2014 CanLII 15045 (ON LRB)

ONTARIO LABOUR RELATIONS BOARD

2978-13-U UNITE HERE Local 75, Applicant v. **Richtree Markets/Natural Markets Group**, Responding Party.

BEFORE: John D. Lewis, Vice-Chair.

DECISION OF THE BOARD: March 25, 2014

1. This is an unfair labour practice complaint under section 96 of the *Labour Relations Act, 1995*, S.O. 1995, c.1 as amended (the "Act"), in which the applicant trade union, UNITE HERE Local 75 ("UNITE" or the "Union"), alleges the employer Richtree Markets/Natural Markets Food Group ("Richtree"), has violated sections 17, 70 and 72 of the Act. The complaint was filed with the Board on January 28, 2014.

2. UNITE filed the application to require Richtree to produce the following documents which the Union says are essential for meaningful collective bargaining:

- a list of names of all current bargaining unit employees, their classifications, their status as full-time, part-time or casual workers and their date of hire;

- a list of these employees' telephone numbers, addresses and e-mail addresses in the possession of the Company;

- any and all information regarding the current health benefits and retirement benefits these employees are entitled to as a result of their employment with the Company; and

- the job descriptions and a list of all duties and responsibilities of these employees.

3. By way of background, the Board in its decision in *Richtree Markets Inc.*, 2014 CanLII 647 (ON LRB), released on January 7, 2014, determined that UNITE had bargaining rights for the employees of the Richtree Markets' location at 14 Queen Street West, Toronto, Ontario. This location is Richtree's current location in the Toronto Eaton Centre. The Board is also aware that UNITE has filed another unfair labour practice complaint against Richtree, in Board File No. 1768-13-U, in which it asserts a breach of sections 17, 50, 70, 72, 86, 82 and 83 of the Act. In that application UNITE takes the position that Richtree is bargaining in bad faith and has refused to recognize the Union has bargaining rights for the current Richtree location in the Toronto Eaton Centre.

4. In the current application, UNITE states it originally asked for the information as set out in paragraph 2 of this decision, in e-mail correspondence to Richtree dated January 10, 2014. Richtree, in its reply e-mail to the Union's correspondence, dated January 20, 2014, stated the following:

> "As you know, the Employer has sought judicial review of the OLRB decision dated January 7, 2014. The grounds for this review are set out in the Notice of Application.
>
> In the interim, the Employer is not prepared to provide the information you requested, in the correspondence below, requested relating to the associates working at the Toronto Eaton Centre".

5. The Union submits that Richtree continues to refuse to provide the information sought. It acknowledges that Richtree has launched a Judicial Review of the Board's decision but that Richtree has not yet perfected the Judicial Review application nor has it obtained a stay of the Board's decision.

6. UNITE asserts that Richtree's unlawful refusal to provide the information is prejudicial to it and makes it impossible to engage in meaningful collective bargaining. Therefore, it seeks that the Board issue a declaration that Richtree's refusal to provide the requested information is a breach of the Act and asks that the Board direct Richtree to provide to the Union the requested information.

7. Richtree, in its Response, does not take the position that the Union, in the normal course, would not be entitled to such information. Likewise, Richtree does not dispute that a refusal to provide such information would be a breach of the Act. Rather, Richtree takes the position that as it is seeking Judicial Review of the Board's decision in *Richtree Markets Inc., supra,* and given the sensitive personal and corporate nature of the information requested, Richtree asks the Board defer/delay the consideration of the application until after the disposition of the current proceedings before the Courts.

8. In light of the above undisputed facts, the Board, in a decision dated February 18, 2014, indicated to the parties that an oral hearing may not be necessary to decide this application but, rather, the matter could be dealt with by way of written submissions. As a result, the Board provided Richtree with the opportunity to file written submissions as to why the Board should not grant the order requested by UNITE. The Board also gave UNITE the opportunity to file written reply submissions.

The Parties' Written Submissions

9. In its written submissions, Richtree asserts that it has not refused to provide UNITE with the requested information as it is merely requesting a "delay in timeline for providing the information". It asserts the delay is reasonable given that it is seeking Judicial Review. It submits that if the Board's decision in *Richtree Markets Inc., supra*, is overturned, the Union and its representatives would not have been entitled to receive the sensitive personal and corporate information it has requested. It submits the

2014 CanLII 15045 (ON LRB)

employee contact information is highly sensitive personal information and that employees have a privacy interest in this information and that the employer cannot typically disclose it without the individual's approval.

10. It submits it would be unreasonable for the Board to direct Richtree to have to go to the expense of compiling such information prior to the disposition of the Judicial Review. It states it has brought the Judicial Review with due dispatch but the timing has somewhat been frustrated by the limited availability of the Union. Therefore, Richtree asks that the complaint be dismissed, or in the alternative, the Board should defer consideration of the complaint.

11. UNITE, in its reply written submissions of March 18, 2014, denies that it has in any way contributed to a delay in the Judicial Review being scheduled. In fact, the Union asserts that since February 11, 2014, the last correspondence from the responding party concerning the scheduling of the Judicial Review, the Union continues to have no information as to the status of the responding party's efforts to secure a date with the Court. Moreover, it asserts that the responding party has, to date, not even perfected the Judicial Review.

12. UNITE submits that the information it has requested is not a lot of information nor would it be expensive to compile. Rather, the request for job descriptions, benefit information and employee contact information is a "very typical request made in collective bargaining in this Province".

Legal Analysis and Decision

13. Rule 38.4 of the Board's Rules of Procedure states as follows:

> **38.4** The Board may conduct a written hearing in any case before it, as the Board considers advisable. Unless the only purpose of the hearing is to deal with procedural matters, the Board will not conduct a written hearing if a party satisfies the Board that there is good reason for not doing so.

14. In this matter neither party has provided the Board with good reason why this complaint should not be conducted by way of a written hearing. The Board, in its decision of February 18, 2014, provided both parties with a full opportunity to provide their written submissions knowing the Board considered the application to be one in which an oral hearing may not be necessary. The Board has carefully reviewed the pleadings and the parties' written submissions and finds that it can decide the application on the basis of the materials filed before it.

15. The Board finds that the material facts in this application are not really in dispute. While Richtree does not concede, in its written submissions, that it has refused to provide UNITE with the requested information, in reality, it has done exactly that. Richtree's initial reply to the Union's request for information, dated January 20, 2014,

2014 CanLII 15045 (ON LRB)

which is set out at paragraph 4 of this decision, is very clear that Richtree is not prepared to provide the requested information while its Judicial Review is pending. Richtree's written submissions requesting a "delay in the timeline" for providing the information, is also an acknowledgement that, to date, it has not nor does it intend to provide such information until the Court renders a decision on its Judicial Review application.

16. Section 70 of the Act is relevant to the Board's determination in this matter. It reads:

> **70.** No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

17. The parties are, of course, familiar with the Board's jurisprudence in this area, particularly *Oaklands Regional Centre*, 2010 CanLII 51878 (ON LRB); *Millcroft Inn*, [2000] O.L.R.B. Rep. July/August 665; *Canadian Niagara Hotels Inc*., 2005 CanLII 49081 (ON LRB); *Ottawa Carleton District School Board*, [2001] O.L.R.B. Rep. Nov./Dec. 1426; *The Globe and Mail*, [1987] O.L.R.B. Rep. Nov. 1368; and *The Ontario Cancer Treatment and Research Foundation (Thunder Bay Clinic)*, 1985 CanLII 969 (ON LRB), and other decisions of the Board and of other Labour Boards. Undoubtedly, the Board's jurisprudence may have had some impact on Richtree's position, namely, the employer is not taking the position that UNITE would not, in the normal course, be entitled to the requested information. Rather, Richtree asserts that it should not have to go through the time and expense of compiling and producing the requested information.

18. In the *Oaklands Regional Centre* decision, *supra*, the Board made the following relevant comments at paragraphs 17 – 20 and 33 and 34:

> 17. In *The Millcroft Inn*, following an extensive analysis, the Board concluded that the rights and obligations attendant upon being the exclusive bargaining agent for employees meant that a union must have the ability to communicate with those employees. The Board stated, at paragraph 33:
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> > The establishment of a collective bargaining relationship between a union and an employer entails a change in the employment relationship between the employer and its workers. The change is from an individual to an [sic] collective basis of the relationship – the union becomes the agent for the employees and, as such, it is entitled to speak on their behalf as if they were together negotiating as a group. The individual employees may not make their own individual bargains or deals with the employer. To that end, the union is entitled to take full

2014 CanLII 15045 (ON LRB)

> instructions from them and to represent them. For the union to do so, it must be able to communicate effortlessly with the employees. The alternative methods offered by the employer do not meet that need. They enable the union to obtain the information, but the methods are such as to amount to an obstacle in the path of the union obtaining what it wants. Obstacles have their social value, but not in this case. Here they serve merely to frustrate the union's capacity to do its job properly. The union needs the information and it should have it without the need to pass through the obstacles suggested by the employer.

18. A union's communication with members of a bargaining unit is thus an activity which is protected by section 70 of the Act. The right and obligation to represent necessarily includes the right to communicate with the employees represented. Interference with the union's ability to communicate with members of the bargaining unit will thus be a violation of the Act, absent a legitimate business purpose: see *The Millcroft Inn* at paragraph 16.

19. The modalities of communication change over time. One common denominator, however, is the need for the names of the employees in the bargaining unit. It is interesting to note that Oaklands does not challenge a union's right to be provided with the names of the employees in the bargaining unit notwithstanding, as it observed in its argument, the absence of an express statutory provision to that effect.

20. In the present day, the telephone remains a significant modality of communication. This is not to say that it will always be so. It is interesting to note that even in 2001, in *Ottawa-Carleton District School Board*, the Board mused that email addresses might be a more effective, and less personally intrusive, means of communication between a union and its members (see paragraph 25). It may well be that "facebook" or "twitter" are now equally, and even more important, means of communication than the telephone. The telephone remains, however, an important means of communication.

33. The Act imposes additional rights and obligations upon a union in relation to collective bargaining. These additional rights and obligations are reviewed in *Canadian Niagara Hotels* at paragraph 24. Simply stated, as a practical matter during collective bargaining a union has a greater need to be able to freely communicate with all the members of the bargaining unit in relation to the bargaining, possible strikes and lockouts and the conduct of ratification votes.

34. Given that the Union's request for the contact information was made in the context of collective bargaining, there being no evidence of a counterbalancing business purpose, we find that Oaklands'

2014 CanLII 15045 (ON LRB)

> refusal to provide that contact information was a violation of section 70 of the Act.

19. In *Canadian Niagara Hotels Inc., supra*, the Board made the following relevant comments:

> 23. Article 3.02 of the collective agreement governs the parties' day to day relationship. It does not address the Union's current circumstances. In my view, the Union cannot reasonably carry out its duties under the Act towards the bargaining unit it represents without having the names, home addresses and telephone numbers of the bargaining unit employees. The Union's duty to fulfil its statutory mandates, e.g. to bargain in good faith, to conclude a collective agreement, to represent all employees in the bargaining unit fairly, requires that it obtain the information from the Employer. So, while individual employees under that Article are not obliged to provide the Union with their personal contact details, the Union is nonetheless entitled to receive that information from the Employer.

20. On a few occasions the Board has been asked to suspend or delay its proceedings pending the outcome of an application for Judicial Review. In this case, Richtree, in the alternative, requests the Board defer consideration of the unfair labour practice complaint pending its Judicial Review Application. In *Cable Tech Wire Company Limited*, [1978] O.L.R.B. Rep. October 895, the Board was asked to suspend consideration of an unfair labour practice complaint which sought a direction from the Board to compel an employer to bargain with the union, pending the outcome of a stay of the Board's order granting bargain rights. At paragraphs 6 and 7 of the decision the Board stated the following:

> 6. The Board has on a number of occasions been asked to suspend its proceedings pending the outcome of an application for Judicial Review. In recent years the Board's response to such requests has been to determine whether the particular circumstances of each case favour proceeding forward or temporarily suspending the proceedings pending the outcome of the Judicial Review. We are of the view that the Board should follow the same type of approach when asked to await the outcome of an application for an order staying a Board decision.
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> 7. One of the considerations the Board must take into account in seeking to determine which course to follow is the effect of delay in labour relations. As the Court of Appeal noted in *Re The Journal Publishing Company of Ottawa Limited and The Ottawa Newspaper Guild Local 20S* (oral judgment released May 17, 1977, unreported) the law which has grown up around labour relations recognizes the principle that "labour relations delayed are labour relations defeated and denied." In our view the effect of any delay in the commencement of collective bargaining after a trade union has been certified is particularly acute. Employees join a trade union to secure

2014 CanLII 15045 (ON LRB)

> the benefits of collective bargaining. Where such collective bargaining does not even begin for a protracted period of time because of the refusal of an employer to meet with the trade union, a likely result is that the trade union will become discredited in the eyes of the employees, causing its support among the employees to erode. Even if collective bargaining does get underway subsequently, the union may well find itself unable to fully reclaim this lost ground. Against this concern for the possible effects of delay in commencing bargaining is to be weighed the additional expense and inconvenience to the respondent employer which would result if it were required to commence bargaining with the complainant and the Court later granted the application for a stay and/or if the Court eventually set aside the certificate altogether.

2014 CanLII 15045 (ON LRB)

21. I agree with and adopt the reasoning of the Board in *Cable Tech Wire Company Limited, supra*, and believe it is analogous to the situation before me. Where meaningful collective bargaining becomes prolonged and frustrated because of the refusal of an employer to provide basic employee information to the trade union, a likely result in the trade union will become discredited in the eyes of the employees, causing its support among the employees to erode. If a trade union cannot even communicate with its members concerning collective bargaining, for lack of current contact information, a likely result is that the trade union will be seen by the employees to be ineffective and non-communicative. Against these concerns is to be weighed the expense and inconvenience to the employer which would result if it were required to provide the information to the trade union and the Court eventually set aside the trade union's bargaining rights.

22. In the present situation, UNITE's bargaining rights concerning the Richtree employees located at the Toronto Eaton Centre were acknowledged by the Board in its decision of January 7, 2014. Richtree has not sought a stay of that decision. Further, Richtree has not yet perfected its Judicial Review nor does there yet seem to be a Court date set for the hearing of the Judicial Review application. Having regard to the time involved and to the possible prejudice to the Union of any further delay, as well as the reasonableness and relevancy of the information requested by the Union, in the context of collective bargaining, I am of the view that, in the particular circumstances of this case, the responding party should be directed to forthwith provide the requested information.

23. Having regard to the above, I find and declare that Richtree's refusal to provide UNITE with the requested information constitutes a breach of section 70 of the Act as it has the effect of interfering in the Union's representation of the bargaining unit and because it undermines the Union's effectiveness in collective bargaining and thus discredits the Union in the eyes of its members.

24. Given my conclusion, it is not necessary to address whether Richtree's refusal to provide the information is also a violation of sections 72 and 17 of the Act.

25. I hereby direct that the responding party forthwith provide to UNITE the information it seeks, as set out at paragraph 2 of this decision.

26. The Board also directs the applicant not to disclose the information to anyone other than the appropriate Union officials; not to use, copy or compile the information for any improper purpose; and to ensure that its officials who have access to the information take the necessary measures to safeguard the privacy of the information. In addition, should the responding party be successful in its Judicial Review Application and the applicant is found to longer hold bargaining rights, as it concerns the Toronto Eaton Centre employees, the requested information, and any and all copies, are to be returned to the responding party, save for one copy to be retained by each counsel in his or her file.

27. The responding party is directed to post copies of this decision immediately in a location or locations where they are most likely to come to the attention of individuals in the bargaining unit. These copies must remain posted for a period of 30 days.

28. I remain seized in the event of any dispute in the application of these directions.

"John D. Lewis"
for the Board

2014 CanLII 15045 (ON LRB)