Saskatchewan
Labour Relations Board

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1985, Applicant v ALUMASAFWAY, INC., Respondent

LRB File No. 179-20; May 13, 2021
Chairperson, Susan C. Amrud, Q.C.; Board Members: Hugh Wagner and Don Ewart

For United Brotherhood of Carpenters and Joiners of America, Local 1985: Heather Jensen

For AlumaSafway, Inc.: Steve Seiferling

Application to defer to grievance-arbitration process granted – Same issues raised in grievance and unfair labour practice application – Arbitrator can determine which document is collective agreement and resolve dispute – Arbitrator can provide suitable remedy, failing which Respondent can return to Board.

REASONS FOR DECISION

Background:

[1] Susan C. Amrud, Q.C., Chairperson: On October 28, 2020 AlumaSafway, Inc. ["AlumaSafway"] filed an application[1] ["ULP Application"] alleging that the United Brotherhood of Carpenters and Joiners of America, Local 1985 ["Union"] had engaged in various unfair labour practices, including failing or refusing to bargain collectively. In this matter the Board has before it an Application to Defer to Arbitrator and Application for Summary Dismissal[2] filed by the Union in response to the ULP Application.

[2] The facts are not in dispute. On March 27, 2020, the Union signed a letter addressed to CLR Construction Labour Relations Association of Saskatchewan Inc.[3] ["CLR"] that applied enabling terms and conditions to a number of contractors, including AlumaSafway ["March 27, 2020 letter"]. It included the following provisions:

> *Anything not specifically amended in this Letter of Understanding shall revert back to the Industrial Agreement* [Provincial Carpenters' Agreement for Industrial Construction].
> . . .

[1] LRB File No. 161-20.
[2] LRB File No. 179-20. This Application was originally filed on November 30, 2020, followed by an amended application filed on December 11, 2020.
[3] CLR Construction Labour Relations Association of Saskatchewan Inc. is the representative employers' organization for unionized employers in the carpenter trade division of the construction industry, pursuant to Division 13 of Part VI of *The Saskatchewan Employment Act*.

> *This Letter shall be effective May 1, 2020 and shall remain in full force and effect until midnight, July 31, 2020 and thereafter from year to year provided that prior to the termination of this agreement either party may give to the other party written notice to enter into discussion with a view to renewal or revision of this Agreement or the conclusion of a new Agreement.*
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> *It is agreed that this Letter shall expire upon the signing of a longer term solution (i.e. a stand-alone Scaffold Maintenance Agreement).*

[3] On June 30, 2020, the Union sent an email to CLR respecting the March 27, 2020 letter that stated as follows:

> *Please distribute this to the local 1985 contractors as notice that the attached Scaffold Maintenance Enabling LOU expires on July 31, 2020. As such Local 1985 will no longer honour said enabling.*

[4] On July 13, 2020, CLR wrote to the Union to serve notice under the March 27, 2020 letter to enter into discussion with a view to renewal or revision of the enabling provisions. It noted its view that the result of its notice was that the enabling terms and conditions were extended to July 31, 2021. On July 15, 2020 AlumaSafway sent a similar notice to the Union. CLR and AlumaSafway are of the view that the March 27, 2020 letter is a collective agreement. In the ULP Application, AlumaSafway is seeking a declaration that the March 27, 2020 letter is a collective agreement, and that the Union cannot cancel its terms without bargaining collectively.

[5] On or about August 13, 2020, the Union filed a group grievance with AlumaSafway over its failure to honour its obligations under the Provincial Carpenters' Collective Agreement ["Carpenters' Collective Agreement"]. AlumaSafway has been compensating its Union member employees at the rates set out in the March 27, 2020 letter, rather than at the rates set out in the Carpenters' Collective Agreement. An Arbitrator heard that grievance on April 28, 29 and 30, 2021.

Argument on behalf of the Union:

[6] The Union submits that the ULP Application should be summarily dismissed because it fails to disclose an arguable case, is entirely unsupported by evidence and was filed beyond the 90-day time limit imposed by subsection 6-111(3) of *The Saskatchewan Employment Act* ["Act"]. In the alternative, it asks that the ULP Application be deferred to the grievance-arbitration proceedings. In support of its arguments, the Union filed an Affidavit of Robin Mullock,

Saskatchewan Regional Manager of Prairie Arctic Regional Council of Carpenters, Drywallers, Millwrights and Allied Workers[4] ["Mullock affidavit"].

[7] The Union relies on *Lyle Brady v. International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, Local Union 771*[5] as establishing the test for summary dismissal. The Board will only summarily dismiss applications if it is plain and obvious that the application cannot succeed. The test is a stringent one. The facts are to be taken as pleaded.

[8] The Union argues that the ULP Application does not contain any facts that support AlumaSafway's allegation that the March 27, 2020 letter is a collective agreement. The ULP Application fails to disclose an arguable case that the Union breached a duty to bargain with respect to the March 27, 2020 letter. The ULP Application, it argues, is entirely unsupported by evidence. The Mullock affidavit, it argues, proves that the letter is not an agreement, and that it was improperly formulated as a Letter of Understanding. In the Union's view, the March 27, 2020 letter is a unilateral waiver by it of terms and conditions of the Carpenters' Collective Agreement, rather than a negotiated and agreed on arrangement. As a unilateral waiver, it can be withdrawn at any time, as long as reasonable notice is provided[6]. The Union retracted its waiver and provided reasonable notice to AlumaSafway of that retraction, in its email of June 30, 2020. The Union noted that AlumaSafway did not file an affidavit to rebut the evidence provided by the Union in the Mullock affidavit.

[9] Next the Union argues that the ULP Application should be summarily dismissed because it was filed more than 90 days after AlumaSafway knew or ought to have known of the circumstances on which it is based. In this regard it relies on *International Association of Fire Fighters, Local 1318 and Local 1756 v The City of Swift Current*[7] and *Saskatchewan Government and General Employees' Union v. Saskatchewan (Government)*[8] as setting out the test for the Board to apply. Those cases rely on the guidelines established by the Alberta Labour Relations Board in *Neville Toppin v United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 488*[9] ["*Toppin*"].

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[4] In the Affidavit, Mullock describes the Union as a Local branch of his organization.
[5] 2017 CanLII 68781 (SK LRB).
[6] *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, 1994 CanLII 100 (SCC), [1994] 2 SCR 490.
[7] 2014 CanLII 12091 (SK LRB).
[8] 2009 CanLII 30466 (SK LRB).
[9] [2006] Alta LRBR 31, 123 CLRBR 253.

[10] With respect to those guidelines, the Union provides the following comments. AlumaSafway has provided no explanation for the delay in filing the ULP Application. The conduct of the Union is not an ongoing breach. AlumaSafway knew all of the facts that are the basis of the ULP Application when it received the Union's email on June 30, 2020. Therefore, when it filed the ULP Application on October 28, 2020, 120 days had passed since it was aware or ought to have been aware of the circumstances about which it complains. AlumaSafway is a sophisticated litigant. There is labour relations prejudice to the Union in having to prepare for both the hearing of the arbitration and the hearing of the ULP Application.

[11] In the alternative, if the Board does not summarily dismiss the ULP Application, the Union asks that it be deferred to the grievance-arbitration process. *Communications, Energy & Paperworkers Union of Canada, Local 911 v ISM Information Systems Management Canada Corporation (ISM Canada)*[10] ["*ISM Canada*"] sets out the criteria the Board follows in making this determination:

> *(i) the dispute put before the Board in an 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 sought under the collective agreement must be a suitable alternative to the remedy sought in the application before the Board.*

The Union argues that these three criteria are satisfied.

[12] First, the Union argues that the proceedings, at their core, are the same. They both hinge on a dispute over the application of the Carpenters' Collective Agreement. The essential nature of the complaint in the ULP Application arises out of the interpretation of the Carpenters' Collective Agreement and the March 27, 2020 letter. Both the grievance and the ULP Application address the issue of whether the March 27, 2020 letter constitutes a collective agreement. Section 6-45 of the Act requires disputes about the application of a collective agreement to be resolved through arbitration. In support of this argument the Union relies on *CLR Construction Labour Relations Association of Saskatchewan Inc. v International Brotherhood of Electrical Workers*[11] ["*CLR v IBEW*"]:

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[10] 2013 CanLII 1940 (SK LRB), at para 22.
[11] 2019 CanLII 79295 (SK LRB) at para 87.

> *Nonetheless, it is not the legal characterization but the essential character of the dispute that carries the day. The essential character is informed by the underlying circumstances, which are the same in both cases, and the principal question, which in both cases asks about the nature of the Union's obligation in relation to the enabling agreement. And while two parties have brought two separate proceedings, the Board is not limited to considering a deferral only in circumstances where a proceeding has been pursued in another forum.*

[13] Next, the Union submits that the Arbitrator has authority to determine which document constitutes the collective agreement. A determination of this point will dispose of both disputes. AlumaSafway will bring the same argument in response to the grievance that it raises in the ULP Application. As a result, the Arbitrator will be tasked with interpreting the Carpenters' Collective Agreement and the March 27, 2020 letter, to determine which document represents the collective agreement between the Union and AlumaSafway. The ULP Application will be resolved through the resolution of the grievance.

[14] Finally, the Union argues, the remedies that the Arbitrator can order are suitable alternatives to the orders that the Board could make on the ULP Application. Complete relief can be obtained through the grievance-arbitration process, which was commenced before the ULP Application was filed. If there are any outstanding issues following the Arbitrator's ruling, AlumaSafway can return to the Board to obtain further remedies.

Argument on behalf of AlumaSafway:

[15] AlumaSafway refers the Board to *International Brotherhood of Electrical Workers, Local 529 v KBR Wabi Ltd*[12] as establishing the test to be applied to the Union's application for summary dismissal:

> *1. In determining whether a claim should be struck as disclosing no arguable case, the test is whether, assuming the applicant proves everything alleged in his claim, there is no reasonable chance of success. The Board should exercise its jurisdiction to strike on this ground only in plain and obvious cases and where the Board is satisfied that the case is beyond doubt.*
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> *2. In making its determination, the Board may consider only the application, any particulars furnished pursuant to demand and any document referred to in the application upon which the applicant relies to establish his claim.*

[16] For the Union to succeed in its Application for Summary Dismissal on the basis of no arguable case, the Board is to assume that the facts pleaded in the ULP Application are true. The Mullock affidavit is not relevant to that application. In the ULP Application AlumaSafway relies on the March 27, 2020 letter, which was signed on behalf of the Union, and which refers to itself as

[12] 2013 CanLII 73114 (SK LRB) at para 79.

an “agreement”. This is the basis for AlumaSafway’s argument that it constitutes a collective agreement and is required, by section 6-39 of the Act, to be interpreted to apply for a minimum of one year. By attempting to unilaterally cancel the agreement after three months, the Union is contravening section 6-39. Further, the Union has failed or refused to bargain a renewal of the March 27, 2020 letter. The March 27, 2020 letter, by its terms, contemplates that it will continue from year to year, and either party can give notice to discuss its terms. The Union does not deny that there was no collective bargaining. The Union has not met its onus to show that there is no arguable case.

[17] With respect to whether the ULP Application was filed within the 90-day timeline, AlumaSafway refers to *United Food and Commercial Workers Union, Local 1400 v Corps of the Commissionaires*[13], which stated that the language of subsection 6-111(3) suggests that the Board’s analysis should start from the premise that the application should be heard.

[18] AlumaSafway argues that the relevant date for the commencement of the 90-day timeline is August 13, 2020, the date that the Union filed the grievance. It was only on that date that AlumaSafway knew that the Union was not willing to bargain changes to the March 27, 2020 letter. AlumaSafway also argues that the breach is ongoing as the Union is continuing to refuse to bargain collectively. An ongoing breach affects the interpretation and application of the timeline.

[19] In the alternative, if the Board accepts the Union’s argument that the date of the commencement of the 90-day timeline is June 30, 2020, AlumaSafway also relies on the *Toppin* criteria. AlumaSafway argues that no prejudice was shown or even argued by the Union and therefore the Board should not dismiss the ULP Application. In this matter, it argues, if there is any delay in filing, the delay is minor.

[20] Finally, AlumaSafway objects to the Union’s suggestion that the ULP Application be deferred to the grievance-arbitration process. AlumaSafway also relies on the three-part test set out in *ISM Canada* and argues that the Union has failed to demonstrate that any of those factors would lead to a determination that the ULP Application should be deferred.

[21] First, the disputes raised in the grievance and in the ULP Application are related but different. The Union has grieved under the Carpenters’ Collective Agreement that it believes applies, assuming that it could terminate the enabling provisions set out in the March 27, 2020 letter. The issue in the ULP Application is whether the Union could terminate those provisions. In

[13] 2021 CanLII 15152 (SK LRB), at para 74.

the ULP Application, the central question is not one of application, meaning or contravention of a collective agreement. The central question is whether the March 27, 2020 letter is a collective agreement. Answering this question is within the powers of the Board, pursuant to clause 6-111(1)(r) of the Act.[14]

[22] The second question is whether the Arbitrator is empowered to resolve the dispute. The matter in question here – whether the March 27, 2020 letter is a collective agreement – is an issue for the Board to decide, and not for an Arbitrator to decide.

[23] Finally, the remedies sought in each proceeding are different. In the grievance the Union is seeking payment of wages pursuant to the Carpenters' Collective Agreement. In the ULP Application AlumaSafway is seeking a declaration that the March 27, 2020 letter is a collective agreement. Even if the Board should decide that the Arbitrator has jurisdiction to make this determination, the Board has concurrent jurisdiction and should maintain that jurisdiction.

Relevant Statutory Provisions:

[24] The following provisions of the Act were considered in this matter:

> ***Interpretation of Part***
> *6-1(1) In this Part:*
> *(d) "collective agreement" means a written agreement between an employer and a union that:*
> *(i) sets out the terms and conditions of employment; or*
> *(ii) contains provisions respecting rates of pay, hours of work or other working conditions of employees;*
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> ***Period for which collective agreements remain in force***
> *6-39(1) Except as provided in this Subdivision, every collective agreement remains in force:*
> *(a) for the term provided for in the collective agreement; and*
> *(b) after the expiry of the term mentioned in clause (a), from year to year.*
> *(2) Subject to subsection (3) and section 6-40, a collective agreement is deemed to have a term of one year after the date on which it becomes effective if the collective agreement:*
> *(a) does not provide for a term;*
> *(b) provides for an unspecified term; or*
> *(c) provides for a term of less than one year.*
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> ***Parties bound by collective agreement***
> *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.*

[14] *International Association of Heat & Frost Insulators and Asbestos Workers, Local 119 v AlumaSafway*, 2019 CanLII 120651 (SK LRB) at para 56.

Arbitration to settle disputes
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.

Unfair labour practices – unions, employees
6-63(1) It is an unfair labour practice for an employee, union or any other person to do any of the following:

. . .
(c) to fail or refuse to engage in collective bargaining with the employer respecting employees in a bargaining unit if a certification order has been issued for that unit;
. . .
(h) to contravene an obligation, a prohibition or other provision of this Part imposed on or applicable to a union or an employee.

Powers re hearings and proceedings
6-111(1) With respect to any matter before it, the board has the power:

. . .
(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;
. . .
(p) to summarily dismiss a matter if, in the opinion of the board, there is a lack of evidence or no arguable case;
(q) to decide any matter before it without holding an oral hearing;
(r) to decide any question that may arise in a hearing or proceeding, including any question as to whether:
(i) a person is a member of a union;
(ii) a collective agreement has been entered into or is in operation; or
(iii) any person or organization is a party to or bound by a collective agreement.
. . .
(3) Subject to subsection (4), the board may refuse to hear any allegation of an unfair labour practice that is made more than 90 days after the complainant knew or, in the opinion of the board, ought to have known of the action or circumstances giving rise to the allegation.

Analysis and Decision:

[25] The Board has determined that the ULP Application should be deferred to the grievance-arbitration process. As the parties agree, the issues that the Board considers on an application for deferral to arbitration are set out in *ISM Canada* and, in a more straight-forward manner, in *CLR v IBEW*:

- Is the dispute the same dispute?
- Can the grievance process resolve the dispute?
- Can the grievance process provide a suitable remedy?[15]

[15] At para 83.

[26] With respect to the first question, the Board finds that the essential character of the dispute is the same in the grievance and in the ULP Application. The parties are the same in both proceedings. They both raise the issue of whether AlumaSafway's Union employees are to be compensated at the rates set out in the Carpenters' Collective Agreement or in the March 27, 2020 letter. They both raise the issue of whether the March 27, 2020 letter is a collective agreement. The essential character of the dispute arises out of the meaning, application or alleged contravention of a collective agreement, therefore it must be resolved through the grievance-arbitration process. Section 6-45 of the Act requires that this dispute be resolved through the grievance-arbitration process. The purpose of this requirement in section 6-45 is to prevent parallel proceedings and the risk of contradictory findings:

> *In the first stage, it is necessary to define the dispute between the parties. If the essential character of the dispute arises out of the meaning, application or alleged contravention of a collective agreement, pursuant to section 6-45 of the Act, then it must be resolved through the grievance process. Section 6-45 establishes an exclusive jurisdiction model in relation to the matters set out therein. In following this model, the courts recognize the proliferation of alternative dispute resolution avenues, facilitate and encourage the resolution of disputes through a single forum, and discourage parallel or overlapping proceedings.*[16]

[27] Next, the Board finds that the Arbitrator has authority to determine which document constitutes the collective agreement. The Arbitrator will interpret the Carpenters' Collective Agreement and the March 27, 2020 letter, to determine which document represents the collective agreement between the Union and AlumaSafway. The Arbitrator will make this determination and then apply what he finds to be the collective agreement to the facts before him to determine whether the employees have been properly compensated. The ULP Application will be resolved through the resolution of the grievance. As the Board noted in *CLR v IBEW*:

> *The second question is whether the grievance process can resolve the dispute. As the Board confirmed in PCL Intracon, this question necessitates only a consideration of whether an arbitrator is authorized to assume carriage over the dispute, not whether an arbitrator is empowered to resolve the entire dispute.*[17]

[28] Finally, the Board finds that the remedies that the Arbitrator can order are suitable alternatives to the orders that the Board could make on the ULP Application. The remedy sought in the grievance is that the employees be compensated in accordance with the Carpenters' Collective Agreement. The remedy sought in the ULP Application is a declaration that the March

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[16] *CLR v IBEW* at para 90.
[17] At para 96.

27, 2020 letter is a collective agreement and all damages that AlumaSafway suffers as a result of the Union's attempt to cancel that agreement. The critical issue is whether the Arbitrator finds the March 27, 2020 letter to be a collective agreement. If he does, and if there are any outstanding issues following the Arbitrator's ruling, AlumaSafway can return to the Board to obtain further remedies.

[29] The Board disagrees with AlumaSafway's suggestion that the Board's decision in *International Association of Heat & Frost Insulators and Asbestos Workers, Local 119 v AlumaSafway*[18], to not defer to arbitration, is equally applicable here. In this matter, neither party has questioned the Board's jurisdiction to consider the ULP Application. In that matter, there was no pending arbitration proceeding and the question presented to the Board was whether the Board had jurisdiction to grant the requested relief or determine which document constituted the collective agreement between the parties. The Board found:

> *[62] The Board has on many occasions acknowledged that, where an unfair labour practice application has been filed, and that application raises an issue related to the meaning, application or alleged contravention of a collective agreement, the Board shares concurrent jurisdiction with an arbitrator. On those applications, the Board's jurisdiction arises from the unfair labour practice provisions in the Act. Many of the related cases were decided pursuant to The Trade Union Act, RSS 1978, c T-17 ["The Trade Union Act"]. In The Trade Union Act, there is neither a provision similar to section 6-41, nor a provision that creates an unfair labour practice arising from the breach of a collective agreement.*
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> *[63] Still, deferral to an arbitrator is not automatic or even unconditional. It needs to be appropriate under the circumstances. As explained by the Board in Canadian Union of Public Employees, Local 3736 v North Saskatchewan Laundry and Support Services Ltd., [1996] Sask LRBR 54 at 60:*
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> > *It is our view that the jurisdiction of this Board and of an arbitrator under a collective agreement must, in many cases, be viewed as concurrent. Consequently, it will continue to be necessary for this Board, depending on the circumstances of each case, to confront the question of when we should exercise our discretion to defer a question to an arbitrator.*
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> *[64] In deciding whether to defer, the Board takes into account its proper role, as well as the important policy objective of promoting the capacity and willingness of the parties to engage in collective bargaining on their own accord. The Board must be careful not to encourage parties to come to the Board as a forum of first resort for resolving disputes as to the meaning, application or alleged contravention of a collective agreement. The Board should give full consideration to the value of ensuring that the parties are equipped to resolve their differences through collective bargaining, and after collective bargaining, through the very processes that they have established and set out in the collective bargaining agreement.* [emphasis added]
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> *[65] Generally speaking, the Board will defer to the grievance-arbitration process contained in a collective agreement where the dispute relates to the meaning, application or alleged*

[18] 2019 CanLII 120651 (SK LRB).

> *contravention of a collective agreement and complete relief can be achieved through that process.*

[30] For the reasons outlined above, the Board has determined that in this matter, deferral to the grievance-arbitration process is the appropriate outcome. As a result of this decision, the Board will not consider the applications for summary dismissal.

[31] The Board thanks the parties for the comprehensive written submissions they provided, which the Board has reviewed and found helpful.

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

DATED at Regina, Saskatchewan, this **13th** day of **May, 2021.**

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson