INTERNATIONAL UNION OF OPERATING ENGINEERS, HOISTING & PORTABLE & STATIONARY, LOCAL 870, Applicant v RURAL MUNICIPALITY OF ORKNEY NO. 244, Respondent

LRB File No. 181-20 and 182-20; August 31, 2021
Chairperson, Susan C. Amrud, Q.C.; Board Members: Maurice Werezak and Jenna Moore

For International Union of Operating Engineers,
Hoisting & Portable & Stationary, Local 870: Darryl Wilcox

For Rural Municipality of Orkney No. 244: Andrew Svenson

Unfair labour practice pursuant to s. 6-62(1)(a) of *The Saskatchewan Employment Act* – Union provided no evidence that Employer contravened provision.

Unfair labour practice pursuant to s. 6-62(1)(n) of *The Saskatchewan Employment Act* – Employer wrongfully reduced employees' hours of work during statutory freeze period – Declaration granted.

REASONS FOR DECISION

Background:

[1] Susan C. Amrud, Q.C., Chairperson: On August 11, 2020, the Board issued a Certification Order to the International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870 ["Union"] with respect to certain employees of the Rural Municipality of Orkney No. 244 ["Employer"][1].

[2] On December 7, 2020, the Union filed two applications with the Board. They alleged that the Employer was engaging in unfair labour practices by reason of the following facts:

- *Delaying the ratification process to undermine the Union's certification contrary to clause 6-62(1)(a) of The Saskatchewan Employment Act ["Act"];*[2]
- *Unilaterally changing hours of work in bargaining unit without engaging in collective bargaining with the union representing the employees contrary to clause 6-62(1)(n) of the Act.*[3]

[1] LRB File No. 104-20.
[2] LRB File No. 181-20
[3] LRB File No. 182-20.

[3] There was some confusion in the evidence about what exactly occurred in the four months between these two events. For the purposes of this decision, the Board has determined the following.

[4] On September 10, 2020, the Employer's Council ["RM Council"] passed the following resolution:

> *That the Council appoints* [JZ], *Division 1 Councillor as the RM Council representative for Union negotiations, acknowledging that the Union requested that the Reeve and CAO* [Chief Administrative Officer] *also be in attendance, and furthermore that any Council members that wish to attend the Union negotiation meetings may attend to observe and furthermore; that the Council authorizes that all decisions regarding Union negotiations will be made at a Regular or Special Meeting of Council.*[4]

[5] The RM Council's representatives met with Union representatives on October 6 and 7, 2020, at the conclusion of which they signed a Memorandum of Agreement[5] ["MOA"], that indicated it was "subject to ratification by both parties".

[6] On October 8, 2020, the RM Council passed a resolution acknowledging receipt of the MOA and determining that they would discuss it at their next regular meeting.[6] The purpose of the delay was to wait until after the pending municipal election to consider ratification. The election was held on November 9, 2020, resulting in some changes to the RM Council's membership; JZ was not re-elected.

[7] At its November 19, 2020 regular meeting, the RM Council passed a resolution deciding to hold an additional regular meeting on December 3, 2020 to discuss, among other issues, the Union.[7] At the December 3, 2020 meeting, the RM Council passed the following resolution:

> *That the Council authorizes* [CM], *CAO to contact SARM legal department in regards to the negotiating of the Union contract for both legal representation and any recommendations; and furthermore, that the Union negotiations will continue once the Council has better determined the position of Public Works Manager/Foreman.*[8]

[8] At its December 10, 2020 meeting the RM Council passed a resolution dismissing CM, the Chief Administrative Officer, and another resolution appointing Bridgette MacDonald as the

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[4] Exhibit E-8, Resolution 204-20.
[5] Exhibit E-20.
[6] Exhibit E-9, Resolution 225-20.
[7] Exhibit E-11, Resolution 245-20.
[8] Exhibit E-13, Resolution 257-20.

Acting Administrator. Being in receipt of the two unfair labour practice applications at this time, they also passed the following resolution:

> *That the Council directs the Acting Administrator to let the Saskatchewan Labour Relations Board and the International Union of Operating Engineers, Hoisting, Portable and Stationary, Local 870 know that the RM of Orkney No. 244 intends to hire a Full Time Permanent Public Works Manager, that as the Union requested the CAO, Reeve and Deputy Reeve to be present for Union negotiations and due to elections and restructuring the Reeve is the only member of the bargaining team that is still involved with the municipality, that the only documentation, or discussion Council has received has been the Memorandum of Agreement to which Council is unsure of what the agreement actually means, and due to the fact that Council is actively seeking assistance in negotiating the contract; that therefore; the above mentioned issues have caused some temporary delays in negotiating the Union agreement.*[9]

[9] At its December 17, 2020 meeting, the RM Council passed a resolution approving the hiring of Laurie-Anne Rusnak to deal with all matters respecting the Union.[10] Rusnak then contacted Darryl Wilcox, the Union representative, who refused to meet with her, indicating the Union would not meet again with the Employer before the Board considered their unfair labour practice applications.

[10] At its May 14, 2021 meeting, the RM Council passed a resolution stating: "That the Council formally rejects the Memorandum of Agreement received from the International Union of International Engineers".[11]

LRB File No. 181-20: Breach of clause 6-62(1)(a) of the Act:

Argument on behalf of the Union:

[11] The Union states that, on October 7, 2020, the Union and Employer signed a MOA. This meant that collective bargaining was concluded. Forcing them to restart bargaining would be unjust. The Union argues that the Employer took too long to consider the MOA. The Employer's personnel issues are irrelevant. The Board should install the MOA as the collective agreement between the parties.

[9] Exhibit E-14, Resolution 292-20.
[10] Exhibit E-15, Resolution 309-20.
[11] Exhibit E-18, Resolution 226-21.

Argument on behalf of the Employer:

[12] The Employer argues that it is premature for the parties to be before the Board. The MOA was subject to ratification by both parties. The Employer chose not to ratify the MOA; there is no evidence before the Board indicating whether or not the employees ratified the MOA. The Employer asked the Union to continue bargaining, and the Union has refused to meet.

[13] The Employer argues that the onus is on the Union in these applications.[12] The Union provided no evidence of a breach of clause 6-62(1)(a).

Relevant Statutory Provisions:

[14] The Union relies on the following provision of the Act:

> *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:*
> > *(a) subject to subsection (2), to interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by this Part; . . .*
> *(2) Clause (1)(a) does not prohibit an employer from communicating facts and its opinions to its employees.*

Analysis and Decision:

[15] The onus in this application is on the applicant, the Union. To satisfy the balance of probabilities standard of proof, the Union's evidence must be clear, convincing and cogent.[13]

[16] In *Saskatchewan Government and General Employees' Union v Saskatoon Downtown Youth Centre Inc.*[14], the Board described the test to be met by the Union as follows:

> *The starting point in the analysis of this application is that the onus is on SGEU to satisfy the Board that EGADZ has contravened clause 6-62(1)(a). The evidence must be sufficiently clear, convincing and cogent. The test to establish the contravention is an objective test: that the probable effect of the memo, on employees of reasonable intelligence and fortitude, would have been to interfere with, restrain, intimidate, threaten and/or coerce them in the exercise of their rights under Part VI of the Act. This requires a contextual analysis.*

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[12] *United Food and Commercial Workers, Local 1400 v Saskatoon Co-operative Association Limited*, 2020 CanLII 10516 (SK LRB).
[13] *Canadian Union of Public Employees, Local 1486 v The Students' Union of the University of Regina Student Inc.*, 2017 CanLII 44004 (SK LRB), at para 86.
[14] 2021 CanLII 19681 (SK LRB), at para 23.

[17] The Board then went on to describe and rely on five criteria set out in *United Food and Commercial Workers, Local 1400 v Securitas Canada Limited*[15] that the Board will consider in determining whether the Employer has crossed the line in its communications:

> 1. Any evidence of a particular vulnerability of these employees to the views and opinions of the Employer. Absent evidence of a particular susceptibility of employees, the Board will start from the presumption that employees are capable of receiving and weighing a broad range of information about matters affecting their workplace and of making rational decisions in response to that information: The Union provided no evidence about these employees.
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> 2. The maturity of the bargaining relationship between the parties. Generally speaking, in a mature bargaining relationship, employees are less vulnerable to the views and opinions of their employer: A mature bargaining relationship does not exist in this workplace.
>
> 3. The context within which the communication occurred: The Union provided no evidence about any communications by the Employer to the employees.
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> 4. The evidentiary basis for and value of the communication: There was no evidence before the Board on this issue.
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> 5. The balance or neutrality demonstrated by the Employer in communicating information to its employees: Again, the Union provided no evidence on this issue.

[18] While it is true that the test is an objective test, nevertheless the Union had an obligation to provide evidence respecting this Employer's actions in this workplace. The challenge faced by the Board in this matter is that the Union provided no evidence of any communications by the Employer to its employees or any actions taken by the Employer with respect to their employees. The evidence that the Union asked the Board to rely on was the delay, from October 7, 2020 to May 14, 2021, in the Employer deciding not to ratify the MOA.

[19] The Board agrees with the Employer that the Union provided no evidence of a breach of clause 6-62(1)(a) of the Act. The onus was on the Union to prove their case. The Union provided no evidence of any action taken by the Employer that could be characterized as interfering with, restraining, intimidating, threatening or coercing their employees.

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[15] 2015 CanLII 43778 (SK LRB), at para 34.

[20] The application pursuant to clause 6-62(1)(a) is dismissed.

LRB File No. 182-20: Breach of clause 6-62(1)(n) of the Act:

Background:

[21] For many years, the practice of the Employer was to lay off or reduce hours of work for employees during the winter season. However, in 2019 it changed that practice. On November 7, 2019, the RM Council passed a resolution that stated: "That the Council approves of the outside employees remaining on hourly wages at this time".[16] The effect of that resolution was that the Union employees remained on full time hours throughout that winter.

[22] On November 19, 2020, the RM Council passed a resolution reducing the hours of work of the Union employees, effective November 23, 2020[17].

Argument on behalf of the Union:

[23] The Union argues that once the certification order was issued, there was an obligation on the Employer to comply with clause 6-62(1)(n) of the Act. That meant that it could not unilaterally reduce the Union members' hours of work as it purported to do in November 2020.

Argument on behalf of the Employer:

[24] The Employer argues that the situation in the winter of 2019 was an aberration. The status quo that it was required to maintain was the one that existed prior to 2019. This meant it was entitled to implement winter hours in November 2020.

[25] The Employer relied on *United Food and Commercial Workers, Local 1400 v Securitas Canada Limited*[18], which reviewed the Board's approach to defining and maintaining the status quo in a newly organized workplace. While that decision indicates that the Board may rely on the reasonable expectations of employees in making the decision respecting what is the status quo, in this matter there is no evidence before the Board respecting the reasonable expectations of the employees. The Board can also consider "well established criteria and past practice"[19]; again

[16] Exhibit E-12, Resolution 257-19.
[17] Exhibit E-11, Resolution 244-20.
[18] 2015 CanLII 43767 (SK LRB).
[19] At para 46.

there is no evidence here of any criteria that the Employer relied on in making this decision. The Employer's evidence was that they tried out this new procedure for one year, decided they did not like it, and therefore wanted to change their practice back to the practice that they had followed in previous years.

Relevant Statutory Provisions:

[26] The following provisions of the Act are relevant to this matter:

> *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:*
> > *(n) before a first collective agreement is entered into or after the expiry of the term of a collective agreement, to unilaterally change rates of pay, hours of work or other conditions of employment of employees in a bargaining unit without engaging in collective bargaining respecting the change with the union representing the employees in the bargaining unit; . . .*
>
> *General powers and duties of board*
> *6-103(2) Without limiting the generality of subsection (1), the board may do all or any of the following:*
> > *(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; . . .*
>
> *Board powers*
> *6-104(2) In addition to any other powers given to the board pursuant to this Part, the board may make orders:*
> > *(b) determining whether an unfair labour practice or a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board is being or has been engaged in;*
> > *(c) requiring any person to do any of the following:*
> > > *(i) to refrain from contravening this Part, the regulations made pursuant to this Part or an order or decision of the board or from engaging in any unfair labour practice;*
> > > *(ii) to do any thing for the purpose of rectifying a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board; . . .*

Analysis and Decision:

[27] The Employer attempted to justify its decision to decrease the Union members' hours of work in November 2020 by describing it as reverting to the previous status quo. The Board does not accept this explanation. Clause 6-62(1)(n) is described as a statutory freeze. It clearly states that the Employer cannot change its employees' hours of work without engaging in collective

bargaining. The Employer has the right to manage its business, but it must operate its business in accordance with the pattern established before the freeze.

[28] The Board stated the Employer's obligation succinctly in *Canadian Union of Public Employees, Local 1486 v The Students' Union of the University of Regina Student Inc.*:

> *Put another way, the Board in Sterling Newspapers Group, supra, stated at paragraph 22:*
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> > *The statutory purpose of s. 11(1)(m) is to require the employer to maintain the status quo with respect to the pre-certification terms and conditions of employment unless the union consents to a change…It stabilizes the bargaining relationship by fixing the terms and conditions of employment at their precertification state. The union is not required to bargain from a sliding scale and can anticipate that employees will retain their current level of pay and benefits until the union and the employer agree to something else.*[20]

[29] The Employer would have the Board find that its practice prior to 2019 is the status quo that they were required to preserve. Their witness described winter 2019 as a pilot project that they decided not to adopt on a permanent basis. Were it not for the intervention of the Certification Order, that would have been a decision they could have made. However, once the Certification Order was granted, clause 6-62(1)(n) prevented them from taking that step without first bargaining with the Union. Their failure to do so is an unfair labour practice.

[30] Turning to remedy, the Union provided the Board with no evidence of the effect of the November 19, 2020 resolution on the employees' income. Accordingly, the only remedy the Board can grant is a declaration that the Employer committed an unfair labour practice by reducing its employees' hours of work in November 2020.

Summary:

[31] In the Board's view, both parties share the responsibility for the current state of their relationship. The MOA signed on October 7, 2020 was subject to ratification, and it was not ratified. This means the parties needed to return to the bargaining table. The Union representatives have done no favours for the Union members employed by the Employer in refusing to meet and bargain with the Employer. The Employer had an obligation to address its collective bargaining responsibilities. It took longer than appropriate to organize itself to do so.

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[20] 2017 CanLII 44004 (SK LRB), at para 66.

[32] Once the Employer was in a position to return to collective bargaining, it was inappropriate for the Union to refuse to meet. Making an application to the Board is a last resort, not the first step when wrinkles arise. The Board urges the parties to return to the bargaining table to continue the process they commenced in October 2020 of bargaining a collective agreement for the employees.

[33] With these Reasons the Board will issue an Order that the application in LRB File No. 181-20 is dismissed. With respect to LRB 182-20, the Board will issue:

(a) a declaration that the Employer committed an unfair labour practice pursuant to clause 6-62(1)(n) of the Act;
(b) an Order determining that the status quo for the employees governed by the Certification Order is full time hours, and directing the Employer that they cannot change those hours of work without bargaining a change with the Union; and
(c) an Order directing the Employer to cease and desist from contravening clause 6-62(1)(n) of the Act.

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

DATED at Regina, Saskatchewan, this **31st** day of **August, 2021.**

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson