



**SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Applicant v
GOVERNMENT OF SASKATCHEWAN, Respondent**

LRB File No. 082-19; February 28, 2021

Vice-Chairperson, Gerald Tegart; Board Members: Joan White and Maurice Werezak

For the Applicant: Crystal L. Norbeck and Samuel Schonhoffer

For the Respondent: Jared G. Biden and Curtis W. Talbot, Q.C.

**Unfair labour practice – Fitness testing for wildland firefighters – Employer's
right to determine test to be used**

**Unfair labour practice – Whether collective agreement reached based on
discussions in meeting – No agreement established**

REASONS FOR DECISION

Introduction:

[1] Gerald Tegart, Vice-Chairperson: This is an unfair labour practice application brought by the Saskatchewan Government and General Employees' Union ("the union" or "SGEU") against the Government of Saskatchewan ("the employer") respecting an agreement the union maintains it reached with the employer during a meeting on April 1, 2019, ("the April 1 meeting") concerning the fitness testing to be used for wildland firefighters then employed or to be employed in the Saskatchewan Ministry of Environment ("the ministry") for the 2019 fire season. The employer maintains that no agreement was reached and that the employer chose a fitness test to be used in 2019 based on the exercise of its management rights.

[2] The hearing of this matter proceeded by Webex on October 26, 27 and 28, 2020.

Evidence:

[3] The union called three witnesses – Donna Cook, Barry Nowoselsky and John Rudd.

[4] Ms. Cook is presently a labour relations officer with the union, a position she has held since December of 2019. At the time of the April 1 meeting, she was a radio dispatcher employed in the ministry and working in Hudson Bay. She was a member of the union and a chief steward. She attended the April 1 meeting and took relatively detailed notes of the discussions that took place. Her notes were introduced in evidence.

[5] Mr. Nowoselsky has been the chair of the union's public service sector bargaining committee for several years. That committee is responsible for collective bargaining for roughly 10,000 union members employed in the executive government, including those in the ministry. He has had involvement in and has knowledge of the history relevant to the within application and the circumstances leading up to and following the April 1 meeting.

[6] During the period around the April 1 meeting, Mr. Rudd was employed in the ministry's Wildfire Management Branch. He was a member of the union and the chief steward in the Prince Albert area. He is familiar with the history of fitness testing for wildland firefighters and attended the April 1 meeting.

[7] The employer called two witnesses – Steve Roberts and Karl Austman.

[8] Mr. Roberts has been the senior manager responsible for wildfire management in Saskatchewan since 2004 and, as such, has direct knowledge of the history of fitness testing in Saskatchewan since that time. During the period around the April 1 meeting he held the position of Executive Director, Wildlife Management in the ministry. He was directly involved in discussions and planning relevant to the testing to be used for the 2019 wildfire season and attended the April 1 meeting.

[9] Mr. Austman has been employed at the Public Service Commission of Saskatchewan since 2016. At the time of the hearing, he was the Executive Director of the Employee and Labour Relations Branch. During the period leading up to and immediately following the April 1 meeting, he was a senior negotiator in that branch. He had been working with the ministry on issues related to fitness testing since March of 2017.

[10] At the times relevant to the within application, the Wildfire Management Branch was part of the Ministry of Environment. The branch and its employees are now part of the Saskatchewan Public Safety Agency, which is a Treasury Board Crown Agency.

[11] The history pertinent to the within application begins in 1998 and 1999, when the ministry moved to introduce fitness testing for the firefighters it employed to fight seasonal wildfires in the province. In 1999, the employer and the union entered into a letter of understanding ("the letter of understanding") that allowed the employer to impose testing for firefighters hired after April 1, 1998, but that gave grandfathered rights to firefighters employed prior to that date. The test to be used for new hires going forward from that date ("non-grandfathered firefighters") would be what

is called the Arduous Test (“the arduous test”). Firefighters who were already employed on that date (“grandfathered firefighters”) would be required to perform a less difficult test, referred to as the Moderate Test (“the moderate test”).

[12] The arduous test was comprised of a screening component and three performance components to be completed consecutively:

- (a) completing a three-mile hike in a field setting with a 45-pound pack dressed in full fire gear and footwear in less than 45 minutes;
- (b) completing an upright row of 18 repetitions with a barbell weighing 51 pounds;
- (c) carrying a Mark 3 fire pump 100 metres, carrying two 100-foot lengths of rolled fire hose 300 metres, and advancing a fully charged wildlife hose 200 metres in less than 4 minutes 10 seconds.

[13] The ministry continued to use the arduous test for non-grandfathered firefighters until 2012, when it began using a test known as the WFX-FIT test (“the WFX-FIT test”).

[14] The WFX-FIT test was developed through the Canadian Interagency Forest Fire Centre (“CIFFC”), which is a national umbrella organization comprised of member wildland fire management agencies across Canada, including Saskatchewan’s agency.

[15] The WFX-FIT test is comprised of a screening component and four performance components:

- (a) carry pump on back;
- (b) hand carry pump;
- (c) hose pack lift and carry on back;
- (d) charged hose advance.

[16] The WFX-FIT test is normally done in a gymnasium or other indoor facility. The time a firefighter takes to complete the test is also a component of the test. The time within which a firefighter is required to complete the test is normally referred to as a “cut score”.

[17] Firefighters employed in member agencies can be shared to work in other jurisdictions pursuant to a mutual aid and resource sharing agreement (“MARS”). However, to be eligible to work in another jurisdiction, a Saskatchewan firefighter (to use that example), must have completed the WFX-FIT test in 14 minutes 30 seconds, which is referred to as the “national cut score” or the “national standard”.

[18] Each member agency can set its own cut score for firefighters wanting to qualify for work as a firefighter in that agency. Saskatchewan originally set its cut score, also referred to as its “agency standard”, at 17 minutes 15 seconds (“the original standard”).

[19] Wildland firefighting is largely seasonal work. Firefighters are recalled each spring and, prior to working, must successfully complete fitness testing.

[20] In May of 2012, the union filed four policy grievances relating to the introduction of the WFX-FIT test. The arbitrator issued his award respecting the grievances (“the arbitration award”) in *Saskatchewan (Environment) v Saskatchewan Government and General Employees’ Union*, 2015 CanLII 85340 (SK LA) on December 16, 2015. The arbitrator summarized his conclusions as follows (at p. 46):

I will summarize my conclusions on the four grievances in issue. This is a summary and must be read in the context of the analysis and reasoning above. The conclusions are:

(1) The employer was not obligated to negotiate the general terms of the WFX-Fit test because it was not a condition of employment as contemplated by Article 3.1(A) of the collective agreement.

(2) The employer breached the collective agreement by not honouring the 1999 Letter of Understanding concerning grandfathered employees. Any changes to the 1999 LOU must be negotiated.

(3) The WFX-Fit test is discriminatory and is not a bona fide occupational requirement because the cut-score as set has a potential discriminatory adverse impact on females and older males. In other respects the WFX-Fit test is valid.

[21] The employer filed a judicial review application with the Court of Queen’s Bench, and a decision varying the arbitration award was granted on October 14, 2016. On June 15, 2018, the Court of Appeal restored the arbitration award in its entirety. The employer applied for leave to appeal that decision to the Supreme Court of Canada and applied to the Court of Appeal for a stay of its decision pending a decision on the employer’s leave application to the Supreme Court. That stay was granted by the Court of Appeal on November 27, 2018.

[22] In early 2019, the ministry began its preparations for the 2019 fire season on the assumption it could continue to use the WFX-FIT test pursuant to the stay granted by the Court of Appeal. However, the Supreme Court of Canada issued its decision denying leave to appeal on March 21, 2019. By the terms of the order of the Court of Appeal imposing the stay, the stay consequently ceased to have effect.

[23] The timing of the decision to deny leave imposed significant challenges for the employer. Its planning for the 2019 season had been premised on the use of the WFX-FIT test and testing was scheduled to begin in early April in time to mobilize firefighters in late April. Returning non-grandfathered firefighters had been notified in January they should train for testing on the assumption the WFX-FIT test would be used applying the original standard. Consequently, there was little time to make any adjustments to the testing requirements and still be ready for the commencement of the season.

[24] Internal discussions took place in the ministry and on March 27 the deputy minister sent a letter to the union, addressed to Mr. Nowoselsky, proposing options to address the problem:

I am writing in relation to the recent decision of the Supreme Court of Canada in the legal proceeding related to the WFX-FIT physical fitness test for Type 1 wildland firefighters [WFX-FIT].

The Saskatchewan Ministry of Environment [Ministry] respects the decision of the Supreme Court, and appreciates that the current legal proceedings have come to an end. The Ministry hopes to negotiate a resolution of outstanding issues with SGEU, to everyone's mutual benefit.

Physical fitness testing for returning wild land firefighters is scheduled starting in the first week of April. You will appreciate that the Ministry must have a physical fitness test to ensure the safety of its employees. At the same time, the Ministry will respect the Arbitrator's decision, as upheld by the Court of Appeal for Saskatchewan.

Additionally, the Ministry's preference is to provide employees with an opportunity to challenge WFX-FIT at the national standard for the upcoming fire season. Employees who pass WFX-FIT at the national standard would continue to receive the benefits of being eligible for export to other firefighting jurisdictions.

The Ministry respects its obligations to grandfathered employees under the 1999 LOU. The Ministry acknowledges it owes compensation to those employees, and is prepared to negotiate this issue. To that end, the Ministry is recommending bifurcating: i) the issue of testing and compensation for grandfathered employees from ii) the testing of non-grandfathered employees.

Under this arrangement, testing and compensation for grandfathered employees will be mutually agreed upon by the Ministry and SGEU through further negotiations while the Ministry proposes that non-grandfathered firefighters would be tested.

Additionally, with regards to the testing of non-grandfathered employees, Ministry respectfully proposes two potential resolutions:

Option One (preferred): The Ministry proposes that all non-grandfathered employees continue to attempt the current version of WFX-FIT. If any non-grandfathered employee fails WFX-FIT due to age or gender, the Ministry is prepared to fulfill its obligations to those individuals.

The WFX-Fit test has been vetted nationally by the Canadian Interagency Forest Fire Centre Inc. and continuing use of the test will ensure Saskatchewan firefighters remain eligible for export for the 2019 fire season and into the future.

Option Two: Use of the current version of WFX-FIT for all non-grandfathered employees for the 2019 firefighting season only. The Ministry would use the next year to assess the validity of other physical fitness tests, or a modified version of WFX-FIT, for future years. The Ministry will fulfil its obligations to any non-grandfathered employee who fails WFX-FIT in the 2019 firefighting season.

Given the short window before testing begins, the Ministry does not have time to assess the validity of using a modified version of WFX-FIT for the 2019 firefighting season. If SGEU does not agree to the use of WFX-FIT for the 2019 firefighting season, the Ministry would be required to revert to the test used prior to the WFX-FIT called the "Arduous Test".

It is the Ministry's belief that reverting to the earlier test is not preferable to anyone. First, employees will be required to take the "Arduous Test" after physically preparing for WFX-FIT. This may have the outcome of fewer persons passing the fitness test.

Second, the Ministry does not have the resources to offer both the "Arduous Test" and WFX-FIT testing at the national standard. If the current version of WFX-FIT cannot be used for the upcoming fire season, no Saskatchewan firefighter would be eligible for export for the 2019 fire season.

I am hopeful that we can agree to an outcome that allows employees who seek the benefits of export to have that opportunity and for Saskatchewan to continue to assist partner jurisdictions; which rely on the professionalism and expertise of our firefighters.

We look forward to hearing from you. Due to the time sensitive nature of this matter, we respectfully request a response at your earliest convenience or by April 2, 2019.

[25] By letter dated Friday, March 29, and forwarded by email sent that date at 3:38 p.m., Mr. Nowoselsky replied on behalf of the union:

I have had an opportunity to review and consider your letter dated March 27, 2019. I must say from the outset that this has been a frustrating and expensive seven years and I am somewhat shocked by the approach taken in your letter of offer.

You indicate that the Ministry respects the decision of the Supreme Court and the fact that the legal proceedings have come to an end, yet the only real offer you make is to continue testing. Let me be clear. SGEU will not agree to the WFX-Fit testing as it is currently constituted. The Ministry had 7 years to devise a plan in the event it was unsuccessful at arbitration, the Court of Queen's Bench, the Saskatchewan Court of Appeal and the Supreme Court of Canada. What defies logic is that the Ministry had zero plans for the 2019 fire season fitness testing in the event the Supreme Court refused to hear their appeal.

We remain hopeful that a resolution may be negotiated in respect of the outstanding issues related to the WFX-Fit grievances. We appreciate the Ministry's preference to provide the opportunity to challenge the WFX-Fit testing to those interested in fire fighting opportunities and expect that this is an opportunity that some individuals would like to see continue. However, SGEU does not have control or input into the processes or procedures for export opportunities. It is offensive to us that you would include the export opportunities in your correspondence containing a veiled (or overt) threat that our members will lose out on these opportunities for the 2019 fire season if SGEU elects to rely on its legal rights. Again, it took us 7 years to get to where we are today and the fact that the Ministry had not planned for the potential that the arbitration decision would stand does not fall on SGEU.

We are agreeable to your request to bifurcate the issues related to the grandfathered employees versus non-grandfathered employees. However, we think it important that the grandfathered employees be offered fire suppression duties for the 2019 fire season while the Ministry figures out its plans.

In respect of the non-grandfathered employees, our position is that the arduous test is fine. It worked well for the Ministry in the past and we saw no reason to depart from that test in 2012. You note that the arduous test is not preferable to anyone, but we ask that you not make any such assumptions. We are prepared to discuss the issue of testing further.

Finally, if you plan to restrict individuals from export opportunities due to the Ministry's failure to plan for the potential that they could be unsuccessful in the litigation process we see that as terribly unfortunate but expect that message will be communicated to members. The message being that due to the Ministry's failure to plan, it will not be in a position to assist individuals with export opportunities for the 2019 fire season. We also expect that no mention of SGEU will be made in that communication as this problem was not only created by the Ministry but perpetuated by the Ministry for the last 7 years.

We look forward to hearing from you further.

[26] The deputy minister forwarded the email and attached letter from the union to Mr. Roberts and to officials in the Public Service Commission and Government Relations. Her covering email stated:

Disappointing response. Labour relations had a different understanding of the Union's position than where they are at. Also the SGEU seems to believe that the Ministry has the choice regarding what test is required for export. The point was missed that WFX-Fit is the national standard that is set by the national association. We will need to regroup now and likely I need to meet with the Union face to face, this shows a big gap between where they are and what I offered. We will need to have a meeting next week to discuss.

[27] Mr. Roberts replied at 4:45 p.m. with a copy to Mr. Austman:

I sadly am not surprised by their steadfast rejection of WFX, of their demand to put all firefighters on active duty including grandfathers, and by their apparent belief that exports would still be available. Interesting threat regarding identification of SGEU role as part of export loss even they clearly demand WFX not be used.

PSC and I were to meet with Barry Monday. Based on this, I am seeking direction on whether to proceed.

[28] The deputy minister replied by email at 8:48 a.m. on Sunday, March 31:

Let's have a quick chat in the morning tomorrow about what resources would be needed to run both the arduous test and WFX. It may be of value for us to understand a comparison and number of staff that opt to take the WFX.

[29] Mr. Roberts replied at 3:57 that afternoon:

I am not sure that we can fully administer the arduous test as it takes more equipment, takes longer (about an hour instead of 20 minutes) but am taking the steps to deliver this.

The arduous test is administered on site in a field setting while WFX is administered offsite in an interior setting (typically a gymnasium). Both must be administered by certified testers and these are limited in number. Therefore, I do not have the resources to run both tests for staff.

We can discuss this as well as a draft directive that I will need to send to all my staff by days end tomorrow.

[30] Mr. Austman sent an email in reply to both Mr. Roberts and the deputy minister at 7:43 a.m. Monday, April 1:

This is just Barry being Barry.

The arbitration award ruled that we had the right to implement the WFX, the only issue is the time. We can still in my view implement the WFX without the union's consent as long as we adjust the time such as going to 2 standard deviations. Or, we can just run the arduous test. The problem with this is that I think it's open to challenge as there's no proof it's not discriminatory.

On the grandfather issue, I thinking we'll just have to align ourselves with prospect that some of them may be coming back as fire fighters without doing a test.

I'm open to a call but we need to be leaving here shortly after 8 to get to PA by 1 pm.

[31] At 9:22 a.m. Mr. Roberts sent an email to the deputy minister and Mr. Austman attaching two alternative draft directives that he described as "options for review and discussion" and that he testified he had prepared for consideration at the meeting with the union in Prince Albert that was held that afternoon.

[32] The two draft directives were included in a three-page document. The first page, numbered Page 1, was a cover page indicating the directive name as "Wildfire Fitness Testing" and that it was approved by Mr. Roberts. It bore the date of April 13, 2017.

[33] The second page, numbered Page 2, was a directive to the effect that the WFX-FIT test would be used for testing non-grandfathered firefighters for the 2019 fire season with a modified provincial cut score of 17 minutes 45 seconds. Grandfathered firefighters would be required to perform the moderate test.

[34] The third page, numbered Page 3, was a directive to the effect non-grandfathered firefighters would be required to complete the arduous test while grandfathered firefighters would be required to complete the moderate test.

[35] The deputy minister sent an email in reply at 11:43 a.m. suggesting some minor edits.

[36] Representatives of the parties met at approximately 1:00 p.m. that afternoon, Monday, April 1. The meeting took place in Prince Albert at the fire control centre and lasted somewhere between one and a quarter hours and two hours. The union was represented by Mr. Nowoselsky, Mr. Rudd, Ms. Cook, George Mcleod, Bonnie Mcrae and Kim Hanson. The employer's representatives were Mr. Roberts, Mr. Austman, Lisa Linford (a labour relations consultant from Mr. Austman's office), Don McKay (Director of Wildlife Support) and Scott Wasylenchuk (Director of Fire Operations).

[37] The five witnesses at the hearing were in attendance at the meeting. The notes taken and prepared by Ms. Cook were presented to each of those witnesses. Because the notes are necessarily cryptic, given they are not a verbatim record of the meeting, the witnesses identified ambiguities in the notes, or different impressions of what the notes reflect. However, the notes were generally accepted as a reasonably accurate record of the meeting.

[38] Mr. Austman and Mr. Nowoselsky carried most of the discussion. Not long into the meeting, both sides engaged in a discussion regarding the use of the WFX-FIT test. The parties' longstanding disagreement on the effect of the arbitration award was raised. Mr. Nowoselsky advanced the union position that the WFX-FIT test was not an acceptable test without adjustments to both the cut score and the angles of the ramps used in the test. Mr. Austman maintained the employer's position that Saskatchewan could not change the test, other than to modify the cut score. He said the employer wanted to discuss using the WFX-FIT test with an adjusted cut score. Mr. Nowoselsky emphasized that the ramp angles were causing injuries and that had to be addressed.

[39] Mr. Austman noted that the WFX-FIT test was a national test, which was needed to allow for exporting of firefighters. He said it was necessary to consult with the designers of the WFX-FIT test, but that timing was a problem. Mr. Nowoselsky stated that he was not agreeing to the use of the WFX-FIT test.

[40] Mr. Austman stated that the employer's preference was to use the WFX-FIT test with a longer time, but, if they couldn't do that, they'd have to go back to the arduous test.

[41] After a brief caucus by each side, Mr. Nowoselsky stated that the union would not agree to using the WFX-FIT test if the employer wasn't prepared to look at the ramp angles as well as the cut score.

[42] Mr. Austman then shared copies of the one-page draft directive that would have implemented the arduous test for non-grandfathered firefighters and the moderate test for grandfathered firefighters. This was page number 3 from the larger draft directive Mr. Roberts had prepared. Its description of the arduous test numbered the pre-screening requirements as 1 and 2, and the performance requirements as 3 through 6.

[43] The union asked for a further caucus. When the meeting reconvened, Mr. Nowoselsky stated that he wanted to check his file in Regina to ensure the performance requirements 3 through 6 were accurately stated. If they were, the union would be in agreement on the use of the arduous test. Mr. Austman asked when Mr. Nowoselsky would get back to him and Mr. Nowoselsky said "tomorrow".

[44] During the course of the meeting there was some discussion concerning issues related to grandfathered firefighters. Near the end of the meeting, once discussions concerning the tests to be used for both non-grandfathered firefighters and grandfathered firefighters were more or less completed, Mr. Nowoselsky indicated he wanted to talk about grandfathered firefighters. The need to contact grandfathered firefighters who were not then working as firefighters for the purpose of offering them an opportunity to return to work was discussed. Mr. Nowoselsky apparently indicated there were 49 such grandfathered firefighters that the union had identified. Mr. Roberts indicated the employer could contact them as a matter of due diligence. In his testimony at the hearing, Mr. Roberts acknowledged that he had agreed in the meeting that the employer should contact grandfathered firefighters. However, he also stated that there had never been an intention on the part of the employer to make a formal agreement respecting grandfathered firefighters at the April 1 meeting.

[45] The meeting adjourned. Nothing was signed during the meeting to reflect an agreement between the parties on the use of the arduous test or on anything else discussed in the meeting.

[46] Based on the discussions in the meeting, the union officials who testified say they concluded that the union had essentially bargained an agreement with the employer that the employer would not use the WFX-FIT test for the 2019 fire season, but would instead use the arduous test for non-grandfathered firefighters. The agreement, as they understood it, was

subject to Mr. Nowoselsky verifying the accuracy of the description of the test as reflected in the draft directive shared at the meeting.

[47] The employer officials who testified say they left the meeting with a different understanding, which was that the government officials had merely advised the union officials that, without an agreement on the use of the WFX-FIT test, which the union said it would not give, the employer was required to use the arduous test. They understood the union officials were merely being advised of that, and the employer representatives had been prepared to discuss it.

[48] Mr. Nowoselsky testified that he had entered the meeting with the understanding the employer required the union's agreement to use the WFX-FIT test, but that it also required the union's agreement to use the arduous test. He understood the purpose of the meeting was to negotiate an agreement on testing for the 2019 fire season.

[49] Mr. Austman testified he went to the meeting understanding that the employer wasn't required to negotiate testing with the union. This is consistent with his email earlier that morning where he offered his opinion that the employer could implement the WFX-FIT test without the union's consent as long as the time was increased, for example basing it on two standard deviations. Or, he said, they could just run the arduous test.

[50] Mr. Roberts testified that he understood there was no requirement for the employer to negotiate testing for non-grandfathered firefighters.

[51] Mr. Roberts sent a reporting email to the deputy minister at 3:22 p.m. with a re line of "WFX-FIT meeting with SGEU":

*Barry Noweselsky and five SGEU personnel met with us.
Barry confirmed that SGEU's stance was WFX-FIT was not bona fide.
SGEU is not opposed to a fitness test but not WFX-FIT due to the ramp, time and injury rates.
SGEU is prepared to challenge the test nationally.
SGEU is committed to continuing the discussions regarding the grandfathered staff.
Karl stated that Gos believe the test to be bona fide and that it could be delivered with a longer completion time.
GoS believes that the old Arduous test is harder on staff and was never tested for discrimination.*

*SGEU met in-camera.
Barry confirmed that either WFX-FIT be delivered without the ramp and with a longer time OR use the Arduous test.
Karl shared the option B directive with them outlining the testing for the grandfathered and non-grandfathered staff. (outlining the use of the Arduous test and the Moderate test for 2019).*

*SGEU accepted this approach and will confirm with Jeff Tuesday afternoon.
WFM will send the final directive to all WFM staff and prepare to deliver the Arduous test.
Any grandfathered staff who left the Ministry would be sent the new directive by WFM
should they wish to return.*

[52] In addition to the internal discussions taking place among government officials that are referred to above, Mr. Roberts was making attempts to get advice from the CIFFC relating to changes that Saskatchewan could make to its provincial cut score that might be objectively acceptable according to the requirements of the arbitration award. Late in the afternoon of April 1, Mr. Roberts sent an email to Dr. Veronica Jamnik, who was a professor at York University and one of the experts who had developed the WFX-FIT test:

I am the Executive Director from Saskatchewan where the test was challenged.

In reference to the cut score used to generate the completion time for Saskatchewan. The arbitrator pondered using 2 standard deviation instead of one would change the time.

Is there some way that you can quantify this and indicate whether it is significant?

[53] Dr. Jamnik replied in the early morning hours of the next day, April 2:

Dr. Gledhill and I are already looking into that and other possible remediation to present to CIFFC for their consideration in Winnipeg on April 10.

[54] Mr. Roberts sent an email in reply at 7:41 a.m., April 2:

Thank you for the quick reply.

My firefighters have returned this week.

We are considering 2 options for testing in Saskatchewan due to our court decision – deliver WFX-FIT with a revised completion time based on a new cut score (eg 2 standard deviations instead of 1) or abandon WFX-FIT entirely and use our previous pack test, upright row and pump carry/hose drag.

We have to make this decision this week and cannot wait until April 10th.

[55] Dr. Norman Gledhill, another expert responsible for the WFX-FIT test, replied by email at what appears to be 9:12 a.m. Eastern Time, which would have been 8:12 a.m. Saskatchewan Time:

Given your time lines, my recommendation to Serge (CIFFC) is the Following:

Until CIFFC adopts a new standard, for the time being use 18:10 min:sec as the new provisional SK agency standard with scores between 17:45 min:sec and 18:10 min:sec termed "borderline acceptable scores". This time is in line with the Arbitration decision. The new agency and Exchange standards should be available after April 10.

Please check with Serge before implementing this new provisional agency standard.

[56] Mr. Roberts reported by email to the deputy minister, Mr. Austman and counsel at the Ministry of Justice at 8:47 a.m.

I was able to contact Dr. Jamnik and Dr. Gledhill and explain our wish to use the WFX with a lower cut score.

They have provided a recommendation as follows:

For the time being use 18:10 min:sec as the new provisional SK agency standard with scores between 17:45 min:sec and 18:10 min:sec termed "borderline acceptable scores".

[57] The deputy minister forwarded that email to Mr. Roberts, Mr. Austman and others at 11:13 a.m. and provided the following direction with respect to the fitness testing to be commenced that week:

With Jared's legal confirmation and with the following regarding the cut score we will proceed with WFX-Fit testing on Wednesday with a revised time of 18:10. I have spoken with both Ministers Duncan and Kaeding and Cam and Ray and they are in agreement with this decision. Karl will be contacting SGEU this morning to share this direction. Steve has a draft Wildfire Directive that will be updated to include the new time. I will ask that the revised directive be sent to myself for final approval and then can be used Wednesday to confirm our position regarding testing. Thank you to all of you who have assisted in working quickly to confirm our position.

[58] Mr. Roberts sent the draft directive to the deputy minister at 11:27 a.m. for her "final review & signature".

[59] Mr. Nowoselsky testified that Mr. Austman had left a voice mail for him around 11:30 a.m. as he was driving back to Regina and advised that there had been "a change of plan" that he needed to share with Mr. Nowoselsky. They subsequently spoke by phone.

[60] Mr. Austman reported by email to the deputy minister and others at 11:44 a.m. that he had talked with Mr. Nowoselsky and told him they were going to use the WFX-FIT test with a cut score of "18.10". He also said he had confirmed with Mr. Nowoselsky that the employer's position was that the arbitrator had ruled the WFX-FIT test was *bona fide* except for the cut score, and that Mr. Nowoselsky had responded "we're going to court".

[61] A Wildfire Management Directive dated April 2, 2019, signed by the deputy minister was issued. The body of the directive stated:

Directive Statement

On March 21, 2019, the government was notified that the Supreme Court of Canada would not hear the WFX-FIT issue. This decision by the SCC sustains the arbitrator's determination that WFX-FIT may discriminate in the future and therefore could not be considered a bona fide fitness test on those grounds with the current cut score of 17 minutes 15 seconds. WFM will comply with the arbitrator's determination and adjust the

physical fitness requirements for Type 1 firefighters immediately. This directive supersedes the previous approved conditions of SOP #TAS911.2 Physical Fitness Requirements.

Protocols

To ensure that Saskatchewan firefighters are fit and able to safely carry out their job duties, WFX-FIT testing will be modified to extend the minimum provincial completion time for the 2019 season.

All recalled Type 1 firefighters hired after April 1, 1998 must complete the test once within the first 2 weeks of recall and before being deployed for initial attack wildfire duties.

This test protocol requires:

- 1) PAR Q+ completed to ensure staff member is fit for testing*
- 2) An acceptable blood pressure test (<160/90 mmHg) before attempting the WFX-FIT test*
- 3) Complete the WFX-FIT test in a revised time of 18 minutes 10 seconds.*

All recalled Type 1 firefighters hired before April 1, 1998 may attempt the WFX-FIT test but must only complete the Sustained action (Moderate) test once within the first 2 weeks of recall and before being deployed for appropriate fire suppression duties.

This test protocol requires:

- 1) PAR Q+ completed to ensure staff member is fit for testing*
- 2) An acceptable blood pressure test (<160/90 mmHg) before attempting the Moderate test*
- 3) A 2-mile hike with a 25-pound pack. This test must be completed in less than 30 minutes.*

[62] Testing for the 2019 fire season was completed in accordance with the directive.

Relevant legislative provisions:

[63] The union pointed us to the following provisions of the *The Saskatchewan Employment Act* in support of its application:

6-1(1) In this Part: ...

(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....*

...

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

...

6-41(1) A collective agreement is binding on:

(a) a union that:

- (i) has entered into it; or*
- (ii) becomes subject to it in accordance with this Part;*

(b) every employee of an employer mentioned in clause (c) who is included in or affected by it; and

(c) an employer who has entered into it.

(2) A person bound by a collective agreement, whether entered into before or after the coming into force of this Part, must, in accordance with the provisions of the collective agreement:

(a) do everything the person is required to do; and

(b) refrain from doing anything the person is required to refrain from doing.

(3) A failure to meet a requirement of subsection (2) is a contravention of this Part.

(4) If an agreement is reached as the result of collective bargaining, both parties shall execute it.

(5) Nothing in this section requires or authorizes a person to do anything that conflicts with a requirement of this Part.

(6) If there is any conflict between a provision of a collective agreement and a requirement of this Part, the requirement of this Part prevails.

...

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;

...

(r) to contravene an obligation, a prohibition or other provision of this Part imposed on or applicable to an employer.

Analysis and reasons:

[64] Since the release of the arbitration award at the end of 2019, the parties have had disagreements over how it should be applied to modifications the employer might make to the WFX-FIT test. We accept the employer's position in two important respects relevant to our consideration of the within application. The first is that the arbitrator found the WFX-FIT test to be valid in all respects, other than its use of the original cut score because of its potentially discriminatory impact on females and older males. The second was a finding that the employer was not obligated to negotiate the general terms of the WFX-FIT test.

[65] However, because of the arbitrator's finding with respect to the potentially discriminatory nature of the cut score, which was ultimately upheld when the Supreme Court refused leave to appeal, the employer was left to find a new cut score that would avoid the same issue going forward.

[66] The union argues that the employer was required, in a rush, to bargain the use of a fitness test for the 2019 season in light of the arbitration award and the Supreme Court's denial of leave to appeal, and that it chose to couple negotiations respecting the WFX-FIT test with a separate

issue or issues related to grandfathered firefighters. This runs counter to what was proposed in the deputy minister's letter, where she specifically proposed bifurcating issues related to grandfathered firefighters and non-grandfathered firefighters. Mr. Nowoselsky agreed to the bifurcation when he replied to the deputy minister's letter. It also overlooks distinctions that need to be drawn between the use of the WFX-FIT test as opposed to the arduous test and the history of legal challenges related to the WFX-FIT test.

[67] The deputy minister's March 27 letter proved to provide an accurate description of what would ultimately transpire in the April 1 meeting. Her letter stated that the ministry hoped to negotiate a resolution of outstanding issues with the union and indicated the ministry's intention to respect the arbitration decision. It expressed the hope of using the WFX-FIT test, in part because it would allow for continued export of qualifying employees to work in other jurisdictions. It recommended bifurcating the issues respecting grandfathered firefighters and non-grandfathered firefighters.

[68] With respect to testing non-grandfathered firefighters, the letter proposed two alternative resolutions, or options. Both involved using the WFX-FIT test. The first, which was indicated as the preferred option, was to continue using the WFX-FIT test without alteration, with a commitment that the employer would fulfill its obligations to any non-grandfathered firefighter who failed the test due to age or gender.

[69] The second option was to use the then current version of the WFX-FIT test for 2019 only, with the commitment to consider other tests or a modified version of the WFX-FIT test for future years, again with a commitment to fulfill obligations arising from any failures due to age or gender.

[70] The letter then stated that, if the union wouldn't agree to the use of the WFX-FIT test for the 2019 season, "the Ministry would be required to revert to the...Arduous Test". The letter did not describe the use of the arduous test as a third option.

[71] The employer maintains it didn't attend the April 1 meeting with the intention of bargaining an agreement with the union on the test to be used, and asks us to characterize its intentions as seeking "alignment", as Mr. Austman described it, or as normal discussions employers and unions engage in in the interests of industrial peace. However, the evidence establishes that the employer wanted to use the WFX-FIT test, for 2019 in particular because of the time crunch. It could only do that without significant legal risk if it could obtain expert advice to provide the comfort of a specific revised cut score that would meet the requirements underlying the arbitration award,

or if it could gain the union's agreement on a cut score, even though it was not required as a general matter to negotiate the test with the union. While Mr. Nowoselsky's March 29 letter in reply to the deputy minister's letter appeared to pour cold water on the possibility of union agreement on a cut score, Mr. Austman nonetheless focused the discussion on the use of the WFX-FIT test during the initial part of the April 1 meeting. Only when it seemed clear that the union was not prepared to budge without changes respecting the ramps did the discussion move to the use of the arduous test.

[72] These discussions, both written and oral, certainly had features of bargaining, and we accept the evidence of the union that its officials thought they were engaged in bargaining with respect to the use and possible modification of the WFX-FIT test based on the letter from the deputy minister and the discussions in the meeting. We conclude, based on the totality of the written and oral exchanges between the parties, as well as the context within which the discussions were taking place, that, despite the characterization placed on the discussions respecting the WFX-FIT test by the employer, the parties did engage in bargaining related to the use of that fitness test.

[73] Those negotiations ended when Mr. Nowoselsky advised the government officials in attendance at the meeting that the union could not accept the WFX-FIT test on the employer's terms and the employer indicated it could not alter the terms in a manner that would satisfy the union.

[74] Without the time constraints under which the ministry was operating, it's conceivable the parties would have adjourned at that point with the prospect of continuing negotiations respecting the use of the WFX-FIT test at some later time. That wasn't practicable. As indicated in the deputy minister's letter, the employer advised the union it would be using the arduous test and provided the draft directive to the union representatives.

[75] We are satisfied the employer never believed it needed the union's agreement to use the arduous test, and it never intended to bargain its use. As indicated in the deputy minister's letter, the government understood it was required to revert to the arduous test if it couldn't use the WFX-FIT test. No agreement or consent from the union was required.

[76] The fact the employer shared the draft directive in the meeting is equally consistent with the employer's position the directive was provided for information, and to support the ensuing discussion, as it is with the union's position that the directive was essentially an offer.

[77] The union stressed the importance of the discussions surrounding Mr. Nowoselsky's intention to verify the performance requirements in the draft directive. We don't find that persuasive. Similar to the sharing of the directive itself, it doesn't seem unusual that the employer representatives would accommodate Mr. Nowoselsky's desire to satisfy himself as to the accuracy of the description in the directive before the employer issued it, in the interests of employer-union relations. It's pure speculation as to where the discussions would have gone if the employer had continued with its intention to use the arduous test and if Mr. Nowoselsky had disagreed that the test was accurately described in the directive.

[78] It's noteworthy that Mr. Roberts, after sending a reporting email shortly after the meeting adjourned, resumed his efforts to obtain a recommended cut score from Dr. Jamnik and Dr. Gledhill. Mr. Roberts is an experienced senior manager who was intimately familiar with the history of the various disagreements and proceedings related to the WFX-FIT test. If he had understood that the employer had just made a binding agreement with the union to use the arduous test rather than the WFX-FIT test, what would lead him to conclude he could nonetheless obtain a cut score from the experts that would allow the employer to use the WFX-FIT test?

[79] Consequently, we find there was no enforceable agreement reached at the April 1 meeting between the parties with respect to the use of the WFX-FIT test or the arduous test for non-grandfathered firefighters in the 2019 season.

[80] We also find that no enforceable agreement was reached at the meeting with respect to grandfathered firefighters. While the employer indicated its willingness to take steps to contact grandfathered firefighters, there was never an intention on the part of the employer that the discussions that took place leading up to and in the meeting constituted the bargaining that would have to take place to change the obligations between the parties resulting from the 1999 letter of understanding.

[81] According to its written submission, the union seeks the following relief:

- (a) An order confirming that the Agreement in Principle [i.e. the agreement the union maintains it bargained with the employer at the April 1 meeting to use the arduous test for non-grandfathered firefighters during the 2019 season] constitutes part of the collective agreement between the Union and the Employer;
- (b) An order requiring the Employer to comply with the terms of the [arbitration] Award;
- (c) An order prohibiting the Employer from requiring non-grandfathered Type 1 wildland firefighters to complete WFX-Fit fitness testing;

- (d) An order requiring the Employer to comply with the terms of the Agreement in Principle by requiring only that the “arduous test” be completed by non-grandfathered Type 1 wildland firefighters;
- (e) An order requiring the Employer to comply with the terms of the Agreement in Principle by recalling all of the grandfathers and giving them an opportunity to work, subject only to the “pack test”;
- (f) Damages for all losses suffered by SGEU and its members arising out of the Employer’s failure to comply with the Award and the Agreement in Principle...

[82] The union also seeks the posting of the decision and order in this matter in the workplace.

[83] Having determined that no formal agreement was reached at the April 1 meeting, the orders sought in clauses (a), (d) and (e) are not available.

[84] With respect to clause (b), there is no basis on which to issue an order in the abstract, since the employer is already bound by the arbitration award and does not dispute that fact. Additionally, the union has not established that the employer failed to comply with the award.

[85] There is no basis on which to grant the relief described in clause (c). No agreement was reached on April 1 to prevent the employer from using the WFX-FIT test, and its use with the revised cut score has not been shown to be in contravention of the arbitration award.

[86] Given these determinations, damages are also not available.

Conclusion:

[87] The application is dismissed.

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

DATED at Regina, Saskatchewan, this **28th** day of **February, 2021**.

LABOUR RELATIONS BOARD

“Gerald Tegart”

Gerald Tegart
Vice-Chairperson