SEIU-WEST, Applicant v CANADIAN BLOOD SERVICES, Respondent

LRB File No. 244-19; April 6, 2022
Chairperson, Susan C. Amrud, Q.C.; Board Members: Jim Holmes and Clive Tolley

For SEIU-West: Heather M. Jensen

For Canadian Blood Services: Eileen V. Libby, Q.C.

Unfair labour practice pursuant to s. 6-62(1)(d) and (r) of *The Saskatchewan Employment Act* – Employer failed to bargain in good faith – Employer failed to come to the bargaining table for 14 months after notice to bargain was served – Employer failed to provide timely dates to bargain the collective agreement – Employer failed to meaningfully collectively bargain wage rates – Employer failed to make a serious effort to conclude a collective agreement – Employer used its claim that it was a public employer under Part VII of the Act to delay bargaining collective agreement.

Unfair labour practice pursuant to s. 6-62(1)(d) and (r) of *The Saskatchewan Employment Act* – Remedy – Employer ordered to provide five bargaining dates within 45 days of these Reasons to resume collective bargaining toward a collective agreement – Declaration that Employer failed to bargain in good faith – Order that Employer cease committing unfair labour practice – Order that Reasons be posted in workplace for 30 days.

Section 7-3 of the Act – Dispute over whether Employer is public employer within the meaning of Part VII of the Act – Board has no jurisdiction to resolve this issue – Proper procedure is for Employer to provide notice under section 7-6 for the appointment of an essential services tribunal.

REASONS FOR DECISION

Background:

[1] Susan C. Amrud, Q.C., Chairperson: SEIU-West ["Union"] filed an unfair labour practice application with the Board on November 5, 2019. It alleges that Canadian Blood Services ["Employer"] has engaged in a number of unfair labour practices during bargaining toward a collective agreement. The Union alleges that the Employer has failed or refused to engage in good faith collective bargaining with the Union, contrary to sections 6-7 and 6-26 and clauses 6-62(1)(d) and (r) of *The Saskatchewan Employment Act* ["Act"]. An issue of particular dispute between the parties is the applicability to this Employer and this bargaining unit of Part VII of the Act – Essential Services. This matter was originally scheduled to be heard on February 19 to 21,

2020. Due to a variety of unfortunate events, it was rescheduled four times, and was eventually heard on June 14, 15 and 16, 2021 and November 23, 24, and 25, 2021.

Evidence:

[2] Two witnesses gave evidence for the Union, Cameron McConnell and Heather Dyck. McConnell is employed by the Union as a Union representative and lead negotiator. Dyck is a member of the Union and an employee of the Employer in its Saskatoon office. Two witnesses gave evidence for the Employer, David Krol and Ian Delaney. Krol is the Employer's Director of Supply Chain Operations for Western Canada. Delaney has been the Employer's Manager of Employee Relations since October 2017; prior to that, he had been employed as a senior employee relations consultant for the Employer since January 2013.

[3] The collective agreement currently in effect between the parties has a stated term of April 1, 2012 to March 31, 2017. The Union represents non-management employees of the Employer who are not otherwise represented by the Saskatchewan Union of Nurses ["SUN"] or the Health Sciences Association of Saskatchewan ["HSAS"]. The Union represents three bargaining units of the Employer's employees, one of which is not affected by this matter. In Saskatchewan, the Employer employs approximately 20 employees represented by SUN; 3 employees represented by HSAS; 70 employees represented by the Union in the bargaining units affected by this matter; an unnamed number of donor relations staff in a different Union bargaining unit; and 14 non-unionized staff.

[4] On December 15, 2016, McConnell sent the required notice to the Employer of the Union's intention to negotiate revisions to the current collective agreement, addressed to Delaney. No response was received. McConnell emailed Delaney again on January 13, 2017; Delaney confirmed receipt of the notice on January 16, 2017. The two spoke on January 23, 2017 and then on February 3, 2017, Delaney emailed McConnell a formal acknowledgement of receipt of the notice to bargain. This letter also indicated that the Employer was taking the position that it provides an essential service to the public within the meaning of Part VII of the Act and suggested that this meant that the parties were to negotiate an essential services agreement prior to beginning negotiations for the renewal of the collective agreement. Delaney stated: "I will get back to you soon regarding some potential dates to start discussions"[1].

[1] Exhibit U3.

[5] Later the same day, McConnell emailed Delaney, asking when he intended to send the essential services notice and for the Employer's initial position on what staff is essential. Delaney replied on February 14, 2017 that he had already provided the notice, and that their position would be provided when the parties started negotiating.

[6] On April 5, 2017 McConnell asked Delaney for information the Union required to negotiate the collective agreement, and Delaney said he would see what they could provide. On April 25, 2017, having received no further communication from the Employer, McConnell emailed Delaney again. Delaney responded to McConnell's emails on April 28, 2017 and May 11, 2017, but without providing all of the requested information or any dates for commencing bargaining.

[7] McConnell wrote to Delaney again on May 31, 2017 and, while Delaney responded the same day, he did not provide all of the requested information or proposed dates for bargaining.

[8] Again, the Employer provided no further information, so McConnell emailed Delaney on July 18, 2017, asking for an essential services proposal and proposed dates for bargaining. He offered the last two weeks of September and the last three weeks of October. Delaney eventually replied, on July 31, 2017, but provided no information and no dates.

[9] Having again received no response from the Employer, McConnell emailed Delaney on August 24, 2017, asking for bargaining dates, this time suggesting the last two weeks of October or anytime in November.

[10] Still no response, so McConnell tried again, on September 26, 2017, offering the weeks of December 4th and 11th. Delaney responded on September 27, 2017 and twice on October 13, 2017, without providing any available dates for bargaining. He indicated that the December dates would not work, his January was very busy and inquired about Union availability in February. McConnell replied the same day that the Union could meet anytime in February.

[11] Finally, on October 24, 2017, Delaney emailed McConnell with proposed dates for bargaining in March 2018, two blocks of three days each (March 6, 7 and 8, 13, 14 and 15). He suggested that the first block be used to negotiate an essential services agreement. McConnell objected to this suggestion. He reminded Delaney that the Act does not require parties to negotiate an essential services agreement unless they reach an impasse in bargaining a collective agreement. Given the long delay in getting bargaining started, he did not agree to using either block of time in March for that discussion. Delaney's response was to suggest the Employer

could find additional time prior to the March dates, but only for the purpose of discussing essential services.

[12] The parties ended up meeting on March 5, 6, 7, 14 and 15, 2018 in Saskatoon. Following the meeting on March 15, 2018 Delaney indicated that the Employer would be next available to meet on July 17 to 19, 2018, and the Union agreed. They met on those dates, and on October 22 to 24 and November 28 and 29, 2018, for a total of 13 days. Little progress was made at these meetings.

[13] On December 3, 2018, Delaney suggested meeting next on March 20 and 21, 2019, and McConnell agreed. For personal reasons, Delaney cancelled these dates. On March 4, 2019 Delaney offered as alternatives June 5th and 6th or August 14th and 15th. They met June 5 and 6, 2019.

[14] At the March 5, 2018 meeting, the Employer tabled an 11-page document of proposals. Despite having had 15 months to prepare for this discussion, the proposals were sparse, only addressed non-monetary issues, and often indicated that the Employer wanted to discuss the issue and "Proposals may follow". The Union's proposals, on the other hand, were 37 pages long. They were complete proposals, other than salary increases and term of the agreement. The Employer responded to these proposals, in many cases with the comment "Defer". This added to the delay.

[15] The Union provided another comprehensive proposal on October 24, 2018. The Employer did not agree to any of the Union proposals.

[16] On November 28, 2018, the Employer provided a new, 9-page package. Its monetary proposal indicated:

> *A general wage increase to all rates and all ranges shall be implemented for the classifications included in "Schedule A" equal to that negotiated between Saskatchewan Association of Health Organizations (SAHO) and the Canadian Union of Public Employees (CUPE) with effective dates between April 1, 2017 and March 31, 2020.*[2]

At this point, SAHO and CUPE had not settled, meaning the amount of the wage increase that the Union was being asked to accept was unknown.

[2] Exhibit U19.

[17] The Employer tabled a further response to the Union proposals, on June 6, 2019. The Employer kept firm on its position throughout bargaining. The Union decided there was no point in continuing to modify its position when, in its view, the Employer was refusing to bargain. The parties agreed they were at impasse.

[18] On June 17, 2019, McConnell wrote to the Minister of Labour Relations and Workplace Safety ["Minister"], requesting the appointment of a labour relations officer to provide mediation or conciliation. In the letter he indicated:

> *The Union takes the position that the essential services provisions of the Act do not apply in this dispute because CBS is not a public employer and the Regina and Saskatoon centres do not provide services that are essential to the public for the purposes of the Act.*[3]

[19] In response Delaney wrote to the Minister on June 21, 2019, indicating:

> *With respect to the position taken by the Union regarding essential services, CBS fundamentally disagrees. The Union has never before made CBS aware of its position regarding essential services. Additionally, on February 3, 2017, CBS advised the Union that pursuant to the Act, CBS is a public employer, and most importantly, provides an essential service to the public. Moreover, CBS takes the position that all employees, in the affected bargaining units, responsible for the maintenance of activities regarding whole blood, plasma, stem cells, and organs and tissues provide essential services to the Saskatchewan public.*[4]

[20] A flurry of letters was exchanged between the Employer and the Union with respect to the terms on which the Union would agree to participate in essential services discussions and with respect to the information that the Employer was required to provide to the Union before the discussions could commence.

[21] The labour relations officer appointed by the Minister met with each of the parties on October 22, 2019. On October 25, 2019, he wrote to the Minister, to advise that no agreement could be reached. He noted that the 14-day cooling off period established by the Act would expire on November 8, 2019.

[22] Further letters were exchanged between the Union and the Employer, debating the conditions on which bargaining an essential services agreement might proceed.

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[3] Exhibit U21.
[4] Exhibit U22.

[23] In February 2020 the parties met for two days to discuss essential services. The Union asked for information that it needed to assess what, if any, duties performed by its members could be considered essential services. The Employer stated that the entire staff was needed for all hours and all duties. On the other hand, on November 8, 2019, the Employer sent a notice to its hospital customers, advising them of a potential labour disruption, and stating:

> *Should a labour disruption occur, we are not anticipating any changes to inventory availability in Saskatchewan, as our national inventory is anticipated to remain stable and plans are in place to have other Canadian Blood Services sites provide support to Saskatchewan. However, delivery times may be slightly extended for certain customers as orders may be filled by distribution sites in neighboring provinces and then delivered to hospitals in Saskatchewan using existing couriers.*[5]

[24] The Employer sent another, similar letter to hospital customers on November 15, 2019, again assuring them that "In the event that the union elects to take job action, we will be able to maintain business as usual by relying on our national inventory to ensure that there is no disruption for patients in Saskatchewan or across Canada."[6] A further letter was sent December 6, 2019, assuring hospital customers there was no need for them to maintain higher than normal inventory.

[25] Further discussions took place, with the assistance of the labour relations officer, on May 12, 13, 18, 19 and 20, 2021. These discussions were not fruitful.

Argument on behalf of Union:

[26] The Union argues that the Employer failed or refused to engage in collective bargaining with a view to concluding a revision of their collective agreement, as section 6-26 of the Act requires. The Employer failed or refused to provide timely dates to bargain. The Employer failed or refused to provide any dates for bargaining in 2017. The Employer intentionally delayed bargaining, by not prioritizing availability and neglecting or refusing to set dates in a reasonable time frame. Subsection 6-26(3) of the Act required the parties to "immediately" engage in collective bargaining. After the Union gave notice, the Employer had an immediate duty to engage in collective bargaining in good faith. It is unusual to have so few bargaining dates, so far apart. The Union was available to a significantly greater degree. There was an extraordinary lack of availability on the Employer's part. Especially once bargaining is begun, this much delay is unusual.

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[5] Exhibit U40.
[6] Exhibit E21.

[27] The Employer failed or refused to meaningfully collectively bargain with respect to wage rates, attempting instead to unilaterally tie bargaining to the outcome of bargaining between other, unrelated parties. Delaney was forced to admit that his assertion, that there was a longstanding practice of following the CUPE-SAHO collective agreement, was not accurate. The Employer was not able to articulate why CUPE-SAHO was a relevant comparator. The Employer did not engage in the required disclosure or discussion on the key issue of wage rates. The Employer's attempt to rely on "me too" bargaining in this situation does not comply with its duty to bargain. The Employer did not come to the bargaining table prepared to enter into a collective agreement. The Employer refused to bargain monetary proposals. They stated that whatever was provided by SAHO to CUPE would be what the Union would receive. This left the Union unable to bargain, as they are not at the table bargaining that amount. It meant that the Employer was refusing to bargain.

[28] The Employer engaged in surface bargaining and failed to make a serious effort to conclude a collective agreement. The Employer advised the Union that the Employer planned to delay financial negotiations until the CUPE-SAHO agreement had been ratified and then to propose the same general wage increase. The parties tentatively agreed to a three-year term for the new collective agreement, then the Employer reversed its position and proposed a five-year term, as part of its "me too" bargaining position. This is further evidence of surface bargaining.

[29] The Employer used its claim of essential services to delay or derail bargaining of revisions to the collective agreement. The Employer admitted it is not a public employer within the meaning of Part VII of the Act, when it advised its customers that if a work stoppage were to occur, it did not anticipate "any changes to inventory availability in Saskatchewan, as our national inventory is anticipated to remain stable and plans are in place to have other Canadian Blood Services sites provide support to Saskatchewan"[7]. Even when the Union agreed to engage in negotiations regarding essential services on a without prejudice and without precedent basis, the Employer refused or neglected to identify the specific services it believes to be essential or provide particulars of its essential services proposal to the Union. The Employer failed in its duty to bargain in good faith by improperly claiming it provides essential services. The Employer's lack of honesty, lack of attention to detail and refusal to deal in specifics in light of the full context of providing blood products through a national organization all was a failure to bargain in good faith. Employers who are cavalier or disingenuous in their claim to provide essential services with the services of a bargaining unit significantly and seriously undermine the collective bargaining process and

[7] Exhibit U40.

significantly depart from their obligations under the Act. It is at the very least troubling that the Employer would name services it does not even provide in Saskatchewan, as essential services that the employees in this bargaining unit need to maintain.

[30] In *Saskatoon Co-operative Association Limited v. United Food And Commercial Workers, Local 1400* [8], the Board found that a union had committed an unfair labour practice for declaring an impasse in bargaining when there was no objectively reasonable basis to do so. The Union argues that is analogous to this case, where the Employer, without an objectively reasonable basis, declared in the notice to the Minister that "all employees, in the affected bargaining units, responsible for the maintenance of activities regarding whole blood, plasma, stem cells, and organs and tissues provide essential services to the Saskatchewan public". No employees in this bargaining unit perform activities regarding stem cells, organs or tissues; Delaney initially attempted to defend this wording, but eventually conceded that these services are not provided, and there is no plan to start providing these services, in Saskatchewan. Contrary to section 6-33 and clause 6-62(1)(r) of the Act, the Employer improperly identified as essential services, services that the employees in the bargaining unit do not even provide and services that can be maintained without the members of the bargaining unit.

[31] The combination of the Employer's failure to make itself available, lack of willingness to have a complete monetary proposal, artificially tying bargaining to a distinct sector, use of essential services in an attempt to unilaterally remove the ability of workers to engage in strike activity, and recklessness as to the facts or even lack of honesty in the Employer's representations to the Union and the Minister, all result in a situation in which the Employer has not fairly or appropriately engaged in the bargaining process. Of particular concern is the Employer's failure to provide any available dates in 2017, even with repeated prompting from the Union. The long gaps when the Employer was unavailable were a failure to bargain.

Argument on behalf of Employer:

[32] The Employer argues that it has engaged in collective bargaining in good faith with a view to entering into a collective agreement.

[33] The Employer argues that the Union did not take issue with the pace of bargaining until after impasse. While bargaining proceeded over an extended period of time, the timing was in accordance with the agreement of both parties. The Act does not guarantee a particular process

[8] 2018 CanLII 1733 (SK LRB).

will be followed in bargaining or guarantee the Union a right to negotiate based on a timetable it sets. The Employer's pattern of bargaining was consistent with the process in other workplaces with dates used to exchange bargaining proposals and the parties taking time to consider proposals between bargaining sessions.[9] The Union has not provided evidence that it was making significant efforts to obtain earlier bargaining dates. As in *United Foods and Commercial Workers Union, Local 1400 v Sobey's Capital Inc. (Varsity Common Garden Market)*[10], the overall tone and content of the interactions between the parties demonstrated a mutual willingness to attempt to arrive at a collective agreement.

[34] The Employer argues that proposing to tie wage increases to the CUPE-SAHO terms was reasonable, because the parties' previous collective agreement included the same term. The monetary proposals advanced by the Employer were not indicative of an intention to subvert collective bargaining. They reflected the Employer's bargaining priorities and view of market conditions. Each party is entitled to set its own bargaining priorities and strategies. The Union cannot argue that it was a proposal that was far outside accepted norms when it is the same formula that was used to arrive at the wage rate increases in the current collective agreement.

[35] The role of the Board is limited to ensuring that parties make genuine efforts to bargain a collective agreement, while permitting parties to engage in hard bargaining in support of their own interests. The Board does not micro-manage negotiations. The Board is only to ensure that neither party acts to frustrate collective bargaining by refusing to meaningfully participate in the process. The limited role of the Board is to ensure an appropriate collective bargaining process, not to guarantee a particular outcome.

[36] The Employer argues that the Board has jurisdiction pursuant to section 7-28 of the Act to determine whether employers and unions are obligated to collectively bargain an essential services agreement. The Employer did not commit an unfair labour practice by requesting that the Union negotiate an essential services agreement. The issue before the Board is whether Part VII of the Act applies to the Employer and the Union, and whether the Employer provides essential services to the public. The Employer's action in raising the essential services provisions was not bad faith bargaining. The Employer argues that by doing so it was merely complying with its obligations under section 7-3 of the Act.

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[9] *United Food and Commercial Workers, Local 1400 v Securitas Canada Limited*, 2015 CanLII 43767 (SK LRB).
[10] 2004 CanLII 65587 (SK LRB) at para 40.

Relevant Statutory Provisions:

[37] Numerous provisions of Parts VI and VII of the Act are at issue in this matter:

> *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.*
>
> *6-26(1) Before the expiry of a collective agreement, either party to the collective agreement may give notice in writing to the other party within the period set out in subsection (2) to negotiate a renewal or revision of the collective agreement or a new collective agreement.*
>
> *(2) A written notice pursuant to subsection (1) must be given not less than 60 days nor more than 120 days before the expiry date of the collective agreement.*
>
> *(3) If a written notice is given pursuant to subsection (1), the parties shall immediately engage in collective bargaining with a view to concluding a renewal or revision of a collective agreement or a new collective agreement.*
>
> *6-33(1) If, in the opinion of an employer or a union, collective bargaining to conclude a collective agreement has reached a point where agreement cannot be achieved, the employer or union shall serve a written notice on the minister and the other party that an impasse has been reached.*
>
> *(2) The written notice mentioned in subsection (1) must set out the essential services, if any, that, in the opinion of the party providing the notice, must be maintained in the event of a strike or lockout.*
>
> *(3) Within three days after receiving the notice mentioned in subsection (1), the other party that received the written notice shall serve a written notice on the minister and the other party setting out the essential services that, in that party's opinion, must be maintained in the event of a strike or lockout.*
>
> *(4) As soon as possible after receipt of a written notice pursuant to subsection (1), the minister shall appoint a labour relations officer or a special mediator, or establish a conciliation board, to mediate or conciliate the dispute.*
>
> *(5) Subject to subsection (6), the labour relations officer, special mediator or conciliation board shall give a report, recommendation or decision to the minister and the parties within 60 days after the date of his, her or its appointment.*

(6) The parties may agree to extend the time set pursuant to subsection (5) for giving a report, recommendation or decision.

(7) No strike is to be commenced and no lockout is to be declared:

> *(a) unless a labour relations officer or special mediator is appointed or a conciliation board is established pursuant to subsection (4);*
>
> *(b) unless:*
>
> > *(i) the labour relations officer, special mediator or conciliation board has informed the minister and the parties that the labour relations officer, special mediator or conciliation board does not intend to recommend terms of settlement; or*
> >
> > *(ii) the labour relations officer, special mediator or conciliation board has informed the minister that the parties have not accepted the recommended terms of settlement by the date set by the labour relations officer, special mediator or conciliation board;*
>
> *(c) unless the labour relations officer, special mediator or conciliation board has informed the minister and the parties in a report that the dispute has not been settled; and*
>
> *(d) until:*
>
> > *(i) in the case where no essential services are identified by the parties or there is an essential services agreement in effect between the parties, the expiry of 14 days after the date on which the labour relations officer, special mediator or conciliation board has informed the minister pursuant to clause (c); or*
> >
> > *(ii) in the case where essential services are identified by either party and there is no essential services agreement in effect between the parties, the expiry of seven days after the date on which the labour relations officer, special mediator or conciliation board has informed the minister pursuant to clause (c).*

(8) If it appears to the labour relations officer, special mediator or conciliation board that settlement of the dispute is unlikely before a strike or lockout, the labour relations officer, special mediator or conciliation board shall discuss with the union and the employer whether it is necessary to establish a shutdown protocol that preserves the plant, equipment and any perishable items.

(9) In this section, "essential services agreement" means an essential services agreement as defined in Part VII.

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.

7-1(1) In this Part:

. . .

(f) "public employer" means:

(i) an employer that:

(A) is defined in Part VI; and

(B) provides an essential service to the public; or

(ii) any employer, person, agency or body, or class of employers, persons, agencies or bodies, that:

(A) is prescribed; and

(B) provides an essential service to the public;

. . .

(h) "union" means a union, as defined in Part VI, that represents employees of a public employer.

7-3(1) If a public employer and union have not concluded an essential services agreement and the minister and the parties have received a report from a labour relations officer, special mediator or conciliation board pursuant to clause 6-33(7)(c) that a dispute between the parties has not been settled, the public employer and the union shall engage in collective bargaining with a view to concluding an essential services agreement as soon as is reasonably possible after receiving that report.

(2) Nothing in this section is to be interpreted as preventing a public employer and union from concluding an essential services agreement at any time.

Analysis and Decision:

[38] The Union alleges that the Employer:

a) failed or refused to provide timely dates to bargain the collective agreement;

b) failed or refused to meaningfully collectively bargain with respect to wage rates;

c) delayed bargaining, and indicated that it would not conclude bargaining until collective bargaining by unrelated parties had concluded, and thus refused to bargain;

d) engaged in surface bargaining and failed to make a serious effort to conclude a collective agreement;

e) used its claim of essential services to delay bargaining a collective agreement.

[39] The Board will assess these complaints, bearing in mind the role the Board plays in reviewing collective bargaining.

[40] The parties generally agree on the law to be applied by the Board, but not on the conclusions that the Board should reach in the application of the law in this matter.

[41] In *Saskatchewan Union of Nurses v Regina Qu'appelle Health Region*[11] the Board relied on the following finding in *University of Regina Faculty Association v Saskatchewan Indian Federated College*[12]:

> *The task of the Board is not to intervene in the bargaining process directly in an effort to dictate the agenda at the bargaining table or the outcome of negotiations. Our responsibility on an application such as this one is to discern whether the course of dealings between the parties can be described as bargaining collectively as that process is defined in Section 2(b) of The Trade Union Act.*

[42] The Board concluded:

> *[76] In the words used by the Board in University of Saskatchewan, supra, the question becomes whether the Employer's conduct was designed to or had the effect of impeding discussions for a resolution of the matter at hand.*

[43] In *Service Employees International Union (West) v Saskatchewan Association Of Health Organizations*[13] ["*SEIU (West) v SAHO*"], the Board considered in detail the role of the Board on an application alleging a contravention of the duty to bargain in good faith:

> *[127] The duty to bargain in good faith was well described in 1996 by the Supreme Court of Canada in its decision in Royal Oak Mines Inc. v. Canada (Labour Relations Board) and Canadian Association of Smelter and Allied Workers, Local 4, [1996] 1 S.C.R. 369, 1996 CanLII 220 (SCC), 133 DLR (4th) 129. At paragraphs 41 and 42, the Court said:*
>
> > *Every federal and provincial labour relations code contains a section comparable to s. 50 of the Canada Labour Code which requires the parties to meet and bargain in good faith. In order for collective bargaining to be a fair and effective process it is essential that both the employer and the union negotiate within the framework of the rules established by the relevant statutory labour code. In the context of the duty to bargain in good faith a commitment is required from each side to honestly strive to find a middle ground between their opposing interests. Both parties must approach the bargaining table with good intentions.*
> >
> > *Section 50(a) of the Canada Labour Code has two facets. Not only must the parties bargain in good faith, but they must also make every reasonable effort*

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[11] 2007 CanLII 68774 (SK LRB) at para 59.
[12] [1995] 1st Quarter Sask Labour Rep 139, LRB No 217-94 (SK LRB) at p 151.
[13] 2014 CanLII 17405 (SK LRB). These findings were not overturned in the judicial review and subsequent appeal: *Cypress (Regional Health Authority) v Service Employees' International Union-West*, 2016 SKCA 161 (CanLII).

> *to enter into a collective agreement. Both components are equally important, and a party will be found in breach of the section if it does not comply with both of them. There may well be exceptions but as a general rule the duty to enter into bargaining in good faith must be measured on a subjective standard, while the making of a reasonable effort to bargain should be measured by an objective standard which can be ascertained by a board looking to comparable standards and practices within the particular industry. It is this latter part of the duty which prevents a party from hiding behind an assertion that it is sincerely trying to reach an agreement when, viewed objectively, it can be seen that its proposals are so far from the accepted norms of the industry that they must be unreasonable.*

[128] Together, s. 11(1)(c) and s. 11(2)(c) impose companion obligation on both employers and trade unions in organized workplaces to bargain in good faith and to make reasonable effort to conclude a collective agreement. A secondary (but not less important) purpose of s. 11(1)(c) is to secure the union's position as the exclusive bargaining agent for organized workers and to compel the employer to negotiate with the union (as opposed to directly with the employees) in good faith with a view to conclusion of a collective agreement.

[129] While ss. 11(1)(c) and 11(2)(c) of The Trade Union Act clearly imposes a duty on the parties to bargain in good faith and makes it a violation of the Act to fail to do so, the practice of this Board in enforcing these obligations has historically been one of measured restraint. Simply put, the Board takes the position that it is not our role to supervise or monitor too closely the bargaining strategies adopted and employed by the parties provided that they genuinely engage in the process. This restraint has grown from the desire of the Board to permit the parties to define and develop their own collective bargaining relations and to avoid interference in the balance of economic power that may exist between the parties. See: Noranda Metal Industries Ltd. Canadian Association of Industrial, Mechanical and Allied Workers v. Noranda Metal Industries Limited, [1975] 1 Can. L.R.B.R. 145. See also: Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Western Grocers, A Division of Westfair Foods, [1992] 4th Quarter Sask. Labour Rep. 83, LRB File No. 168-92.

[130] The reality of collective bargaining is that it is a process of resolving conflict through conflict. While The Trade Union Act may regulate that conflict, it also contemplates that a power struggle may well occur between employers and trade unions. The purpose of collective bargaining is to bring the parties together in a setting where they can present their proposals, justify their positions, and search for common ground. Although the parties may have expectations that particular proposals will be agreed to, or that certain kind of concessions will never by asked of them, or that issues will be discussed in a particular order, or that a particular result will be achieved within a certain period of time, there is no guarantee that such will be the case. Each party has the right to attempt to achieve an agreement on terms that it considers advantageous and to adopt strategies intended to advance its own self interests. The parties also have the right to hold firm in their respective positions. The results of collective bargaining flow from the skill of the negotiators, from the prevailing social and economic realities of the day, from the relative strength of the parties, and from their willingness to exercise their respective strength.

[131] The function of this Board is to ensure that the parties engage in a process of collective bargaining; that they agree to meet; that they come to the bargaining table prepared to enter into a collective agreement and/or resolve the issues in dispute between the parties through collective bargaining; that their negotiators have authority to bind their principals; that they explain their proposals and disclose relevant and necessary information that could affect their collective bargaining relationship; and that they not misrepresent the facts or their proposals to the other party. See: Saskatchewan Government Employees' Union v. Government of Saskatchewan and the Honourable Bob Mitchell, [1993] 1st Quarter Sask. Labour Rep. 261, LRB File No. 264-92. Simply put, it is

the responsibility of the Board to ensure that the parties engage in a process of collective bargaining; it is not the function of this Board to ensure that a particular substantive result is achieved or avoided through collective bargaining.

[132] The parties are best able to fashion the terms of their relationship and, in the event of impasse in collective bargaining, each has recourse to economic sanctions. Each round of collective bargaining is a new beginning and many external factors can influence the relative economic power (or perception thereof) of the parties. As a consequence, this Board does not judge the "reasonableness" of the proposals advanced by the parties at the bargaining table unless we conclude that the proposals being advanced or the positions being taken by a party are indicative of a desire to subvert, frustrate or avoid the collective bargaining process. While holding firm on proposals or hard bargaining is permissible, surface bargaining or merely going through the motions of collective bargaining without any real intention of concluding a collective agreement is not consistent with the duty to bargain in good faith. The difficulty of distinguishing "hard bargaining" from subversive behavior was acknowledged by this Board in Saskatchewan Government Employees' Union v. Government of Saskatchewan & Saskatchewan Association of Health Organizations, [1999] Sask. L.R.B.R. 307, LRB File No. 109-98 wherein the Board made the following comments:

> *In mature bargaining relationships, such as this one, it is often difficult for the Board to discern if the bargaining behaviour falls within the realm of "tough, but fair" or if it crosses over into an unacceptable avoidance of collective bargaining responsibility. In Canadian Union of Public Employees v. Saskatchewan Health-Care Association, [1993] 2nd Quarter Sask . Labour Rep. 74, LRB File No. 006- 93, the Board described this dilemma in the following terms, at 83:*
>
> > *. . . when an allegation of an infraction under s.11(1)(c) is brought before us, the Board is faced with the somewhat delicate task of evaluating the bargaining process to determine whether there is any employer conduct which endangers or threatens to subvert that process, while at the same time, not intervening so heavy-handedly that the process ceases to reflect the strength, aspirations and historical relationship of the parties themselves. The distinction between process and substance has a will-o'-the-wisp quality at the best of times, but this is particularly the case where a tribunal is trying to discern whether the conduct goes beyond the generous limits of the tolerable in collective bargaining, or whether it merely reflects a permissible exploitation of strength or skill by one party to gain advantage over the other.*

[44] The parties relied on a number of additional decisions that elaborate on the duty to bargain[14]. As the Board has noted on many occasions, the obligation in section 6-7 and

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[14] *Moose Jaw Firefighters' Association No. 553 v City of Moose Jaw*, 2019 CanLII 98484 (SK LRB); *Sask Media Guild, Local 30199 v Sterling Newspapers Gp*, [2000] Sask LRBR 67; *Saskatchewan Union of Nurses v Regina Qu'appelle Health Region*, *supra* note 11; *Service Employees International Union (West) v Saskatchewan Association Of Health Organizations*, *supra* note 13; *United Food and Commercial Workers, Local 1400 v Securitas Canada Limited*, *supra* note 9; *United Foods and Commercial Workers Union, Local 1400 v Sobey's Capital Inc. (Varsity Common Garden Market)*, *supra* note 10; *United Steelworkers of America, Local 5917 v Jamel Metals Inc.*, 2005 CanLII 63019 (SK LRB); *SGEU v Saskatchewan*, 1999 CarswellSask 973, [1999] Sask. LRBR 307, [1999] SLRBD No. 30; *International Brotherhood of Electrical Workers, Local 2067 v SaskPower and Government of Saskatchewan*, [1993] 1st Quarter Sask Labour Rep 286, LRB File No. 256-92 (SK LRB).

subsection 6-26(3) of the Act to engage in collective bargaining, as defined in clause 6-1(1)(e), imposes two duties on the parties: to bargain in good faith and to make every reasonable effort to enter into a collective agreement. The role of the Board is to ensure that the parties comply with both of these duties. In enforcing these obligations, the approach of the Board is one of measured restraint. It is not the Board's role to supervise or monitor too closely the bargaining strategies used by the parties, provided that they genuinely engage in the process. The Board's role is to monitor the process. The Board's role is to ensure that neither party acts to frustrate collective bargaining by failing or refusing to meaningfully participate in the process.

[45] The Board will not consider the content of the parties' proposals except for the purpose of determining whether a party is engaging in surface bargaining or except if they are otherwise indicative of a party not acting in good faith. The Board will not judge the reasonableness of the parties' proposals unless the Board concludes that the proposals being advanced or the positions being taken are indicative of a strategy to subvert, frustrate or avoid the collective bargaining process. The Board may examine the proposals put forward by the parties, but only for the purpose of determining what they might reveal about the motivation of the parties. While holding firm on proposals or hard bargaining is permissible, surface bargaining or merely going through the motions of collective bargaining without any real intention to conclude a collective agreement is a contravention of the duty to collectively bargain in good faith. A party may not engage in surface bargaining, in which an outward willingness to observe the form of collective bargaining masks an intention to avoid entering a collective agreement at all.

[46] The Supreme Court of Canada has stated that to comply with their obligation to enter into collective bargaining in good faith "a commitment is required from each side to honestly strive to find a middle ground between their opposing interests. Both parties must approach the bargaining table with good intentions"[15].

[47] What the Board must determine, without intervening unduly in the dynamics of the bargaining process, is whether a sincere effort was being made by the Employer to conclude a collective agreement with the Union. Or does the Employer's conduct reveal an unwillingness to strive toward the conclusion of a collective agreement? In reviewing the Employer's conduct, the Board must assess whether that conduct was designed to or had the effect of impeding discussions for a resolution of the collective agreement. Was the Employer negotiating in good faith with a view to arriving at a collective agreement?

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[15] *Royal Oak Mines Inc. v Canada (Labour Relations Board)*, 1996 CanLII 220 (SCC), [1996] 1 SCR 369 at para XLI.

[48] The Board has reached the conclusion that the Employer has committed unfair labour practices pursuant to clauses 6-62(1)(d) and (r) of the Act. This determination is based on the combination of the following conduct.

[49] First, despite repeated requests by the Union, the Employer failed to provide any dates for bargaining for more than 10 months after receiving the notice to bargain from the Union. Then, when the Employer finally offered dates for bargaining, those dates were more than 4 months further into the future. Failing to make its representatives available to meet for more than 14 months after receipt of the notice to bargain does not comply with the Employer's obligation to "immediately" engage in collective bargaining.

[50] The Employer's argument that the Union did not take issue with the pace of negotiations until after this matter was filed is not supported by the evidence. Granted, the Union did not push the issue of commencing discussions until July 2017. Starting then, however, the Union attempted several times to set dates for bargaining in 2017. On every occasion the Employer failed to provide dates or failed to reply at all. Failing to even respond to emails from the Union suggesting dates is evidence that the process of collective bargaining was being impeded by the Employer. The Employer argued that the Union's approach of not proposing specific dates somehow bolstered their argument. For example, on September 26th, the Union offered the weeks of December 4th and 11th. The Employer declined and also indicated that it had no dates in January. The Employer asked if the Union had any dates in February. The Union said it could meet anytime in February. Again the Employer declined to make its representatives available on any date in February. For the Employer to argue that this should be interpreted as evidence disproving the Union's argument is inexplicable. The opposite is true. By this point, the Union's position was, basically, we will meet anytime, and the Employer's response was, we are not available. Viewed from this perspective it is clear that the Employer was not complying with its obligations under the Act. The evidence was clear that the Employer was not prioritizing availability to bargain, as the Act requires them to do.

[51] The Employer is a sophisticated organization with several employees whose jobs are focused on labour relations. The Employer would have been aware of the pending expiry of the collective agreement with the Union and should have been preparing for negotiations with the Union even before it received the notice to bargain. Instead, when it finally came to the table more than 14 months after receiving the notice, it provided an 11-page document for the Union's review. In that document it referred to six Articles, but with respect to four of them it did not raise any

specific issues, but instead just indicated that “proposals may follow”; it also indicated that it wanted to defer discussion on two Letters of Understanding. In response to the Union’s 37-page document, the Employer’s response to many of the issues raised was “Defer”. This approach interfered with a timely process of collective bargaining.

[52] With respect to a proposal on wages, the Employer unreasonably expected the Union to agree to wage rates being negotiated at a different table, between parties having no relationship to the Union or the Employer and it initially expected the Union to agree to those wage rates at a time when the amounts were unknown. The Employer’s argument, that their proposal to match wage increases negotiated in another bargaining unit was a creative solution to resolve collective bargaining while securing fair, competitive wages for employees, is also not supported by the evidence. They refused to enter into any discussions with the Union respecting wage rates. They expected the Union to agree to unknown wage rates that were going to be set between unrelated parties, without any consideration of how those unrelated parties would arrive at those rates. This approach by the Employer did not comply with its duty to bargain in good faith.

[53] The Employer did not come to the table with a view to arriving at a collective agreement. It did not comply with its obligation to try to find a middle ground. This is perhaps illustrated mostly clearly by its refusal to consider a proposal by the Union that the agreement contain the following protection for its employees: “Employees shall not travel when the Provincial Highways Department has issued advice indicating that travel is not recommended on the required route”[16]. In *SEIU (West) v SAHO*, the Board stated: “this Board does not judge the ‘reasonableness’ of the proposals advanced by the parties at the bargaining table unless we conclude that the proposals being advanced or the positions being taken by a party are indicative of a desire to subvert, frustrate or avoid the collective bargaining process”[17]. The Board has concluded that the unreasonableness of this position is evidence of just that. The Employer has been failing to meaningfully participate in the collective bargaining process.

[54] Considerable evidence was led respecting whether Part VII of the Act applies to this workplace and, if so, how. That evidence has been disregarded. It is not the role of the Board to make those determinations: that is the role of an essential services tribunal. If the Employer believes that it is a public employer within the meaning of Part VII, and that Part VII applies to the employees in this bargaining unit, its option on reaching impasse in bargaining an essential

[16] Article 9.08 b) of Exhibits U16, U17, U18 and U20.
[17] At para 132.

services agreement with the Union was to follow the process set out in the Act, which it did not do. While the Union is of the view that Part VII of the Act does not apply to this bargaining unit, it nonetheless agreed to enter into negotiations for an essential services agreement, on a without prejudice and without precedent basis. Again, in this attempt at collective bargaining, the Employer failed to provide the Union with the information it needed to assess the Employer's claim. The Employer based its claim of being a public employer in part on duties not performed by members of this bargaining unit and in some cases on duties not performed by any of its employees in Saskatchewan. It sent three letters to its hospital customers advising that in the event of a labour disruption, it would be business as usual. The Board considers this conduct as evidence that the Employer's claim of essential services was being used to delay bargaining a collective agreement. These positions were further evidence that the Employer was not taking seriously its duty to collectively bargain in good faith.

[55] The Employer's argument, that the Board has jurisdiction pursuant to section 7-28 of the Act to determine whether employers and unions are obligated to collectively bargain an essential services agreement, was also disregarded by the Board. The interpretation of section 7-28 is not at issue in this matter.

[56] Clause 6-1(1)(e), section 6-7 and subsection 6-26(3) require the Employer to engage in collective bargaining in good faith, with a view to the conclusion of a new collective agreement. It was clear from the tone and content of the evidence of the Employer's witnesses that the Employer is failing to bargain in good faith. Its conduct had the effect of impeding discussions for a resolution of the collective agreement. The evidence indicated that the Employer's conduct went beyond tough but fair bargaining, and crossed over into an unacceptable avoidance of its collective bargaining responsibilities.

Remedy:

[57] The Union requested the following relief:

(a) A declaration that the Employer failed to bargain in good faith and an order that the Employer cease committing that unfair labour practice;

(b) An order that the Employer bargain with the Union and provide to the Union five bargaining dates within 45 days of these Reasons for Decision, on which it is available to bargain;

(c) An order declaring that the Employer is not a public employer within the meaning of Part VII of the Act or, in the alternative, an order that the Employer cease using essential services to delay the process for bargaining a collective agreement;

(d) An order that the Employer post these Reasons for Decision in locations accessible to members in the affected bargaining units for a period of 30 days.

[58] In determining an appropriate remedy, the Board seeks to place the parties in the position in which they would have been, but for the unfair labour practices. The goal of the remedy is to ensure collective bargaining proceeds and that a good long-term relationship is maintained between the parties.[18]

[59] The Board has determined that all of the relief requested by the Union will be granted, other than the remedy requested in paragraph (c). The Board does not have jurisdiction to determine whether the Employer is a public employer within the meaning of Part VII of the Act. While it might have been more convenient for the parties to have the Board make this decision, that is not the choice made by the Legislature. That determination requires an assessment of whether the Employer "provides an essential service to the public". That determination can only be made by an essential services tribunal appointed in accordance with Part VII of the Act[19].

[60] Section 7-3 sets out the obligation to engage in collective bargaining with a view to concluding an essential services agreement. The obligation applies to a public employer and to a union that represents employees of a public employer. A public employer is an employer that provides an essential service to the public. If the Employer believes that it is a public employer, and if it believes it cannot achieve an essential services agreement with the Union, section 7-6 provides that it is to serve written notice of that impasse on the Chairperson of the Board, the Minister and the Union. This will trigger the process for the appointment of an essential services tribunal that will determine whether the Employer is a public employer that provides essential services to the public, and the details respecting the essential services that must be maintained during a work stoppage.

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[18] *Moose Jaw Firefighters' Association No. 553 v City of Moose Jaw*, *supra* note 14; *Saskatoon Co-operative Association Limited v United Food And Commercial Workers, Local 1400*, *supra* note 8.
[19] *University of Saskatchewan and Canadian Union of Public Employees, Local 1975*, LRB File No. 015-19; June 27, 2019.

[61] The Board thanks the parties for the comprehensive oral and written submissions they provided, which the Board has reviewed and found helpful. Although not all of them may have been referred to in these Reasons, all were considered in making this decision.

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

DATED at Regina, Saskatchewan, this **6th** day of **April, 2022.**

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson