

**Saskatchewan Labour Relations Board**  
**J.R. Hobbs, Vice-Chairperson**  
**C. Jones, J. Tomlinson**

December 1, 1994  
(13 pp.)

**Appearances:** Ivany Decision

Garry Bainbridge and Bettyann Cox, for the Applicant.  
Robert H. McKercher, Q.C., and Shaunt Parthev, for the  
Respondent.

---

REASONS FOR DECISION

The University of Saskatchewan Faculty Association alleges that a newsletter sent by the President of the University of Saskatchewan to all of its employees constitutes an unfair labour practice within the meaning of Sections 11(1)(a), (b) and (c) of The Trade Union Act. These sections of the Act state:

- 11(1) It shall be an unfair labour practice for an employer,  
employer's agent or any other person acting on behalf of the  
employer:
- (a) in any manner, including by communication, to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any right conferred by this Act;
  - (b) to discriminate or interfere with the formation or administration of any labour organization ...;
  - (c) to fail or refuse to bargain collectively with representatives elected or appointed, not necessarily being the employees of the employer, by a trade union representing the majority of the employees in an appropriate unit;

The University admits that the newsletter, dated April 11th, 1994, was prepared by the President of the University and mailed or delivered to all employees of the

---

University including all members of the Faculty Association, but disputes any and all allegations of illegality.

The newsletter read as follows (the numbering of the paragraphs was added by the Board to facilitate reference):

TO: Deans, Department Heads, Faculty and Staff  
FROM: George Ivany, President  
DATE: April 11, 1994

Dear Colleagues:

- 1) In light of concerns about the University's financial situation, I believe it is important to note that settlements with the various bargaining units may have a further impact on our budgetary crisis. I would like to comment on the status of negotiations at this time.

#### ASSISTED EARLY RETIREMENT PROGRAMS

- 2) As many of you will know from the December 14, 1993 Faculty Association Bulletin, we proposed an Assisted Early Retirement Program for faculty. In September of 1993, we proposed an Assisted Early Retirement Program as part of a three- year package for members of the Faculty Association. It was a continuation of the plan set out in the 1991-92 Collective Agreement. On November 15, we proposed an enhanced plan. We put this plan on the table only until December 31, 1993 for two reasons. Such a plan would provide the University with flexibility in our critical budget planning only if it would take effect for the 1994-95 academic year. Second, and most important, the enhancement costs could only be met if we could achieve special, one-time, transition funding from government who had asked us to make specific proposals to that end. Clearly the budget timelines of government required clarification of such costs in a timely manner.
- 3) When we put this plan forward to the Association bargaining team, we emphasized the importance of settling the Collective Agreement by December 31, 1993 to provide adequate time for individuals to consider the option before the March 15 application deadline, and to give units adequate time to plan for the retirements. The University's proposal was

modified on November 19, December 10, December 16, and December 22 in response to suggestions and concerns raised by the faculty negotiators. The University's negotiating team indicated its willingness to meet any time between December 23 and December 31, 1993. No meeting dates were taken up by the Association, and the proposal lapsed on January 1, 1994.

- 4) It is unfortunate that the parties were unable to reach agreement because I believe it would have been in everyone's best interests to be able to offer our faculty members an assisted early retirement plan.
- 5) In terms of support staff, the University has agreed to implement an Assisted Early Retirement Plan for support staff which would include employees under the jurisdiction of the Administrative and Supervisory Personnel Association (A.S.P.A.) and the Canadian Union of Public Employees (C.U.P.E.) Local 1975, together with equivalent out-of-scope University employees. The effective date of the plan is from March 1, 1994 to April 30, 1995.
- 6) This plan is available to permanent and seasonal employees who have completed 10 years or more of service and are eligible to receive a retirement pension under the terms of the Pension Plan in which the employee is enrolled. Employees must also be less than 65 years of age if a member of the Academic Pension Plan and less than 63 years of age if a member of the Non-Academic Pension Plan. A further important condition is that the University must be satisfied that the employee's position will be declared redundant or another position in the same department or unit and at a similar salary level will be declared redundant as a result of the University agreeing to the early retirement under the plan. As a result this plan can be used as a very effective planning tool.

## THE STATUS OF NEGOTIATIONS

### CUPE 1975 (Support Staff)

- 7) The Collective Agreement expired on December 31, 1993. The parties have met and are scheduled to continue negotiations this month. The Universities of Saskatchewan and Regina bargain jointly with this bargaining unit.

#### CUPE 3287 (Sessional Lecturers)

- 8) Negotiations commenced on July 16, 1992 for a contract that expired on June 30, 1992. The parties have not met recently.

#### ASPA (Administrative and Supervisory Personnel)

- 9) Our contract with this bargaining unit expired on June 30, 1993, and several meetings have been held to date. Agreement has been reached on an Assisted Early Retirement Plan as described previously.

#### Faculty Association

- 10) The Faculty Association Agreement expired on June 30, 1992. We began negotiations on December 16, 1992, and have met over 40 times since then. Agreement has been reached on many items but some remain unresolved.
- 11) The University's Negotiating Committee has repeatedly asked for more meetings. In the months of January, February, March, and April, the University's Negotiating Committee has proposed 59 meeting times; the Faculty Association's Negotiating Committee has agreed to meet 11 of those times. I believe that the negotiating committees should meet more often, with the goal of achieving a settlement in the near future.
- 12) On November 19, 1993, the Faculty Association put forward its salary proposal for a three-year agreement. According to our estimates, this proposal would result in salary increases of almost 10% over the three-year period. (In addition, there is provision for a COLA-a cost of living adjustment.) On December 16, 1993, the Association provided proposals for fringe benefit improvements; they are estimated to cost an additional 2.5%. The total for this salary and benefit package is 12.5%. With career development increases and special increases added in, the total cost to the University by the third year would amount to almost 18% more than current salary costs.
- 13) On December 17, the University responded with a three-

year package which would add an estimated 6.2% to the current costs for salaries and benefits. Over the three-year period, there would be a scale increase of 0.5%, career development increases and special increases of 5.4%, and fringe benefit enhancements of 0.3%.

- 14) No further monetary proposals have been exchanged.
- 15) Achieving an agreement on these and other items, subject to negotiations in all bargaining units, is important to the health of the University. Having complete information on all budgetary matters, particularly in these difficult financial times, will enable us to plan our future more effectively.
- 16) Indeed the time is long past for us to demonstrate the true collegiality we all profess to hold so dearly. The University needs each and every one of us to consider the larger picture, to lift our eyes from matters more personal. We can still remain a great institution serving our people. But only by pulling together!

George

The factual context in which the competing claims of the parties must be evaluated can be described as follows. The Faculty Association has bargained collectively on behalf of the faculty of the University of Saskatchewan since the 1950's although it only applied for and received a certification order in 1979. Throughout this period, the parties negotiated numerous collective agreements and it was during negotiations for the most recent collective agreement that this dispute arose.

The last collective agreement expired at the end of 1992 and the parties commenced negotiations for a new agreement. Bargaining was, as always between these parties, time consuming and slow but a new agreement was reached in November 1994. The slow pace of negotiations was due in part to the busy schedules of the members of the two negotiating teams and in part to the complexity of the issues with which they had to contend. Although both sides became impatient and frustrated with the pace of negotiations, neither side accused the other of any bargaining impropriety, with the single exception of the April 11, 1994, newsletter.

This newsletter was one of a series of newsletters which the President regularly sent out to all members of the faculty and other employees of the University. These newsletters addressed all manner of issues which the President considered to be of interest to the staff and faculty and occasionally touched upon labour relations but never to the extent of the April 11th

newsletter. The President testified that his reason for composing and sending the April 11th newsletter was to inform the faculty of the University's version of some of the substantive and procedural issues that had arisen in bargaining. Obviously, he also wished to influence the faculty by the views expressed in his letter and thereby persuade or pressure the Faculty Association.

The parties spent some time attempting to establish the accuracy or inaccuracy of the newsletter, both in the sense of what it included and what it omitted. This caused me to ask counsel for the Faculty Association if the accuracy of the letter was an issue because inaccuracy was not alluded to in the Faculty Association's application, and if it was an issue, was the Faculty Association alleging that the President had intentionally made false or misleading statements. Counsel's reply was yes to the first part of my question and equivocal in response to the second part of my question. The Board will therefore dispose of this application on the understanding that the Faculty Association is not alleging that the President intentionally misrepresented the truth.

The first of the inaccuracies is the impression left by the President's newsletter that as a result of the Faculty Association and the University not reaching an agreement on the "enhanced plan" by December 31st, 1993, the faculty members would be unable to access an assisted early retirement plan. The Union relies particularly upon the following comment in the fourth paragraph of the newsletter:

"It is unfortunate that the parties were unable to reach agreement because I believe that it would have been in everyone's best interests to be able to offer our faculty members an assisted early retirement plan."

The Union says this is misleading and inaccurate because the President was aware when he released his newsletter, that the parties continued to negotiate an early retirement plan subsequent to the lapsing of the University's "enhanced plan." In fact, subsequent to the newsletter the parties were successful in negotiating an early retirement plan, although not the "enhanced plan" which lapsed on December 31st, 1993.

In the Board's opinion, this portion of the newsletter could not have misled any member of the faculty who read it fairly and with an open mind because if they did, they would realize that all the President said was that a particular window of opportunity for a particular enhanced plan closed on December 31, 1993, and this was entirely true and accurate. The President did not state or suggest that prospects for any form of assisted or enhanced early retirement were now ended and members of the Faculty Association would understand this. Furthermore, even if a member of the faculty did read the President's comments in the manner alleged, he or she would know that regardless of what the President might think,

negotiations for assisted or enhanced early retirement would continue, if that was the Faculty Association's wish.

The second inaccuracy is more in the nature of a complaint of lack of balance. The Faculty Association complains that the President commented very briefly on negotiations with CUPE and ASPA (see: paragraphs five to nine inclusive of the newsletter) but dwelt on negotiations with the Faculty Association at length. This says the Faculty Association, makes it look more difficult to negotiate with by comparison to the other unions.

The Board does not see anything unusual and mischievous in this portion of the newsletter for two reasons. First, the newsletter referred to CUPE and ASPA because it was sent to members of those unions and neither of these unions (or the Faculty Association) alleges that it misdescribes the events it addresses. Secondly, it is conceded by the Faculty Association, that it is the lead agreement at the University of Saskatchewan. In other words, neither CUPE nor ASPA will settle their collective agreements with the University until they see what the Faculty Association achieves in its agreement. In this situation, it is easy to understand why the Faculty Association would draw the greater part of the University's attention.

The Faculty Association was particularly annoyed by the President's comments in paragraph 11 which state that the University proposed 59 meetings during the preceding four months and the Faculty Association only agreed to meet on 11 of those occasions. The Faculty Association did not specifically dispute the University's numbers but took issue with the President's failure to mention that there were also dates proposed by the Faculty Association which were unacceptable to the University. The Faculty Association gave no details of these dates.

A similar objection concerned the impression created by the President that the Faculty Association let the enhanced early retirement plan slip away on December the 31st, 1993 because they were unwilling to meet with the University during their Christmas holidays. Mr. Paus-Jenssen, the President of the Faculty Association at the time, testified that this was very unfair because the University knew that the faculty were unable to meet during Christmas holidays because they were too busy fulfilling their commitments to their students.

The Faculty Association alleges that these comments created the impression that the Faculty Association's negotiating committee was less accommodating than the University when it came to scheduling negotiating sessions and implies that the protracted state of negotiations was solely attributable to the Faculty Association. In the Board's opinion, although these comments may have created that impression with some members of the faculty, the comments were factually accurate, at least substantially, if not completely.

The Union also alleged that the employer's statement in paragraph 12 that:

"The total for the salary and benefits package is 12.5% with career development increases and special increases added in, the total cost to the University by the third year would amount to almost 18 % more than current salary costs."

is inaccurate and misleading. However, the Faculty Association called absolutely no evidence to substantiate this allegation whereas the University not only stood by its statement but called Ms. Soroka who was responsible for these figures to explain how they were arrived at. We will never know whether the University's arithmetic was completely accurate, although based upon the evidence provided to the Board, there is no basis for finding serious fault with it.

Accuracy or inaccuracy can be a relevant consideration when it is alleged that an employer's communication interfered with its employees' rights but the Faculty Association has not exposed any meaningful inaccuracy. The fact that the Faculty Association may have a different and equally honestly held view of the same matters would not surprise anyone familiar with collective bargaining but this difference does not render the University's comments illegal. These differences of opinion routinely and inevitably develop between unions and employers who are engaged in collective bargaining. As far as omissions in the newsletter are concerned, it is not necessary for one party to attempt to deal with both sides of every issue in every communication with the employees. The fact that a communication is not exhaustive or perfectly balanced does not make it an unfair labour practice. I am sure that the Faculty Association's version would be just as objectionable to the University but that would not make the Faculty Association's version illegal or a violation of the Act. Furthermore, even if the employer's description of matters was incorrect, that does not by itself make its comments a violation of the Act.

The Board's approach to minor inaccuracies and omissions in non-coercive communications to employees from either of the parties to collective bargaining is the same as that followed by other boards and like those other boards, it has not changed much over the years. The following comments were authored by the British Columbia Labour Relations Board in 1975 in *Noranda Metals Industries Ltd. and C.A.I.M.A.W.*, (1975) 1 Can LRBR 145, and adopted by the Ontario Labour Relations Board in *Canada Cement Lafarge Ltd.*, (1980) OLRB Rep. Nov. 1583 and again and more recently in *Ottawa Citizen, A Division of Southam Inc.*, (1991) 10 CLRBR (2nd Series), page 293 at 307:

The Union's concern was with the letter of September 5th - the letter to the employees - whose special feature was that it painted the stance of the committee in an inaccurate and disparaging way. That letter may have been defamatory. If written in the course of a

representation campaign, it probably would have been a violation of s. 3(2)(f) (which was interpreted by the Board in the recent Langley Advance decision). However, we cannot conclude that it was a failure "to bargain collectively in good faith . . . and to make every reasonable effort to conclude a collective agreement". If this Board were asked to evaluate every distortion of fact or inflation of opinion contained in material written during heated collective bargaining disputes, we would be doing little else. (And we might note that if inaccurate employer letters to employees are a violation of s. 6, then inaccurate union letters to employees might well be a violation of s. 7.) The appropriate remedy for the Noranda letter of September 5th would not be a cease and desist order under s. 8 of the Code. Rather, it was the CAIMAW response to the employees of September 5th together with the meeting of September 15th, (and subsequent events indicate that that was an efficacious remedy).

In *Ottawa Citizen, A Division of Southam Inc.*, supra, the Ontario Board went on to reaffirm a similar passage from its earlier decision in *Fruehauf Trailer Co. of Canada Ltd.*, (1975) OLRBR Jan. 77:

14. As a general matter the Board must be very careful not to insert itself, without hesitation, into the bargaining process as a censor of the communications between parties engaged in this often emotionally charged exercise. A more intrusive approach would provoke disruptive litigation over what is essentially unavoidable human nature. Furthermore we believe that reasonable employees and diligent trade unions have little difficulty evaluating and responding to most of the isolated direct communications that may occur during collective bargaining.

This has been the approach followed in Saskatchewan and it is as commendable on legal and practical grounds now, as it was when it was authored by the British Columbia and Ontario Labour Relations Boards in 1975 (see: *Ipsco Inc.*, 1985 April, Sask. Labour Report p. 52).

In this case, the Faculty Association has not shown anything in the President's letter that constitutes an inaccuracy or omission of the kind that would be indicative of a unfair labour practice. However, whether an employer's comments are accurate or inaccurate is only one of the factors which the Board considers on an application of this kind and it is not determinative one way or the other of whether an unfair labour practice has been committed. A completely accurate communication can still be a unfair labour practice of the kind alleged in this application.

Accordingly, the Board must still determine whether the President's letter was an attempt to bypass the Faculty Association and negotiate directly with the faculty. If that is the proper characterization of the newsletter, then it infringes upon the faculty's Section 3 right to be represented by the Faculty Association in negotiations with the University, thereby bringing Section 11(1)(a) into play. It also breaches the duty imposed upon the University by Section 11(1)(c) to negotiate exclusively with the Faculty Association.

This Board, like every other board in Canada, has long recognized the distinction between communications which are informational and those which are an attempt to circumvent the Union as the employees exclusive representative for collective bargaining. In a series of lengthy and detailed decisions (see: Moose Jaw Co-operative Association Limited, 1985 April, Sask. Labour Report, p. 43; Saskatoon Co-operative Association Limited, 1985 April, Sask. Labour Report, p. 29; Dairy Producers Co-operative Limited, 1990 Winter, Sask. Labour Report, p. 246; Canadian Linen Supply Company Ltd., 1991, Sask. Labour Report, 1st Quarter, p. 63; Western Grocers, Division of Westfair Foods, 1992, Sask. Labour Report, 4th Quarter, p. 83) this Board has explained why employers must be careful but expressly rejected the argument that any communication by the employer to its employees about collective bargaining is a violation of the employer's duty to negotiate exclusively with the certified union. As succinct a statement as any can be found in Canadian Linen Supply Company Ltd., supra, at 67:

Counsel for the Union argued that Section 11(1)(a) and (c) prohibit an employer from communicating with his employees about any matters that are the subject of collective bargaining, whether the communication in question is accurate or inaccurate. We do not agree. This Board has repeatedly taken the position that the Union's argument in this regard is not in keeping with the express terms of Section 11(1)(a) of The Trade Union Act nor has it generally been accepted by Labour Boards throughout Canada.

It is settled law in this Province that an employer is entitled to communicate with its employees, even with respect to matters that are the subject of collective bargaining negotiations, so long as the communication:

- (a) does not amount to an attempt to bargain directly with the employees and circumvent the union as the exclusive bargaining agent;
- (b) does not amount to an attempt to undermine the union's ability to properly represent the employees; and,
- (c) does not interfere with, restrain, intimidate, threaten or coerce

an employee in the exercise of any rights conferred by the Act.

The determination of whether, in the particular circumstances, a communication has interfered with, coerced, intimidated, threatened or restrained an employee in the exercise of a right conferred by the Act is an objective one. The Board's approach in such cases is to ascertain the likely effect of the communication on an employee of average intelligence and fortitude.

An employer is not considered to have bargained directly with his employees, or failed to have negotiated in good faith with the union by fairly and accurately informing employees of its version of the negotiations taking place; see: Saskatoon Co-op (supra); Dairy Producers Co-op (supra).

When determining whether an employer's comments are an attempt to bargain directly with the employees, the Board has regard to a number of factors. The first and often the most important factor is the maturity and security of the bargaining relationship. In this case the University and the Faculty Association have been negotiating successfully with each other for decades. It is a mature bargaining relationship where the University has repeatedly demonstrated that it fully accepts the Faculty Association as the representative of its faculty. If we tighten the focus down from the historical context to the single round of bargaining in which the newsletter was issued, the same pattern emerges; almost two years of serious bargaining between the proper parties which resulted in a new collective bargaining agreement which was being signed while this hearing was in progress.

Another indicator of direct bargaining is whether the contents of the newsletter were discussed or negotiated with the union prior to being communicated to the employees. In this case, the University had discussed all matters with the Faculty Association prior to issuing the newsletter. The newsletter was not a device designed to bypass or marginalize the Faculty Association by speaking to the employees first. Nor is there anything in the newsletter which is in the nature of a proposal or invitation to the employees to enter into discussions directly with the employer. Rather, it directs the employees to take any concerns they have back to their union. In summary, this letter does not possess any of the hallmarks of bargaining or negotiating. It is informational in intent and affect and as such falls outside of the prohibition against direct bargaining.

There is one other argument put forward by the Faculty Association which we will respond to before proceeding any further. The Faculty Association submitted that the President's newsletter focused more on the Faculty Association's proposals and conduct than on setting out the University's position on the issues. The Faculty Association then submitted that "as exclusive bargaining

agent it is for the Union and the Union alone to communicate its bargaining proposals to its members." It argues that previous decisions acknowledging the employer's right to comment on collective bargaining were limited to comments on the employer's own proposal or conduct.

In the Board's opinion, this view is not supported by the words of the Act or by the Board's previous decisions. The employer's communications in both Saskatoon Co-operative Association Limited and Dairy Producers Co-operative Limited, supra, are set forth in full in those decisions, and both employers commented extensively upon the union's position. Furthermore, such a distinction would have no practical merit. Collective bargaining is a bilateral process where the employer's conduct and position is a synthesis of its own initiatives and its reaction to initiatives of the union. It would be a rare occasion when the contribution of one of the parties could be extracted from the whole and then presented to the employees in a manner that could be understood without reference to the whole. The rule suggested by the Faculty Association would be like requiring the employer to speak by using only one-half of the alphabet.

The Faculty Association's second argument and what struck the Board as its real complaint with this newsletter is that it embarrassed the Faculty Association negotiating committee. The Faculty Association submits that even if the newsletter was accurate and dealt with matters which the University was prima facie entitled to comment upon, the newsletter can still be an unfair labour practice. It submits that the Board must determine whether the newsletter was an attempt to discredit its negotiating team and create dissention among its membership in the hope that the membership would apply pressure on the Faculty Association's negotiating team to settle the collective agreement.

The Board agrees in principle except for the suggestion that the University's comments become improper if they are for the purpose of applying pressure upon the Faculty Association to settle the collective agreement. The purpose which renders an employer's comments unlawful is if their purpose is to undermine or damage the relationship between the employees and their union, as this would interfere with a union's ability to properly represent its membership and with the employee's right to bargain collectively through the union.

Categorizing the facts as either a legitimate exercise of free speech or an illegal attempt to undermine the relationship between a union and its members, can be very difficult and more so, when the decision must be made in the rough and emotionally charged world of collective bargaining. Collective bargaining is in essence a power struggle between an employer and a union in which the employees, with their ability to analyze and assess the respective merits and strengths of the parties, play a crucial role because who they support usually determines the outcome. This struggle is not a free for all without rules but a struggle that must be waged with the tools set out in the Act. These tools include the right to negotiate stubbornly and vigorously, to inflict economic damage on

each other by strike and lockout, to seek public support by picketing and other means and to persuade or win the support of the employees by the force of rational and honest argument.

The President's newsletter is a tool of the last kind and its right to exist is important to any democratic organization or community. The prohibitions in The Trade Union Act on an employer's right to communicate with its employees are intended to prohibit coercive comments and to compel the employer to recognize a certified trade union as the exclusive representative of its employees for collective bargaining purposes. The Trade Union Act was never intended to be a means to censor the flow of information to employees and keep them in the dark as to the activities of their own union, whenever the information would embarrass the union. An employer, the employees and the larger community have a legitimate interest which can be affected by the collective bargaining decisions which employees make and everyone, including unions, have an interest in insuring that employees receive the information they need to make these decisions. The employee's right to receive timely, relevant and accurate information concerning collective bargaining from any source, including their employer, does not disappear because one of the incidental affects of the information is to embarrass the union.

The employer's right to communicate with its employees on the subject matter of collective bargaining with a certified union is fraught with peril for employers, but provided its comments are non-coercive and respect the employee's right to negotiate through their union, they are not prohibited. The idea that a certification order makes the union a clearing house and sole source of information for employees on collective bargaining including the union's conduct, has been rejected by this and other boards. In Saskatchewan Telecommunications, 1989 Spring, Sask. Labour Report, p. 68, the Board made this statement which seems appropriate to this case:

The union's complaint in this case amounts to the proposition that it should be a clearing house to which all information on the bargaining process must pass. The fact is, however, that the union has no exclusive right to inform employees. Section 11(1)(a) of the Act is clear: nothing in the Act precludes an employer from lawfully communicating with its employees.

In the end the facts are quite simple. The employer told its employees the truth about the reason for the delay in implementing the agreement. A basic premise of The Trade Union Act is that trade unions are democratic organizations, and fundamental to any democratic organization is informed discussion and the free flow of information. Telling employees the truth about ratification could not have interfered with the exercise of their democratic rights under The Trade Union Act, or constituted interference in the internal

administration of the union.

In this case, there is nothing in the newsletter that unfairly depicted the Faculty Association. If the Faculty Association was discredited or embarrassed at all, it was by its own conduct which the newsletter only described.

The application is dismissed.