



**MANITOBA LABOUR BOARD**  
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**CASE NO. 120/08/LRA**

**IN THE MATTER OF: *THE LABOUR RELATIONS ACT***

**- and -**

**IN THE MATTER OF: An Application by**

**The Canadian Union of Public Employees, Local 4593,  
Applicant,**

**- and -**

**Shelley Genovey, Janet Husak, Leanne Kennedy,  
Geneva Lindsey, Brenda Patterson, Kathy Waldner,  
Judie Webb and All Other Employees Represented by  
the Applicant Union,  
Persons Concerned,**

**- and -**

**ASSINIBOINE REGIONAL HEALTH AUTHORITY,  
Respondent/Employer.**

**BEFORE: C. S. Robinson, Vice-Chairperson**

**R. P. Bayer, Board Member**

**M. V. Wyshynski, Board Member**

**APPEARANCES: T. Epp, Counsel for Assiniboine Regional Health Authority**

**W. Sumerlus, Counsel for Canadian Union of Public Employees,  
Local No. 4593**

**D. Dickinson, Manager of Human Resources, Assiniboine  
Regional Health Authority**

**L. McLeod, National Representative, Canadian Union of Public  
Employees, Local No. 4593**

## **REASONS FOR DECISION**

### **I. Background and Facts**

The Applicant, Canadian Union of Public Employees, Local 4593 (the “Union”), filed an application seeking remedy for an alleged unfair labour practice which claimed that the Respondent, Assiniboine Regional Health Authority (the “Employer”) violated sections 5, 6 and 7 of *The Labour Relations Act* (the “Act”) when it sent a notice addressed to the Applicant’s members regarding the Employer’s decision not to implement an Arbitration Award issued by Mr. A. B. Graham, Q.C., concerning the annual vacation provisions of the Collective Agreement in force between the parties. The Applicant named certain Persons Concerned on behalf of whom the Union filed individual grievances that were the subject of Arbitrator Graham’s Award. The Employer denied the allegations, stating, in part, that it was entitled and obliged to communicate with its employees regarding vacation planning as was done in the present case.

The Board conducted a hearing at which time Counsel for the each of the parties made submissions. The facts of this matter, as provided to the Board by Counsel, are straightforward and uncontested. The facts may be briefly summarized as follows:

1. The Union is the bargaining agent for a unit of employees set forth in Manitoba Labour Board Certificate No. MLB-6183. In 2006, the Union filed individual grievances on behalf of the named Persons Concerned which were the subject of a grievance arbitration hearing conducted in 2007 before Arbitrator A.B. Graham, Q.C. The grievances each involved a complaint that the Employer failed to properly interpret and apply one or more provisions in the applicable Collective Agreement pertaining to annual vacation entitlement.
2. The Arbitration Award issued on March 4, 2008.
3. The Arbitrator allowed each of the seven grievances before him for consideration. Commencing at page 49 he stated the following:

**DECISION AND REMEMDY**

1. The grievances are allowed.
2. Declarations are granted that:
  - (i) Articles 1501 and 1503 of the Collective Agreement provide that employees with a certain number of years of service are entitled to a specific number of weeks of vacation as outlined in Article 1503. A week of vacation is equal to seven calendar days. Articles 1501 and 1503 reflect an agreement reached by the parties whereby vacation time entitlements are earned on the basis of length of service and are not limited with reference to either the number of shifts scheduled in the weeks of vacation taken by the employees in question, or by any requirement that employees must work a minimum number of hours in a year determined by their respective EFTs;
  - (ii) A week of vacation consists of any block of seven consecutive days selected by the employee, subject to that employee being entitled to that week of vacation by seniority or otherwise;
  - (iii) The Employer is not entitled to charge an employee "stat", or a day retained by the employee pursuant to Article 1512 of the Collective Agreement (commonly referred to as an Incidental day"), in order to adjust or make up for the number of shifts an employee will miss while on vacation;
  - (iv) Days retained pursuant to Article 1512 of the Collective Agreement are part of (not in addition to) the vacation entitlement set forth in Article 1503. However, those days are retained at the initiative of the employee;
  - (v) Articles 1513 and 3104 of the Collective Agreement do not represent a limit on the vacation time entitlement set forth in Articles 1501 and 1503, but rather are provisions which address the issue of the pay to be received by full-time and part-time employees during the periods of their vacations. Those articles represent a reasonable reconciliation of the relationship between vacation time and vacation pay;
  - (vi) Article 1513 and 3104 of the Collective Agreement are to be construed so that the reference to "accrued vacation" is interpreted as "accrued vacation pay";
  - (vii) The total amount in an employee's vacation pay "bank" is to be paid to the employee over the period of the employee's annual vacation, that is to say over the number of weeks taken as vacation, or if any days are retained by

the employee pursuant to Article 1512, over the number of weeks taken as vacation and the days so retained. The total amount in an employee's vacation pay "bank" will include the appropriate percentage of income earned on both regularly scheduled shifts, and in the case of part-time employees, on any extra shifts worked by that particular employee. In view of the declarations set forth above, I will make no additional orders providing specific remedies to the individual grievors, and I will afford the parties an opportunity to discuss what additional remedies, if any, are required.

3. I hereby retain jurisdiction to determine what, if any, additional remedies are required, if the parties are unable to agree on any such remedies. I also retain jurisdiction to determine any other issues which may arise with respect to the implementation of this Award.

### **CONCLUSION**

The result of these proceedings is that the grievances have been allowed, and I have accepted the Union's arguments with respect to the interpretation of the various provisions referred to in this Award. It should be stated that the positions asserted by the Employer were not unreasonable. I am satisfied that the Employer was attempting to fairly administer the Collective Agreement in an environment of scarce resources and significant staffing and scheduling challenges. The decisions and actions the Employer took were based on its bona fide interpretation of the provisions in the Collective Agreement. The Employer's objectives were also legitimate. However, I have found that the Employer's decisions and actions were inconsistent with the applicable provisions in the current Collective Agreement.

4. Following receipt of the Arbitrator's Award, Ms. Glenda Smith, a National Representative of the Applicant Union, and Ms. Dawn Dickenson, Manager of Human Resources for the Employer, had discussions regarding how the Award would be implemented.
5. As set out in the Collective Agreement, the vacation year is from May 1<sup>st</sup> in one year to the 30<sup>th</sup> of April the next year. Vacation planning takes place in March each year. Employees must indicate their vacation preference to the Employer on or before March 31. Thereafter, the vacation schedule is finalized by the Employer, giving due consideration to employee preference and individual circumstances including seniority, and then it is posted.

6. On March 25, 2008, the Employer decided that would seek judicial review of the Arbitrator's Award.
7. On March 25, 2008, the Employer posted the following Memorandum addressed to "All Staff in CUPE Bargaining Unit" from Ms. Dickenson:

Re: Scheduled Vacation for the 2008/2009 (sic)

As you may be aware, a recent arbitration award was received by the Employer, this (sic) would mean a change of practice for the Assiniboine RHA for Vacation Planning.

The Assiniboine RHA will not be implementing the Award as written by Mr. Graham at this time and it is an expectation of CUPE members to schedule their vacation as outlined in the Employers (sic) Vacation Guidelines dated January 2008. The Assiniboine RHA will be pursuing a judicial review of this matter.

If you have any questions, please call me at the Shoal Lake Office.

8. Around the same time Ms. Dickenson sent the above-noted Memorandum to managerial staff to be posted, she sent an email to Ms. Smith, Ms. Ann Bailey (President of CUPE Local 4593), and Ms. Debbie Halliday, indicating that the Employer would not be implementing the Arbitration Award. Attached to the email was a copy of the Memorandum addressed to "All Staff in CUPE Bargaining Unit".
9. The email was not immediately seen by Ms. Smith. She first discovered that the Employer was not going to implement the Arbitrator's Award when she was advised by Ms. Bailey.
10. On March 28, 2008, the Employer filed an application for judicial review of the Arbitrator's Award in the Court of Queen's Bench.

11. An Order respecting the Award dated April 15, 2008 was filed in the Court of Queen's Bench on April 21, 2008.
12. On April 24, 2008, the Employer filed a Notice of Motion for a stay of the Order.
13. On July 11, 2008, the Union filed a Notice of Motion for Contempt and a Motion to Consolidate all of the matters before the Court.
14. The parties subsequently agreed to withdraw their Motions respecting the Stay, Contempt, and Consolidation and scheduled a date to hear the judicial review application.
15. The parties stipulated that if called to testify, Ms. Smith and Ms. Bailey would have stated that they are "hearing from a lot of members in the field regarding what good is the Collective Agreement and why do we have to go through this". Their evidence would be that this matter is "affecting members and representatives of the Union". In addition, it was agreed by the parties that, had she testified, Ms. Smith would have said that if she had been advised prior to the posting of Ms. Dickenson's Memorandum that the Employer's intent was not to implement the Arbitrator's Award, she would have been prepared to discuss the matter with the Employer and the Union Executive.
16. The parties further stipulated that had Ms. Dickenson testified she would have said that "at no time prior to the posting of the Memorandum did she have any ill intent" and that the Memorandum was not meant to be "a flagrant, in-your-face 'we do not intend to follow the Arbitration Award'". She would have further testified that the "time crunch" respecting vacation scheduling "brought about the issuance of the Memorandum".

## II. Positions of the Parties

The Union asserted that the Employer committed an unfair labour practice when it posted the Memorandum addressed to “All Staff in CUPE Bargaining Unit” advising that it would not be implementing the Arbitrator’s Award at that time. Although it originally claimed that the Employer’s action in this regard violated sections 5, 6 and 7 of the *Act*, Counsel for the Union indicated that the true focus of the Union’s argument was an alleged violation by the Employer of subsection 6(1) of the *Act*. Specifically, the Union argues that the Employer’s direct communication with employees in the bargaining unit, in the circumstances, constituted an interference with its exclusive representation rights.

Union Counsel expanded upon this position as follows. Vacations and the manner in which they are planned and scheduled are matters set out in the Collective Agreement entered into between the Union and the Employer and constitute terms and conditions of employment. As stipulated in sections 78 and 128 of the *Act* as well as Article 1107 of the Collective Agreement, the decision of an arbitrator constitutes a final and binding resolution of a grievance. Following receipt of Arbitrator Graham’s Award relating to the terms and conditions of employment, it was not open to the Employer to directly correspond with employees to advise that it did not intend to comply with the Award. The Union’s exclusive right to negotiate on behalf of the individuals in the bargaining unit must be respected in such cases. Counsel submitted that the Employer should have had discussions with the Union regarding its desire to not implement the Award rather than simply sending out a notice to employees without advising the Union. Counsel stressed that the Employer’s action in this regard effectively deprived the Union on any meaningful opportunity to represent its members regarding the decision. The issue of implementation of an arbitration decision, or a delay in doing so, is “demonstrably bargainable.” Moreover, while the Employer had the right to seek judicial review and a stay of the Award in the courts, it “jumped the gun” in the circumstances and unilaterally determined that it would not comply with the Award and advised employees directly of its decision. This

action was particularly damaging to the Union in the circumstances given previous joint discussions that had occurred regarding implementation of the Award. The Union was taken by surprise by the Employer's communication to the employees which led members to question the utility of the Collective Agreement and its arbitration provisions.

In support of its position, Counsel for the Union submitted the following authorities:

1. **G. Adams, *Canadian Labour Law***, 2nd ed. (Aurora, Ont.: Canada Law Book, looseleaf);
2. **Noël v. Société d'énergie de la Baie James**, [2001] 2 S.C.R. 207;
3. ***Bell Canada v. C.E.P.***, [2003] C.I.R.B.D. No. 1; and
4. ***DuPont Canada Inc. v. C.E.P.***, [2000] OLRB Rep. May/June 457.

Counsel for the Employer replied that there is no provision in the *Act* requiring an Employer to engage in discussions with a bargaining agent prior to seeking judicial review of an Arbitration Award. Moreover, it was not incumbent upon the Employer in the circumstances to seek a stay of the Award prior to advising employees that it did not intend to comply with the Arbitrator's decision given that judicial review was going to be sought. The Employer advanced the view that it was up to the Union in the present case to take steps pursuant to section 127 of the *Act* to enforce the Award. On this view, it was only after the date on which Arbitrator Graham's Order was filed in Court (April 21, 2008) that the necessity to seek a stay could potentially have arisen. Counsel submitted that, as of the date of the impugned Memorandum to employees, there was nothing yet to stay as the said Order had not been filed.

In specific answer to the propriety of posting the Memorandum dated March 25, 2008 to the employees without first discussing the matter with the Union, the Employer's position is that

by simply advising employees that it intended to schedule vacation as it had done in the past notwithstanding the Arbitrator's decision, it was not bargaining directly with employees and it did not violate subsection 6(1) or any other section of the *Act*. Rather, the employer was simply advising the employees of its position regarding the Award and its expectation that vacation would continue to be scheduled in accordance with past practice. Counsel pointed out that given the timing of the Award and the vacation year, it was necessary to promptly advise employees of its decision. In so doing, the Memorandum's author, Ms. Dickenson, did not have any "ill intent" and there is nothing in the Memorandum which may reasonably be said to constitute intimidation, coercion, threats, or undue influence. The absence of such factors is significant, argued counsel for the Employer, as subsection 6(1) is subject to the freedom of speech provisions set out in subsection 32(1) of the *Act*. The Employer believes that it did not interfere with the representation of employees when it sent out the Memorandum.

In support of its position, Counsel for the Employer submitted the following authorities:

1. *Bank of Nova Scotia v. Retail Clerks International Union*, [1978] 1 Can. L.R.B.R. 541;
2. *Superior Ambulance Ltd. v. O.P.S.E.U.*, [1987] OLRB Rep. May 772; and
3. *St. Mary's General Hospital v. O.N.U.*, [1982] OLRB Rep. March 491.

### **III. Analysis**

The issue in this case concerns whether the Employer violated subsection 6(1) of the *Act* when it issued the Memorandum dated March 25, 2008 addressed to "All staff in CUPE Bargaining Unit". Subsection 6(1) of the *Act* prohibits employers and employers' organizations, and those acting on their behalf, from such things as interfering with the formation, selection, or

administration of a union or the representation of employees by a union. The section reads as follows:

**Employer's interference with union**

**6(1)** Subject to subsection 32(1), every employer or employers' organization, and every person acting on behalf of an employer or an employers' organization, who participates in, or interferes with, the formation, selection, or administration of a union, or the representation of employees by a union that is the bargaining agent for the employees, or contributes financial or other support to a union, commits an unfair labour practice.

As the certified bargaining agent, the Union has the exclusive authority to bargain collectively on behalf of bargaining unit members with respect to the terms and conditions of their employment. In this regard, subsection 44(a) of the *Act* provides as follows:

**Effect of certification**

**44** Subject as otherwise provided herein, where a union is certified under this Act as the bargaining agent for the employees in a unit

(a) the union immediately replaces any other bargaining agent for employees in the unit, and has exclusive authority to bargain collectively on behalf of employees in the unit and, subject to subsection 69(1), to bind them by a Collective Agreement until the certification of the union in respect of employees in the unit is cancelled...

There are numerous authorities which discuss the exclusive authority of a bargaining agent with respect to the representation of employees in the bargaining unit for which it has been certified. A certified union's "monopoly on representation" was commented on recently by the Supreme Court of Canada in *Bisailon v. Concordia University*, [2006] 1 S.C.R. 666, wherein LeBel J., writing for the majority, described the principle as follows commencing at paragraph 23:

23 The certification of an association of employees produces a variety of legal consequences, both for the association itself and for the employees and the employer.

- 24 First, the *Labour Code* gives certified unions a set of rights, the most important of which is most certainly the monopoly on representation. When it is certified, a union acquires the exclusive power to negotiate conditions of employment with the employer for all members of the bargaining unit with a view to reaching a Collective Agreement. Once a Collective Agreement is in place, the union's monopoly on representation also extends to the implementation and application of the agreement. For example, a certified union holds a monopoly with respect to the choice of solutions for the implementation of the Collective Agreement. The union's power to control the process includes the power to settle cases or bring cases to a conclusion in the course of the arbitration process, or to work out a solution with the employer, subject to compliance with the parameters of the legal duty of representation" (*Noël v. Société d'énergie de la Baie James*, [2001] 2 S.C.R. 207, 2001 SCC 39, at para. 45).
- 25 Second, the monopoly on representation also has a significant impact on employees' rights. Our system of collective representation proscribes the individual negotiation of conditions of employment. A screen is erected between the employer and the employees in the bargaining unit (*Noël*, at para. 42). This screen prevents the employer from negotiating directly with its employees and in so doing precludes the employees from negotiating their individual conditions of employment directly with their employer (*Syndicat catholique des employés de magasins de Québec Inc. v. Compagnie Paquet Ltée*, [1959] S.C.R. 206; *Noël*; *Isidore Garon Ltée v. Tremblay*, [2006] 1 S.C.R. 27, 2006 SCC 2). Moreover, once a collective agreement is signed, it becomes the regulatory framework governing relations between the union and the employer, as well as the individual relationships between the employer and employees: *Hémond v. Coopérative fédérée du Québec*, [1989] 2 S.C.R. 962, at p. 975; *Noël*, at para. 43; *Isidore*, at para. 14.
- 26 The system of collective representation thus takes certain individual rights away from employees. In particular, employees are denied the possibility of negotiating their conditions of employment directly with their employer and also lose control over the application of those conditions. In return, by negotiating with the employer with one voice through their union, employees improve their position in the balance of power with the employer (*Isidore*, at para. 38). Moreover, the individual interests of each member of the bargaining unit are protected in a system of collective representation. For example, in order to be certified to represent employees, a union must obtain the support of a majority of the employees in the bargaining unit (s. 28 L.C.). Furthermore, having regard to the provisions of s. 21 L.C., it follows from the case law that employees must, inter alia, have a certain commonality of interests where labour relations

are concerned and that this helps to protect employees' individual interests. Lastly, while the monopoly on representation confers rights upon certified unions, it also imposes upon them a duty to act properly by, for example, taking into account the competing interests of all employees in the bargaining unit: s. 47.2 L.C.; *Noël*, at paras. 46-55.

- 27 Finally, the collective representation system in labour law has a significant impact on the employer. It requires the employer to recognize the certified union and to enter into good-faith collective bargaining exclusively with it. However, the employer also derives various benefits from the collective representation system. In particular, employers acquire the right to industrial peace for the term of the collective agreement and can, in principle, expect that disagreements stemming from the implementation and application of the Collective Agreement will be negotiated with the union or settled through the grievance arbitration process....
- 28 It is worth noting that the monopoly on collective representation is not limited to the context of the Collective Agreement but extends to all aspects of employee-employer relations (*Isidore*, at para. 41; *Noël*, at para. 57).

The union's monopoly with respect to collective bargaining is based not only on the existence of a Collective Agreement, but also on the certification of the union (*Isidore*, at para. 38; *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983, at pp. 1007-8). For this reason, any negotiations regarding conditions of employment that are not mentioned in the current Collective Agreement must be conducted by the certified union.

In *Noël v. Société d'énergie de la Baie James*, [2001] 2 S.C.R. 207, Justice LeBel notes, at paragraph 41, that “the monopoly that the union is granted over representation” is one of the “fundamental principles” of labour law in all Canadian jurisdictions.

As Justice LeBel so ably described, once certified, the bargaining agent acquires the exclusive authority to engage in collective bargaining and to enter into a collective agreement on behalf of the employees in the bargaining unit (subject of course to ratification). The monopoly on representation extends to the implementation and application of the collective agreement. The certified bargaining agent is, as LeBel J. describes in *Noël*, *supra* at paragraph

45, an employer's "mandatory interlocutor" with respect to all aspects of administering the collective agreement. In his seminal text, *Canadian Labour Law, supra*, at page 10-24.1, George Adams similarly notes that "Direct dealing with members of the bargaining unit over terms and conditions of employment to the exclusion of the trade union may also constitute interference, subject to the specific terms of the collective agreement which may permit and regulate certain types of individual arrangements". As has been explicitly recognized in labour relations jurisprudence, the certified bargaining agent's exclusivity on representation of employees demands that the union "be seen as the channel through which changes in the terms and conditions of employment which affect employees are effected, and that the power of a unionized employer to deal unilaterally with those terms and conditions be placed under limitations which are well-understood and clear" (see *Bell Canada, supra* at paragraph 106 quoting the Saskatchewan Labour Relations Board in *Saskatoon City Police Association v. Saskatoon Board of Police Commissioners* (1993), 94 CLLC 16,037).

In the present case, the Employer, having initially engaged in discussions with the Union regarding implementation of the arbitration decision, then unilaterally and without prior notice to the Union issued a communication to employees in the bargaining unit to the effect that it would not comply with Arbitrator Graham's Award pertaining to the vacation provisions of the collective agreement. Those provisions of the collective agreement, as interpreted by the Arbitrator, constitute terms and conditions of employment. The Union stressed that the Employer's actions effectively denied it the ability to enter into discussions with the Employer. Moreover, as the Employer did not provide prior notice to the Union of its decision and chose instead to communicate directly with the Union's membership, the Union has no ability to discuss the Employer's decision with the bargaining unit employees that it represents. The Union was essentially caught by surprise by the decision of the Employer and the manner in which it communicated that message to employees.

The Board concurs with the position of the Union that by posting the Memorandum dated March 25, 2008 to all bargaining unit employees without giving notice to, discussing with, or

seeking the agreement of the Union, the Employer violated subsection 6(1) of the *Act*. The issues relating to the implementation of the Arbitrator's Award, or the deferral thereof pending judicial review, were indeed "demonstrably bargainable" in all of the circumstances and the Employer ought to have engaged the Union in a discussion before it took unilateral steps to declare that the Arbitrator's Award would not be implemented as written by Arbitrator Graham. The failure to do so in the circumstances constitutes employer interference with the representation of employees by a union.

It should be noted that the Board recognizes that an employer need not first advise a union that it intends to seek judicial review of an arbitration decision prior to filing its Application in Court. However, it is not permissible for an employer to *unilaterally* determine that an arbitral award will not be complied with and to communicate that determination directly to bargaining unit employees, absent consent of the bargaining agent, without a court first issuing a stay of the arbitrator's decision. An edict that an arbitration decision will not be followed effectively constitutes a change to the terms and conditions of employment of employees. As noted above, the certified bargaining agent's monopoly on collective representation extends to the implementation and application of the collective agreement. The Employer in the circumstances of the present case had an obligation to secure the agreement of the Union to delay the implementation of the arbitral decision in lieu of a stay of the decision granted by a court of competent jurisdiction. In acting as it did, unilaterally and without notice to the Union, and communicating directly with the employees in the bargaining unit, the Employer committed an unfair labour practice contrary to subsection 6(1) of the *Act*.

In reaching its conclusions, the Board reviewed and considered all of the arguments advanced by the Employer and the cases submitted in support thereof. Counsel for the Employer stressed that the impugned Memorandum simply presented information to employees regarding the Employer's decision to exercise its right to seek judicial review of the Arbitration Award and to suspend the Award's application pending a determination by the superior courts. Counsel indicated that presentation of such information does not constitute bargaining directly with

employees and that the *Act* does not prevent all manner of communications by Employers with their employees in a bargaining unit. Employer counsel cited *St. Mary's General Hospital, supra* at paragraph 25 where the Ontario Labour Relations Board stated that an employer is not precluded from "dealing directly with an employee to ensure that he/she understands what his or her schedule is and how the employer views its obligation to pay for those scheduled hours" and that the "dissemination of such information is not bargaining". Generally speaking, we concur with that statement, however, the Employer in the present case did not merely disseminate information about the schedule to ensure employee understanding. Here, the Employer, without notice to the Union, wrote directly to employees advising that it unilaterally decided to suspend the interpretation of provisions of the collective agreement issued by the Arbitrator. That fact distinguishes this case from *St. Mary's General Hospital, supra* where the employer simply requested that employees sign a document which, the Ontario Board concluded at paragraph 22, did not alter or affect any working condition or term of employment.

The Employer also referred to the Ontario Board's decision in *Superior Ambulance Ltd., supra*. In that case the union claimed that the employer bargained terms and conditions of employment directly with certain individuals in its bargaining unit. The individuals at issue were on a leave of absence for the purpose of taking part in pilot para-medical program offered by the Province of Ontario. While on leave of absence, the students were found by the Ontario Board at paragraph 32, to be "on work outside of Superior's control" and "outside of the scope of the bargaining unit". The issue in the case concerned the renewal of agreements governing the leaves of absence presented by the employer to the individual employees. The Board concluded that in communicating directly with the employees concerned regarding the renewal of the agreements, it was merely presenting terms and conditions which had been accepted earlier by the union. Those facts are clearly distinguishable from the present case.

Finally, the Employer relied upon *Bank of Nova Scotia, supra* wherein during a period in which the union was soliciting membership for the purposes of a certification application, the employer held meetings with employees on company premises during work hours purportedly to

inform employees regarding the employer's total compensation package. The union claimed that the meetings constituted an unfair labour practice as the information conveyed was outside of the scope of permissible employer communications during a union organizing drive. The complaint was dismissed as the federal Board determined that the employer only highlighted the current employment situation and neither adversely commented on unions and collective bargaining nor made threats, promises or other prohibited statements. Counsel for the Employer indicated that this case stands for the general proposition that not all employer communications with individual employees are prohibited and more specifically that an employer may accurately publicize existing terms and conditions of employment.

While the *Bank of Nova Scotia* case concerns a certification drive rather than a situation as in the present case where there is a certified bargaining agent involved - and is accordingly distinguishable on that basis - the Board certainly agrees with the position that not all employer communications with individual employees are contrary to the *Act*. There are many situations daily in which employers quite properly communicate with their employees. However, the Employer's communication in the present case did not concern the mere publication of existing terms and conditions of employment. Rather, it was direct communication with employees for the purpose of advising them that it *repudiated* Arbitrator Graham's declarations respecting certain terms and conditions of employment set forth in the vacation provisions of the collective agreement. That type of communication is vastly different from that which the federal Board reviewed in *Bank of Nova Scotia, supra*.

The Employer further indicated that it did not have any ill-intent or motive when it sent out the Memorandum addressed to the employees; it simply wished to advise them that vacation would be scheduled in accordance with its former policy and practice. Counsel stated that subsection 6(1) of the *Act* is specifically subject to the free speech provisions set out in subsection 32(1). The Employer stated that its communications did not stray from the permissible speech allowed by subsection 32(1).

However, a violation of subsection 6(1) does not necessarily require proof of ill-intent, anti-union animus or other pejorative motive. There is clear precedent from this Board that where it is alleged that an employer has interfered with the representation of employees by a union, the employer's motive is not relevant to the determination as to whether an unfair labour practice has been committed. Thus, in *Churchill R.H.A. and M.N.U.*, September 5, 2001, Case No 760/00/LRA, the Board determined that the employer's offer of salary and other incentives for nurses to induce them to work in remote areas constituted a violation of subsection 6(1) of the *Act*, notwithstanding the fact that the employer did not attempt to undermine or circumvent the union and indeed had unsuccessfully tried to bargain with the union. Accordingly, at page 18, the Board stated:

We are appreciative of the problems confronting Churchill RHA and its legislated duty to provide adequate health care to its constituents. However, the legislation does not make any provision for consideration of extenuating circumstances. We are satisfied the Churchill RHA did not consciously attempt to undermine the MNU or to create dissension within the ranks of the bargaining unit. That may have occurred. However, it did commit an unfair labour practice by entering into those special agreements.

Similarly, it is likely fair to state that the Employer in the present case did not seek to consciously undermine or create dissension with the Union here. However, we are satisfied that a breach of subsection 6(1) of the *Act* occurred.

For the foregoing reasons, the Board issued Order No. 1442 in which it determined that the Employer violated subsection 6(1) of the *Act*, and ordered that the Employer post a copy of the Board's Order at the Employer's premises, in the locations where it posted the March 25, 2008 Memorandum addressed to "All Staff in CUPE Bargaining Unit". It should be noted that the parties agreed that this was an appropriate remedy to be imposed in the event that the Board determined that an unfair labour practice had been committed.

**DATED** at **WINNIPEG**, Manitoba, this **24th** day of **July, 2009** and signed on behalf of the Manitoba Labour Board by:

***"C.S. Robinson"***

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**C. S. Robinson, Vice-Chairperson**

***"R.P. Bayer"***

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**R. P. Bayer, Board Member**

***"M.V. Wyshynski"***

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**M. V. Wyshynski, Board Member**

CSR/mr