



GOVERNMENT OF PRINCE EDWARD ISLAND
LABOUR RELATIONS BOARD

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Chief Executive Officer

DEPARTMENT OF LABOUR
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D E C I S I O N

RE: UNFAIR LABOUR PRACTICE COMPLAINT FILED JULY 7, 1988 AND
AMENDED OCTOBER 31, 1988 - FAILURE TO NEGOTIATE

BETWEEN: UNITED FOOD & COMMERCIAL WORKERS' UNION, LOCAL 1252 (IN TRUSTEESHIP)
COMPLAINANT;
AND: GARDEN PROVINCE MEATS (1985) INC. RESPONDENT.

COUNSEL FOR COMPLAINANT - EUGENE P. ROSSITER
COUNSEL FOR RESPONDENT - WILLIAM G. LEA, Q.C.

1. Application No. 88-016 involves an Unfair Labour Practice Complaint filed with the Board on July 7, 1987 by United Food & Commercial Workers' Union, Local 1252 (In Trusteeship) (hereinafter referred to as UFCW) against Garden Province Meats (1985) Inc. (hereinafter referred to as Garden Province). UFCW alleged Garden Province had refused to negotiate and thus had breached sub-section 9(1)(e) of the Labour Act, R.S.P.E.I. 1974, Cap. L-1.
2. A Reply was filed by Garden Province, and the Chief Executive Officer inquired into the Complaint as required by Section 10 of the Labour Act. His report was filed with the Board indicating in part that he was unable to effect a settlement. The Board held a hearing on October 31, 1988 to deal with the matter in accordance with sub-section 10(3) of the Labour Act.
3. At the hearing, counsel for UFCW sought leave to amend its Unfair Labour Practice Complaint to claim additional remedies. In accordance with Section 26 of the Regulations, the Board granted leave for UFCW to file its amended Labour Practice Complaint.
4. The Unfair Labour Practice Complaint alleged against Garden Province is as outlined below:

Garden Province Meats (1985) Inc. refused to negotiate a Collective Agreement with the Certified Bargaining Agent, United Food & Commercial Workers' Union Local 1252 (In Trusteeship) for the employees described in Article II of the Collective Agreement between Industrial Enterprises Incorporated and Local 1252 in effect until May 31, 1987 as provided therein.

At the hearing, counsel for Garden Province admitted the foregoing, which is contained in Paragraph 4 of the Amended Unfair Labour Practice Complaint.

5. The complaint was made pursuant to subsection 9(1)(e) of the Labour Act, supra, which states as follows:

9(1) No employer, employers' organization or an agent or any other person acting on behalf of an employer or employers' organization shall

. . .

(e) fail or refuse to bargain collectively in accordance with this Part.

6. The Board finds that Garden Province is an employer within the meaning of subsection 9(1)(e) of the Labour Act, supra and that UFCW is the certified bargaining agent for the employees of Garden Province according to a previous order of this Board issued on September 7, 1956, which has not been revoked.

7. In light of the evidence heard and the admissions made by Garden Province, the Board has concluded that Garden Province did in fact commit a violation of subsection 9(1)(e) of the Labour Act when it refused to negotiate or bargain collectively with UFCW.

8. While the above noted comments dispose of this complaint except for the remedy, the Board wishes to address an issue raised during the course of the hearing. Basically, the specific issue revolves around whether or not an employer should negotiate with an incumbent union when there is a union seeking to displace the incumbent. The argument was that the negotiations might be fruitless, and good labour management relations could be undermined.

9. The Board researched this issue and has concluded that, in those particular circumstances, the employer still has an obligation to negotiate with the incumbent. Support for this proposition is found in Ontario Labour Relations Board Law and Practice by Sack and Mitchell (1985; Butterworths, Toronto; p. 464)

10. The case of International Brotherhood of Electrical Workers Union Local 1687 v. Crowle Electrical Limited et al (1982) OLRB Rep. Oct. 1458 deals with a situation similar to the present case. There, an unfair labour practice was filed against the employer, but it was filed by the union seeking to displace the incumbent. The incumbent union and the employer had negotiated a collective agreement during the period of time the application for certification was pending. This the applicant union felt was an unlawful interference with its organizing attempts or constituted a breach of the statutory freeze provision in Section 79(2).

11. In Crowle Electrical, the Ontario Labour Relations Board reviewed the relevant legislation and the authorities dealing with this point. In fact, they contemplated the very same scenario as has transpired in this complaint. when the Board stated at paragraph 35 at page 1470:

If the applicant's submissions are accepted, Section 79(2) must be read as qualifying the duty to bargain under section 15 following the employer's receipt of notice of a displacement application. Otherwise an employer who refuses to bargain in the face of a displacement application might find himself faced with a complaint filed by the incumbent union alleging a failure to bargain in good faith . . . (emphasis added)

After reviewing the legislation, the Board in Crowle Electrical concluded that the obligation to bargain still existed. It was also stated that this view was preferred on the basis of 'practical labour considerations'. However, it was noted that the employer was not to seize upon negotiations to effect an unlawful purpose.

12. This Board is fully cognizant of the fact that employees have the right, as prescribed by statute, to become members of a trade union (Section 8(1) Labour Act) However, the incumbent union has previously acquired a certification order from this Board to be the exclusive certified bargaining agent for the employees at Garden Province. That order continues in existence until such time as this Board otherwise determines. Thus, Garden Province must fulfil the duties imposed upon it by statute, one of which is to bargain.

13. The remedies requested in the Amended Unfair Labour Practice Complaint are as outlined below:

- (a) An Order directing the Respondent to negotiate in good faith with Complainant immediately;
- (b) An Award against the Respondent in favour of the Complainant;
- (c) An Order providing that any pay increase received by the employees pursuant to any new contract negotiated and intended to replace the contract expiring on May 31, 1987, be retroactive, with interest thereon at the rate of 20% per annum;
- (d) Costs in favour of the Complainant on solicitor-client basis against the Respondent.

14. The authority of the Board to impose a remedy is found in subsection 10(3) of the Labour Act; namely:

(3) If the chief executive officer or other officer appointed by him, as the case may be, is unable to effect a settlement of the matter complained of, the board shall conduct a hearing on the complaint, and, if the board is satisfied that an employer, employers' organization, trade union or other person is committing or has committed an act prohibited by section 9, the board shall, by order, make such award, give such direction, or take such other action as the board considers just and necessary in the circumstances and, without restricting the generality of the foregoing, may, by such order or subsequent order,

- (a) direct the employer, employers' organization, trade union or other person to cease doing the act and to rectify in such manner as the board considers just any violation of section 9;
- (b) direct an employer to pay to an employee a sum equal to the wages, salary or other remuneration lost by the employee by reason of the employer's violation of section 9;
- (c) direct an employer to reinstate an employee in his employ at such date as in the opinion of the board is just and proper in the circumstances in the position that the employee would have held but for the suspension, transfer, refusal to transfer, lay off, discharge or change of status of the employee done or made by the employer contrary to section 9;
- (d) direct an employer to employ a person at such date as in the opinion of the board is just and proper in the circumstances in the position that the person would have held but for the refusal of such employer to employ such person contrary to section 9.

Thus it is evident, the Board does have wide remedial powers to impose any remedy it believes "just and necessary" in the circumstances, if it finds, as it has in this case, that an act prohibited by section 9 of the Labour Act has been committed.

15. While the Board heard submissions from Garden Province that the Board should not order the company to negotiate, as the employees should be represented at the negotiating table by the bargaining agent of their choice, the Board cannot accept this proposition. The employees of Garden Province have a bargaining agent; namely, UFCW, the union they previously asked this Board to certify. This Board did certify that union as the exclusive bargaining agent for those employees (Order 1-56) and, until otherwise ordered by this Board, they are bound by that Order.

16. The Board will order Garden Province to negotiate in good faith with UFCW and further orders that such negotiations are to commence immediately. For further certainty, the Board orders the negotiations to commence within seven (7) days of the receipt of this Order.

17. Turning now to the award requested by UFCW, the Board does believe it has the power to impose such a remedy given the broad authority conferred by subsection 10(3) of the Labour Act; however, it does not believe a punitive remedy should be imposed in light of the particular facts of this case, but does believe a remedy is necessary and warranted.

18. The Board believes that a remedy for the employees is "just and necessary". For the Board not to make such an order would be overlooking the benefits and detriments that may have occurred. The employer should not be permitted to benefit from a violation of the Labour Act. On the other hand, the employees of Garden Province should not be penalized because of the employer's breach of the law.

19. The Board is fully aware of the purpose of the Labour Act and that the Board should promote good labour relations. The whole inter-union situation involving CAW and UFCW is obviously causing a number of problems. Be that as it may, the Board must attempt to ensure that the purposes of the Labour Act are carried out in a manner which is fair and equitable to the parties concerned.

20. For the foregoing reasons, the Board orders and directs that Garden Province is obligated to pay to all bargaining unit employees all monetary losses that UFCW can establish by reasonable proof as arising from the loss of opportunity to negotiate a collective agreement, due to the unlawful conduct of Garden Province; the said damages, if any running from June 19, 1987, the date the violation occurred, up to the date of the first meeting ordered in Paragraph 16 hereof, together with interest as appropriate. The Chief Executive Officer is directed to reschedule this matter for hearing and determination on the issues of damages and interest, and the Board remains seized of this case for such purposes.

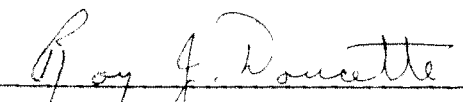
21. Finally, on the issue of costs, the Board is not satisfied that it has the jurisdiction to impose costs. There is nothing explicitly or implicitly stated in the legislation which would provide for such a remedy, and the Board is unaware of any similar tribunal in this province ever following such a practice. In any event, the facts of this case do not warrant an award of solicitor-client costs against Garden Province.

22. The Board orders that, in accordance with subsection 10(4) of the Labour Act, service of this order on both Garden Province and UFCW shall be by serving a copy thereof on the solicitors who represented the parties at the hearing.

THIS DECISION made by the Labour Relations Board and issued under the hand of its Chief Executive Officer on January 31, 1989.

PANEL:

M. Lynn Murray, Chairman
Gerry Doyle, Member
Elizabeth MacFadyen, Member



Roy J. Doucette
Chief Executive Officer