Signal under sections 6-62(1)(g), 6-62(4) and 6-62(1)(r) of the *SEA*. Essentially, that application alleges that the employees that were laid off by Signal were laid off in violation of their right to associate under the *SEA*.

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[16] See RWDSU v. Tai Wan Pork Inc., LRB File No. 076-00, [2000] SLRBD No. 21
[17] 2010 CanLII 81339 [SK LRB], LRB File No. 189-10

[28] The second application (LRB File No. 200-18) was filed under section 6-55 alleging that the layoffs constituted a technological change in respect of which Signal was required to bargain collectively with the Union.

[29] In its arguments, Signal argued that there was settled jurisprudence that the layoff of an employee resultant from a business closure was not a violation of the *SEA*. It relied upon the Supreme Court decision in *Societe de la Place des Arts de Montreal v. International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Stage Local 56*[18] and *Plourde v. Wal-Mart Corp*[19]. In rebuttal, RWDSU argued that those cases were no longer good law and had been reconsidered by the Federal Court of Appeal in *Fedex Freight Canada Corp. v. Teamsters Local Union No. 31*[20] *and U.F.C.W., Local 503 v. Wal-Mart*[21]

[30] Both of these cases cited by the Union in reply were determined based upon the statutory freeze provisions of the *Quebec Labour Code* (Wal-mart) and the *Canada Labour Code* (Fedex). In *Wal-Mart*, the *Plourde decision* and the *Place des Arts* decisions were distinguished by the Supreme Court.

[31] At this stage of the proceedings, it is not necessary to engage in an exhaustive review of the case law to determine its applicability to the current case. We need only determine if the Applicant has raised an arguable case. Given the difference of view between the parties, there appears to be an arguable case regarding the impact of a layoff on closure on the rights granted by the *SEA* to employees. I reaching this conclusion, we are making no determination of the merits of Union's case, merely saying that it has raised an arguable case.

[32] Having concluded that an arguable case has been founded with respect to one of the two applications, it is unnecessary to make any further review regarding this requirement.

Does the Balance of Convenience Favour the Union or Signal?

[33] The second part of the test utilized by the Board with respect to the grant of Interim Relief is whether the balance of convenience favours the issuance of an interim Order. While similar to the test utilized by the superior courts in a civil context, the terminology is

[18] 2004 SCC 2
[19] 2009 SCC 54, [2009] 3 S.C.R. 465
[20] 2017 FCA 78 (CanLII)
[21] [2014] 2 SC% 323, 2014 SCC 45 (CanLII)

somewhat different. In *RWDSU v. Aaron's Furniture*[22], the Board described this portion of the test as follows:

> *[26] The second part of the test is whether or not the balance of convenience favours the issuance of an interim order. While there are other considerations…this factor [i.e. balance of convenience] is similar to the requirement that an applicant for interim relief must show that the labour relations harm in not issuing the interim order outweigh the labour relations harm in issuance of the requested order. At common law, this is generally regarded as the requirement to show irreparable harm if the interim order is not made.*

[34] In *Re Prairie Micro-tech Inc*.[23], the Board elaborated upon what an applicant needs to demonstrate on this aspect of the inquiry. At pp. 5 & 6, the Board says:

> *Whether it is described as an interlocutory injunction or an interim order. . .what the Board is being asked to do is to issue an order for relief in circumstances where there is no opportunity for the parties to present evidence, and no full consideration can be given to the merits of the complaints enumerated in the application. Under these conditions, it is our view that the applicant must be required to show that there will be some prejudice to them which cannot be fairly addressed if they are required to await the full hearing and determination of the main application. There are, no doubt, circumstances in which the Board would issue orders pursuant to Section 5.3 without putting the applicant to such a test, but in this kind of case, where we are being asked to issue an order without the benefit of a hearing, we feel it is necessary that the applicant provide us with a persuasive rationale for granting relief in the form of a description of the harm which will accrue to them if the order is not granted. [Emphasis added.]*

[35] Applying the balance of convenience test, we have concluded that the Union has failed to persuade us that our early intervention is required in this case.

[36] We reach this conclusion for a number of reasons. Firstly, we are not convinced that any damage to the Union, or the affected employees will be irreparable and not compensable in damages should a breach be ultimately found. Secondly, we heard at the

[22] 2016 CanLII 1307 (SK LRB), 282 CLRBR (2d) 281
[23] [1994] SLRBD No. 62

hearing that the parties had met, albeit briefly, to negotiate and Signal indicated it was prepared to continue to negotiate. Thirdly, the closure will not be effective until November 30, 2018 which makes any Order at this stage somewhat premature. Finally, the interim relief sought is tantamount to giving the Union most, if not all, of the relief it seeks on the main application.

[37] The relief sought by the Union in this application is for an Order that:

> *The Respondent Employer not proceed with the closure of the plant in Regina whose employees are represented by the Applicant until the Board has heard and determined the matters in LRB File Nos. 199-18, 200-18 and issued Orders in those matters.*

[38] At the hearing, the Union also asked that we make an Order that Signal bargain in good faith and provide information which the union has requested to the Union.

[39] The Union's argument in favour of a finding of irreparable harm is tied to its argument that the harm caused to the employees is a breach of their association rights under the *SEA*. That harm, if it exists, is not a present harm, and is prospective, insofar as any harm will not occur until the plant closure on November 30, 2018. Additionally, should that harm be determined to have occurred, the Board can order that the employees be compensated in damages or, presumably, an Order that the plant be re-opened, if possible and practicable.

[40] Contrast the prospective damage to the damage which would occur to Signal if it were ordered at this stage to discontinue its plant closure. That would undoubtedly cause damage if their position was ultimately successful. While the damage would be monetary in nature, it is uncertain if any such damages could be repaid by the employees.

[41] There is no advantage for either party based upon the above.

[42] At the hearing of this matter, counsel for the Union acknowledged that the communication by Signal to the Minister of Labour Relations and Workplace Safety satisfied the requirements of section 6-54(3). While Signal did not acknowledge any duty to bargain collectively, it stated, through its counsel, that it was prepared to continue to discuss the closure with the Union. At this stage of the proceedings, we would prefer not to predetermine the question which may be ultimately resolved between the parties. As such, an interim Order, is not, in our opinion necessary or desirable. Interim Orders are within the discretion of the Board. In these circumstances, the Board would not exercise its discretion to issue an Order.

[43] The closure of the plant will not occur until November 30, 2018. If the parties wish, the Board may be able to conduct an expeditious hearing of the matter prior to that date and make a full inquiry into the facts underlying the two applications. This is the course which is usually preferred by the Board. To make an Order in the present case prejudges the ultimate outcome and should not be done on the basis of affidavit evidence when a full hearing could be available to the parties.

[44] Finally, and importantly, apart from the supplemental relief requested by the Union at the hearing, the requested Order would effectively provide the same relief sought in the underlying applications, arresting the plant closure and layoff of the employees affected. Again, it is preferable that the parties seek an expedited hearing of this matter rather than seek interim relief which grants them everything sought in the final application.

[45] With respect to the additional relief requested at the hearing, that is a procedural matter which can be reviewed during the processing of the applications proper. Again, without a factual foundation and a determination regarding whether or not Signal is required to bargain in good faith and that the failure to produce documents is a violation of this duty, we are unwilling to make an interim Order in that regard.

[46] For these reasons, the application for Interim Relief is denied. An appropriate Order will accompany these reasons. This is a unanimous decision of the Board.

DATED at Regina, Saskatchewan, this 5th day of November, 2018.

LABOUR RELATIONS BOARD

Kenneth G. Love Q.C.
Vice-Chairperson