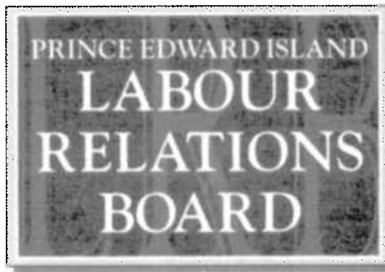


File No. 09-009

Decision No.

IN THE MATTER OF AN UNFAIR LABOUR PRACTICE COMPLAINT

BETWEEN:

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 501

APPLICANT

AND:

THE UNIVERSITY OF PRINCE EDWARD ISLAND (SECURITY POLICE)

RESPONDENT

COUNSEL FOR THE APPLICANT **Glen S. Gallant**

COUNSEL FOR THE RESPONDENT **Murray L. Murphy**

DECISION

Background

The Canadian Union of Public Employees, Local 501 is the sole and certified bargaining agent for the security police of the University of Prince Edward Island. This group of employees consists of the classification of Corporal, Constable, and Security Attendant, and at the time of the hearing is composed of a total of fourteen employees.

The Collective Agreement between the parties expired on the 30th day of April, 2007. By agreement, the parties delayed collective bargaining until March, 2009, pending a decision of the Supreme Court of Prince Edward Island on the issue of the meaning of essential services which was of interest to the parties.

In March, 2009, the parties commenced the process of collective bargaining, and started with the exchange of proposals on the 3rd day of March, 2009. There was a subsequent meeting of the representatives of the parties on the 1st day of April, 2009 to commence the face to face negotiations. The parties met again on the 4th day of May, 2009 to continue the face to face negotiations.

During the meetings on the 5th day of May, 2009, the Applicant learned that the Respondent was considering making changes to the security police force. After hearing of this possibility, the Applicant left the meeting, advised that the collective bargaining had ended and that the Applicant would be seeking conciliation services pursuant to the provisions of the Act. The written request for conciliation was submitted on the 6th day of May, 2009. On the 15th day of May, 2009, a conciliator was appointed.

The first meeting with the conciliator took place in July, 2009. Subsequent conciliation meetings occurred on the 22nd, 23rd and 24th days of September, 2009. The Applicant alleges that on the 24th day of September, 2009, the Respondent gave notice to the Applicant of its intention to reorganize the security police force. The Applicant further alleges that the failure by the Respondent to advise of this possibility at the outset of the collective bargaining in March, 2009 amounts to an unfair labour practice.

Following receipt from the Respondent of the written notice that it would reorganize the security police force, the Applicant asked that the conciliation process be adjourned. On the 28th day of December, 2009, the Complainant filed an unfair labour practice complaint pursuant to the provisions of the *Labour Act* (hereinafter the "*Act*") alleging that the Respondent had violated section 24 of the *Act* for failing to bargain in good faith and make every reasonable effort to conclude a Collective Agreement.

In contrast, the Respondent alleges that the Applicant started the process of hard bargaining during the first meeting of the parties by suggesting that the Applicant's position on wages in the Collective Agreement was to seek parity with the Town of Summerside police force. The Respondent takes the position that its suggestion that it might have to reconsider the structure of security services at the Respondent was reactionary and alleges that this was a matter of hard bargaining being met with hard bargaining.

On the 11th day of January, 2010, the Respondent filed its Reply to the Complaint, denying the allegations of unfair labour practice.

Statutes Considered

Labour Act, R.S.P.E.I. 1988, Cap L-1

Cases Considered

AES Data Limited [1979] OLRB Rep. May 368
Alberta Projectionists and Video Technicians Local 302 et. al. and Famous Players Inc. [1995] Alta L.R. B.R. 162
Amalgamated Jewelry & Allied Trade Workers Union Local 33 v. Toronto Jewelry Manufacturers Assn 1679 CarswellOnt 1202
Assoc. des realisateurs v. Societe Radio-Canada 2001 CarswellNat 3643
Canadian Union of Public Employees, Local 1252 and Department of Finance/Board Management [1995] N.B.L.E.B.D. No. 2
Canadian Union of Public Employees, Local 1190 and the New Brunswick Board of Management [2005] N.B.L.E.B.D. No. 9
Canadian Union of Public Employees, Local 2664 v. Le Patro d'Ottawa [1983] OLRB Rep. February 244
Canadian Union of Public Employees, Local No. 30 and City of Edmonton [1995] Alta. L.R.B.R. 102
Canadian Union of Public Employees v. Nova Scotia [1983] S.C.J. No. 75
Canadian Wire Service Guild Local 213 v. Canadian Broadcasting Corp. 1987 CarswellNat 1073
In Spar Aerospace Products Limited [1978] OLRB Rep. Oct. 859
Laurentian University Faculty Association v. Laurentian University of Sudbury [1979] OLRB Rep. August 767

Local 1979 Retail Clerks International Union and Wilson Automotive (Belleville) Ltd. [1980] OLRB Rep. July 1136
MacLean-Hunter Cable TV Ltd. (Guelph) v. R.C.I.U. Local 206 1980 CarswellNat 782
Molson Brewery Ontario Ltd., Toronto [1977] O.L.R.B. Rep. 526
O.N.A. v. Haliburton (Municipality) Board of Health 1977 CarswellOnt 840
PSAC v. Canada (Senate) (2008) Carswell Nat 4695.
Re Central Web Offset Ltd. [2008] A.L.R.B.D. No. 52
Re Oakville Lifecare Centre [1993] OLRB Rep. October 980
Re Radio Shack and USW 1979 CLB 6927
Re Saskatchewan [1989] S.L.R.B.D. No. 52
Re Saskatchewan [1999]S.L.R.B.D. No. 30
Re Southam Inc. [2000] Alta L.R.B.R. 177
Re University of Prince Edward Island [2006] P.E.I. L.R.B. D. No.6
Re Westinghouse Canada Ltd. and United Electrical, Radio and Machine Workers of America Local 504 [1980] OLRBRep. 577
Retail Wholesale Dairy Worker Union Loc 1515 v. Perfection Foods Ltd. [1986] P.E.I. J. No. 10
Royal Oak Mines Inc. v. Canada (Labour Relations Board)[1996] 1 S.C.R. 369
United Food and Commercial Workers Union Local 864 et.al. v. Polar Foods International et. al. P.E.I.L.R.B. 01-004-02-056
United Steelworkers of America v. Radio Shack [1979] OLRB Rep. 1220

Texts Considered

Adams, *Canadian Labour Law* (2nd ed.)
Sack, Mitchell, Price, *Ontario Labour Relations Law and Practice* (3rd ed.)

Evidence

Documentary Evidence

Exhibit A-1 filed consisting of:
Certification Order
Collective Agreement (May 1, 2004-April 30, 2007)
Notice to Bargain
Request for Appointment of a Conciliation Officer
Letter to William MacKinnon from Carolyn Betram, dated May 15, 2009
Letter from Shawn Shea, PEI Labour Relations Board, dated September 11, 2009
Employer Position on Outstanding Articles
The University of Prince Edward Island's Reply to Complaint of Unfair Labour Practice

Oral Evidence

At the hearing, Bill MacKinnon gave evidence on behalf of the Applicant. Mr. MacKinnon testified that he was the National Service Representative with the Canadian Union of Public Employees (CUPE), a position he has held for the last thirteen years. He advised that his job entails a wide variety of duties, and that he has been involved in the bargaining process for eleven (11) collective agreements. In addition, he testified that he was a union member while employed as a police officer with the Town of Summerside prior to having his present position with CUPE.

Mr. MacKinnon outlined the structure of the security force at the Respondent. He testified that there are some members of the security force who are classified as police officers pursuant to the *Police Act*, R.S.P.E.I. 1988, Cap P-11.1 . These individuals have all the powers of any police officer in Prince Edward Island. However, the security force at the Respondent was limited in its ability to respond to matters of a criminal nature because of its lack of resources. In other words, although some employees have police powers, the security forces regularly call on the local city police services for assistance in investigation of any serious matter.

Mr. MacKinnon testified that, at the commencement of the collective bargaining, each party exchanged proposals. He recollected that some specific provisions of the Collective Agreement were discussed. At the next meeting on the 1st day of April, 2009, Mr. MacKinnon testified that the Applicant presented first. He indicated that some minor issues were agreed to at that meeting. He recalled a discussion that day regarding job classifications, but he testified that there was absolutely no discussion that day about reorganizing. He testified that the next day scheduled was the 4th day of May, 2009, but nothing of substance was discussed regarding the collective bargaining. There was subsequently some disagreement between the parties as to whether the Applicant representatives were entitled to be paid for that day.

Negotiations occurred again on the 5th day of May, 2009. Mr. MacKinnon testified that at the face to face meeting, he presented to the Respondent's representative, Frank Gillan, that the Applicant's position on wages was a *substantial increase*, with the goal to achieve parity with the wages of the police officers in the Town of Summerside. Mr. MacKinnon testified that he felt he had made it clear to Mr. Gillan that the Applicant had no illusion it would be successful in achieving parity, but that somehow "...the gap had to close" in reference to the salaries paid to the Respondent security force compared to the salaries paid to the Town of Summerside police officers. Mr. MacKinnon testified that the Applicant had used the Town of Summerside as a reference point as the police officers in Summerside were the lowest paid police officers in Prince Edward Island.

According to Mr. MacKinnon's evidence, the deterioration began at this juncture. His recollection was that Mr. Gillan advised that because of the wage proposal put forward by the Applicant, the Respondent would have to review its provision of a security force. Mr. MacKinnon testified that he pressed Mr. Gillan on this issue and did not feel he received a satisfactory response. Mr. MacKinnon testified that at this point he was very upset, and angry, and advised Mr. Gillan that as far as he was concerned, the negotiations were over.

Mr. MacKinnon also testified that he was so upset at that time that he stated to Mr. Gillan that he would implement a public relations campaign against the Respondent and enlist the student union, students, and parents. He testified that he also threatened the Respondent with legal action because he felt that the Respondent had already engaged in an unfair labour practice.

On the 6th day of May, 2009, Mr. MacKinnon testified that he met with the union members and it was agreed that he would file a request for conciliation.

Frank Gillan gave evidence for the Respondent. He testified that he is a negotiator employed with HRA, and that the Respondent is one of his clients. He testified that he has been involved in the negotiations of many collective agreements. He also testified that Mr. MacKinnon's recollection of the history of the events was reasonable.

Mr. Gillan did testify that on the 3rd day of March, 2009, there was an exchange of proposals. At that time, the parties took a few minutes to review the proposals, although he testified that there was no detailed discussion at that date. He also testified that he had taken note of the comment in the Applicant's proposal that it was seeking a "substantial wage increase". He referenced articles 11 (Hours of Work) and 37 (Job Security) of the Collective Agreement as two (2) that were the subject for negotiations as far as the Respondent was concerned. He indicated that there would have been very little substantive discussions on the 3rd day of March, 2009.

He further testified that at the meeting on the 1st day of April, 2009, the discussions were more detailed, but no discussions about money took place that day. He testified that he kept "poking around" the issue of article 37, looking for clarification on the Applicant's position on this. He advised that there was no face to face bargaining on the 4th day of May, 2009, but that on the 5th day of May, 2009, both parties came with responses to the proposals.

On the 5th day of May, 2009, Mr Gillan testified that Mr. MacKinnon presented the Applicant's position first. It was during this presentation that the Respondent became aware that the Applicant was indeed seeking wage parity with the Town of Summerside police force. From the Respondent's perspective, this was a huge wage increase - from approximately $38,000 per year to $60,000 per year per employee. Mr. Gillan testified that he had no authority to put forward the Respondent's position at that time in the face of that request. He advised he would have to go back to the Respondent to get instructions on that issue. He also testified that he stated to Mr. MacKinnon that this was a pretty significant position the Applicant was taking and that the Respondent would have to look at how it was going to deliver the security services in future. He also testified that he commented that it would be an option for the Respondent to disband the security police force, and that he advised Mr. MacKinnon that there could very well be consequences with seeking wage parity.

Mr. Gillan testified that Mr. MacKinnon did get very angry, and refused to carry on the bargaining process any further. The parties had a short caucus following which Mr. MacKinnon advised Mr. Gillan that the Applicant was finished with the collective bargaining and would be seeking conciliation pursuant to the provisions of the *Act.*

The conciliation process began on the 10th day of July, 2009. Mr. Gillan testified that there was a brief meeting with both parties and then the parties were set up in separate rooms. The proposal put forward by the Applicant was "more or less the same" as the proposal offered on the 5th day of May, 2009, Mr. Gillan testified. The next date of conciliation was on the 22nd day of September, 2009. Mr. Gillan testified that the Respondent's proposal was provided to the conciliator on that day. On the 23rd day of September, 2009, the Applicant responded and tabled its position on wages. No face to face meetings occurred that date according to Mr. Gillan.

Mr. Gillan testified that on the 24th day of September, 2009, the Respondent presented the document found at Tab 7 of the Exhibit A-1 which is titled *"Employer Position on Outstanding Articles, September 24, 2009"*. This document identified a number of articles of the Collective Agreement and the status of the bargaining with respect to each. At the bottom of the list is the notation *"Notice re Reorganization (attached).* The attached page states as follows:

Further to the discussion at the bargaining table on May 5, 2009, the University of Prince Edward Island hereby serves notice to CUPE Local 501 of its intent to reorganize Security Services. The University has decided to eliminate the need for sworn police powers within the Security Services Division. The division's services and structure will be reorganized to more closely model the security services delivered in other Atlantic Canada universities and in the vast majority of Canadian universities.

We will consult with the union in carrying out this reorganization.

Mr. Gillan testified that it was the Respondent's hope that this would generate discussions. He further testified that this was not presented to the Applicant any sooner because there had been no prior opportunity. He testified that after receiving the Applicant's proposal on the 23rd day of September, 2009, and seeing the Applicant's wage demand, the Respondent felt that the issue of wages was too great so it wanted to get the notice out to the Applicant. He indicated that the hope was that discussions would be generated, and that the Respondent did not want to leave the issue until the Collective Agreement negotiations had been completed. He testified that the suggestion of reorganization was purely a money issue, in other words, had the Applicant not been seeking parity then the issue of reorganization would not have been tabled.

Following receipt of the notice as outlined above, the Applicant refused to carry on any further conciliation and proceeded to file the Unfair Labour Practice complaint.

Issues

At issue is whether or not the Respondent engaged in an Unfair Labour Practice.

Decision

The Applicant stated the issues as follows:

1. Did UPEI's conduct during collective bargaining amount to bargaining in bad faith?

2. Has UPEI violated the statutory freeze provisions of the *Act*?

The Board must consider what gives rise to the collective bargaining process. Section 24 of the *Act, supra* states;

where a party to a collective agreement has given notice under Section 23 to the other party to the agreement

a) the parties shall, without delay, but in any case within twenty days after the notice was given or such further time as the parties may agree, commence collective bargaining and shall make every effort to conclude a new collective agreement.

There is clear evidence before the Board that the parties were engaged in the collective bargaining process. Notice had been given on the 18th day of February, 2007 of the Applicant's intention to enter into collective bargaining.

It is well settled that parties in a collective bargaining process have a duty to bargain in good faith. It is also well settled that it is an unfair labour practice and in violation of the provisions of the *Act, supra* to bargain in bad faith.

The Respondent has argued that the initial position taken by the Applicant to seek wage parity was hard bargaining. It was clearly seeking a wage increase that amounted to much more than a reasonable increase. The Respondent argues that it accordingly met hard bargaining with hard bargaining by responding that it might have to reconsider the organization of the security services at the Respondent.

Both parties have provided case law on the issue. The case of *Royal Oak Mines Inc. v. Canada* (Labour Relations Board)[1996] 1 S.C.R. 369 presents a succinct statement of the rules applying to the bargaining process:

> 41. *Every federal and provincial labour relations code contains a section comparable to s. 50 of the Canada Labour Code which requires the parties 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.*

It is fair to say that the evidence discloses that the Applicant was seeking wage parity with the police officers employed at the Town of Summerside. The Applicant's position was that since the security personnel had been given the designation of police officers, they should be paid on a similar scale to the police officers at the Town of Summerside. Summerside was used, the Board was advised, as the police officers employed at the Town are the lowest paid police officers in the province. In essence, the Applicant seemed to be saying that it would start out by seeking wage parity with the lowest paid police force in Prince Edward Island. From the Applicant's point of view, it was bargaining in good faith and had approached the bargaining table with good intentions.

However, the wages paid to the police officers in Summerside were still substantially higher than the wages that were being paid to the security personnel at the Respondent. The Respondent argues that the Applicant's stated position of seeking wage parity was an enormous jump in wages that the Respondent could simply not afford. It argued that the Applicant's request for such a large jump in wages was pricing itself out of the market. On the 5th day of May, 2009, the Respondent's stated position was that in light of the request for wage parity, it would have to look at its overall structure of delivering security services. At this point, the representative of the Applicant walked out of the negotiations alleging bad faith.

Whether conduct is considered hard bargaining or conduct amounting to an unfair labour practice is essentially a question of fact in the circumstances of each case. In the case of *Re Southam Inc.* [2000] Alta L.R.B.R. 177, the Board made the following comment:

> 47. *...the question for labour boards is always the larger one of whether the accused party is making reasonable efforts to reach a collective agreement, or instead attempting to avoid entering an agreement. To answer that question, labour boards look at the totality of the parties bargaining conduct.*

The Applicant argues in its brief as follows:

It is submitted that UPEI engaged in superficial bargaining, adopted an inflexible position on an important issue (re-organization - job security), refused to disclose important information when repeatedly asked directly about it, and presented at the table an issue that by design was tailor made for rejection.

Labour Boards and courts have recognized that tabling an issue which is tailor made for rejection or designed to avoid a collective agreement, constitutes bad faith bargaining.

The evidence presented by Mr. MacKinnon was that he put forward the proposal for wage parity realizing it would not be achieved at this round of negotiations. He maintained the position that the security personnel should be paid on par with other police officers in the province. The Applicant acknowledged in its evidence through Mr. MacKinnon that it really did not have an expectation of getting to parity at this round of collective bargaining. However, during the negotiations, the Applicant consistently stated that its ultimate objective was wage parity with Summerside. In the face of this position, the Respondent reacted with the statement that it would have to reconsider the organization of its security force.

The Respondent makes reference to the case of *PSAC v. Canada (Senate)* (2008) Carswell Nat 4695. At page 11 of that decision, the Board makes the following comment:

The duty to bargain in good faith imposes obligations with respect to the bargaining process, but it does not imply that the parties must succeed and effectively enter into a collective agreement. However, it requires that the parties undertake the bargaining process seriously and honestly, with the intent of entering into a collective agreement. As the Supreme Court stated in Royal Oak Mines Inc. "...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...". However, the duty to bargain in good faith does not preclude hard bargaining and it is important to distinguish between surface bargaining and hard bargaining.

As a general principle, the Board must not assess the reasonableness of the positions taken by the parties. However, the Board must not hesitate to intervene when it determines that the behavior of a party amounts to bad faith or prevents informed and rational discussions......To make a determination of the parties' behavior, the Board must consider the bargaining relationship between the parties and the context of the negotiations.

The Applicant quotes from *United Steelworkers of America v. Radio Shack* [1979] OLRB Rep. 1220 as follows:

69. In order to make necessary but sensitive assessments of bargaining conduct the Board must assess the totality of a collective bargaining relationship...The legislation requires the parties to make every reasonable effort to make a collective agreement, a duty which patently unreasonable proposals fly in the face of.

One could argue that the Applicant also adopted a position that was "tailor made for rejection" by advancing a proposal for wage parity with the Town of Summerside, which would have necessitated an increase of almost twice the wage earnings being paid to the security personnel. Surely the Applicant was aware that the Respondent would not seriously consider that position. Accordingly, the same case law can be applied to argue that the Applicant engaged in superficial or surface bargaining. It is important to look at the conduct of both parties in this process.

In the opinion of the Board, this was a situation of hard bargaining met with hard bargaining. Based on the evidence before us, we are of the view that the initial position put forward by the Applicant was a position of hard bargaining, met by the Respondent with its own hard bargaining stance. It is not for the Board to determine that the positions taken by the parties were unreasonable. The parties are free to bargain in whatever manner they deem appropriate provided it is not illegal or in contravention of the legislation. There is no evidence before us to suggest that the Respondent attempted to avoid entering into a Collective Agreement. Accordingly, the Board finds that the behavior of the Respondent did not amount to bad faith.

Statutory Freeze

The second issue raised by the Applicant is that the behavior of the Respondent violated section 24 of the *Act*, which states:

> *24. Where a party to a collective agreement has given notice under Section 23 to the other party to the agreement, ...*
>
> *(b) the employer shall not, without the consent of the bargaining agent of the employees affected, increase or decrease rates of wages or alter any other term or condition of employment in effect immediately prior to the expiry date of the collective agreement until*
>
> *(i) a new collective agreement has been concluded, or*
>
> *(ii) the bargaining agent and the employer, or representative authorized by them on their behalf, have bargained collectively and have failed to conclude a new collective agreement and either*
>
> *(A) a conciliation officer has been unable to bring about an agreement between the parties and fourteen days have elapsed from the date on which the report of the conciliation officer was filed with the Minister and a conciliation board or mediator has not been appointed under section 27 or section 34 or*
>
> *(B) a conciliation board or mediator has been appointed and has been unable to bring about an agreement between the parties and seven days have elapsed from the date on which the report of the conciliation board or mediator was filed with the Minister. R.S.P.E.I. 1974, Cap.L-1, s.23*

The issue centers around the notice which was delivered to the Applicant at the conciliation on the 24th day of September, 2009. The Notice, marked as part of Exhibit A-1, at Tab 7 states:

Further to the discussion at the bargaining table on May 5, 2009, the University of Prince Edward Island hereby serves notice to CUPE Local 501 of its intent to reorganize Security Services. The University has decided to eliminate the need for sworn police powers within the Security Services Division. The division's services and structure will be reorganized to more closely model the security services delivered in other Atlantic Canada universities and in the vast majority of Canadian universities.

We will consult with the union in carrying out this reorganization.

The Applicant argues as follows in its brief filed with the Board:

79. The Union submits that the timing of the actual implementation of UPEI's decision to eliminate the requirement for sworn police officers is immaterial to the determination of a breach of a statutory freeze provision of the Act. What is important and fully supported by the evidence given at the hearing is that during the freeze period UPEI made and communicated to the Union its de facto decision to reorganize its security services.

The Respondent stated as follows in its written brief filed with the Board:

Note that subsection 24(b) prohibits the employer from actually altering the terms and conditions of employment, There is no prohibition against talking about altering terms and conditions of employment at the bargaining table. This is what was done in this instance. The university tabled a proposal for discussion purposes. No reorganization (ie. altering terms and conditions of employment) was ever implemented.

Again, both parties provided legal authorities for the Board's consideration. Several consistent themes can be found in the cases. Firstly, the purpose of a statutory freeze provision is to ensure that the parties have confidence in the issues they are bargaining about. The case of *The Canadian Union of Public Employees, Local 1252 and Department of Finance/Board Management* [1995] N.B.L.E.B.D. No. 2 states:

The purpose of the freeze is to establish a solid basis for bargaining, rather than a continually shifting ground where one party has to say - "well, if you are going to start doing that I am going to have to revise my bargaining demands".

And in the *Canadian Union of Public Employees, Local 1190 and the New Brunswick Board of Management* [2005] N.B.L.E.B.D. No. 9, at paragraph 15 of the decision, the Board states:

The conclusion reached by Chairperson Stanley is consistent with the object of the freeze provision as it was described by Le Dain, J. in The Queen v. Canadian Air Traffic Control Association - 1982 (supra) where the employer sought to impose compulsory overtime during the statutory freeze in accordance with the collective agreement but in the face of an existing voluntary overtime policy. The court held the employer in violation of the federal statutory freeze. At paragraph 24 Justice LeDain said:

The purpose of Section 51 of the Public Service Staff Relations Act is to maintain the status quo in respect of terms and conditions of employment while the parties are attempting to negotiate an agreement, It is a particular version of a provision found in labour relations legislation that is designed to promote orderly and fair collective bargaining. There must be some firm and stable frame of reference from which bargaining can proceed. The provision should not be given a narrowly technical construction that would defeat its purpose.

Also, the case of *In Re Oakville Lifecare Centre* [1993] OLRB Rep. October 980 states, at paragraph 30 of the decision:

> *The purpose of the statutory freeze was described in AES Data Limited, [1979] OLRB Rep. May 368 at paragraph 10 as follows:*
>
> > *10. The purpose of section 70 [now section 81] is to maintain the prior pattern of the employment relationship, in its entirety, while the parties are negotiating for a collective agreement, This ensures that they will have a fixed basis from which to begin negotiations, and prevents unilateral alterations in the STATUS QUO which might give one party an unfair advantage either from the point of view of bargaining or of propaganda.*

The following passage from *In Spar Aerospace Products Limited* [1978] OLRB Rep. Oct. 859 is frequently cited in many of the cases on the subject of statutory freeze:

> *The business as before approach does not mean that an employer cannot manage its operation What it does mean, is simply, that the employer must continue to run its operation according to the pattern established before the circumstances giving rise to the freeze occurred providing a clearly identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of benefits would have upon the representation of the employees by a trade union.*

Taking the above case law into account, and with regard to the provisions of section 24 of the *Act*, the evidence before the Board confirms that the Respondent made a decision to alter the terms and conditions of employment when it presented the notice contained at Exhibit A-1, Tab 7. The language contained in the notice is clear. With respect to the arguments of counsel for the Respondent, the Board does not find that this was a proposal tabled for discussion. Rather this was a clear statement that a decision had been made which would dramatically affect the delivery of security services at the Respondent by removing the requirement that the security services have sworn police officers in its employment. The choice of language presented in this statement is important. Had the Respondent used the more liberal phrase that the *need may have to be evaluated in future*, there would probably be no violation of the statutory freeze period. However, the Board is of the view based on the evidence and the specific language employed by the Respondent in this type-written statement that the statutory freeze period has been violated because the Respondent has clearly made a decision to alter the terms of employment.

The Respondent argues that even if there was an alteration to the terms and conditions of employment, that by virtue of article 2 of the Collective Agreement, the management of the University has the express right to reorganize. The submission states as follows:

...the provisions of the collective agreement remain in force during the freeze period, and the parties are entitled to rely and act upon them. This principle is well illustrated in Molson Brewery Ontario Ltd., Toronto [1977] O.L.R.B. Rep. 526.

...Molson's wanted to make a change in the long established shift schedule while negotiations were being carried on. The union objected to the change. The expired agreement contained a management rights clause which provided the employer with the express right to determine schedules. The Ontario Board noted that the operation of the collective agreement provisions continued while the freeze was in effect and since the matter of scheduling was an express management right in the agreement there was no breach of the Act.

The Board acknowledges that the Respondent has management rights. The Respondent relies on article 2 of the Collective Agreement which states:

2.1 The control and direction of the Department of Physical Plant and Security Services, including the right to hire, classify, suspend or discharge for cause; lay-off, promote or set back in classification; re-assign other duties because of a lack of work or other just cause, is vested in the Employer, provided that, in the exercise of such functions, the Department Head shall not violate any provisions of this Agreement or discriminate against any employee because of membership in or lawful activities on behalf of the Bargaining Unit.

The Board has reviewed the provisions of the management clause and the arguments presented by counsel for the Respondent. On an initial review, it does appear that the management rights clause would permit the Respondent to make such decisions notwithstanding the timing relative to the collective bargaining process. However, there are more specific clauses in the Collective Agreement that must be taken into account. Specifically, article 37 states:

ARTICLE 37 - JOB SECURITY

37.1 All job classifications listed on Appendix "A" attached hereto shall remain in force for the duration of this Agreement.

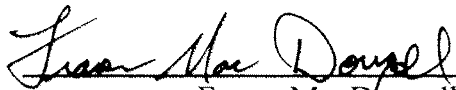
A review of Appendix A reveals the salary schedule along with the job classification, and corresponding salary. In the notice presented to the Applicant on the 24th day of September, 2009, one of the articles that the Respondent indicated it wished to negotiate was article 37. The notation made beside this was "Delete the article". It seems to beg the question why this would be a separate article in the Collective Agreement that the Respondent was seeking to delete if the management rights clause could supercede this provision anyway.

The Respondent has relied on the decision of Molson Breweries, noted above. But the Board is of the view that this decision must be distinguished from the facts before us, as the management rights clause does not contain the same level of clear language as the situation in the Molson Breweries case. Even if it could be said that the management rights are broad enough to permit changes to the classification, the management rights clause also requires that in doing so, no other provision of the Collective Agreement be violated. If it was clearly the case that the Respondent could make changes affecting job security, there would be no need for article 37. It also seems clear to the Board that the Respondent was well aware of this, as it listed article 37 as one of the articles that it wished to negotiate during the collective bargaining process.

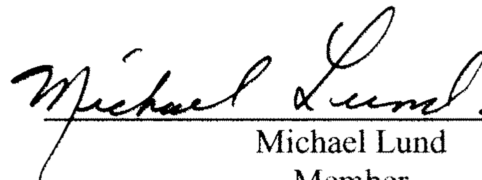
The Board finds that the management provisions do not supercede the provisions in the Collective Agreement and that the decision undertaken by the Respondent to re-organize the security services while in the midst of the collective bargaining process was a violation of the statutory freeze provisions of the *Act.*

Accordingly, the Board find that the Respondent was in violation of Section 24(b) of the *Act* and pursuant to the provisions of section 11(3) of the *Act* orders the Respondent to rescind the decision to re-organize the security services and to continue the collective bargaining process pursuant to the provisions of *Act.*

Nancy Birt
Chair

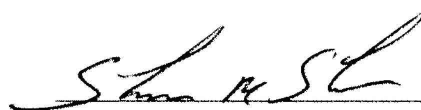


Fraser MacDougall
Member



Michael Lund
Member

This decision made by the Prince Edward Island Labour Relations Board on the 27 day of July, 2011, and issued under the hand of its Chief Executive Officer on the 28 day of July, 2011.



Shawn Shea
Chief Executive Officer