



August 30, 2006

**Directed to:** Fraser Milner Casgrain - Fausto Franceschi, Gateway Casinos G.P. Inc. - Howard Worrell, Chivers Carpenter - Patrick Nugent/John Carpenter, United Food and Commercial Workers Union, Local No. 401 - Christine McMeckan

**Re: An Unfair Labour Practice Complaint brought by United Food and Commercial Workers Union, Local No. 401 affecting Gateway Casinos G.P. Inc. and Howard Worrell – Board File No. GE-05020**

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OUR VISION...

The fair and equitable application of Alberta's collective bargaining laws.

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To administer, interpret and enforce Alberta's collective bargaining laws in an impartial, knowledgeable, efficient, timely and consistent way.

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[1] United Food and Commercial Workers Union, Local No. 401 ("Local 401" or the "Union") and Gateway Casinos G.P. Inc. ("Gateway" or the "Employer") are in collective bargaining. The bargaining affects employees at Gateway's Palace Casino at West Edmonton Mall. On August 9, 2006, employees in the bargaining unit rejected the Employer's most recent offer. The next day, bargaining broke down in acrimony. The Union complains that the Employer interfered in its representation of employees (*Labour Relations Code* s. 148(1)(a)(ii)) and failed to bargain in good faith and make reasonable efforts to conclude a collective agreement (*Code* s. 60(3)). The complaints centre upon two things: an Employer letter to employees prior to the vote, and the Employer's refusal after the vote to meet further until the Union tenders another monetary proposal.

[2] This panel of the Board (Wallace, Kirkwood, Kondro) heard the complaint. This is our decision. Though we heard about the recent bargaining, especially from July 25 to 28, 2006, in considerable detail, it is not necessary to recite all the evidence. In light of the approaching expiry of the Union's strike vote, we have elected to only summarize the most important points and to provide these abbreviated reasons.

[3] The background of this dispute is well known to this panel, which sat nine days of hearing in April 2006 over an earlier breakdown in bargaining. The dispute was ultimately settled by the parties through a consent order that renewed the bargaining. By the terms of the consent order, both parties tabled a complete bargaining proposal in late May. Since then, the parties have bargained for some nineteen days and have made dramatic progress toward a collective agreement. By agreement of all the witnesses, discussions have been civil, constructive and productive. There remain, however, about a dozen unresolved non-monetary items and there has been no agreement on either wages or other monetary items.

[4] Discussion of monetary items commenced on July 25, 2006. On July 27 the Employer moved off its May 26 position and put forward a new wage grid that it proposed as the basis of a comprehensive settlement. The proposal contained a grid that provided raises of 3% for each year of a three-year agreement, market adjustments for certain classifications (highest in the food and beverage department), and a "diagonal" grid for the most populous classification, dealers, that provided for wage progression both by accumulated hours of work and by levels defined by the dealer's skills. In discussion of this proposal the Employer provided the Union committee wage survey information that it said showed that Palace Casino wage rates were and would remain at or near the top of the

marketplace. For its part, the Union's formal position remained its May 26 position, being a \$3.50/hour increase across the board in the first year, followed by 10% raises in following years; though it had put out some "feelers" about initial increases in the \$0.80 to \$1.00/hour range. At this point, then, and despite the Employer's movement from the May 26 position, the parties remained far apart on wages, even on the basis of the Union's "feelers".

[5] The Employer incorporated its wage proposal into a comprehensive offer on July 28. The parties agreed that employees would vote upon this offer. At the close of the bargaining session on July 28, the Union was still waiting for information from the Employer about the actual placement on the new wage grid of employees in the Gaming department. For this reason the vote was scheduled for August 9. The parties held open previously-scheduled bargaining dates on August 10 and 11 to follow up on the result of the vote.

[6] The Union's bargaining committee, led by President Douglas O'Halloran, had told the Employer that the wage offer was not adequate and the Union would be recommending rejection. Witnesses on both sides acknowledged that a rejection by the employees was expected. Within hours of the end of the July 28 meeting, a message to employees appeared on the Union's website. The message provided no details of the Employer's offer, but stated that the Union bargaining committee did not endorse the offer and recommended rejection at the vote on August 9.

[7] Howard Worrell, the Employer's Vice-President of Operations, testified that he and his committee were expecting the Union to provide employees with details of the offer before the vote. This did not happen. The Union's witnesses testified that this was not the Union's practice; it preferred to encourage a good turnout by reserving communication of the details of the offer to the August 9 meeting. By August 3, Palace Casino management had seen no indication that employees were being apprised of the details of the offer and were becoming impatient with the number of questions asked of managers by employees. Mr. Worrell resolved to write a letter to employees communicating the main thrust of the Employer's wage offer.

[8] The next day, Friday, August 4, the Employer completed letters addressed to individual employees and commenced distributing them. Distribution continued over the weekend. The letter, in relevant part, read:

(...)

The Union also published on their web site July 28<sup>th</sup> a notice of a union meeting on August 9<sup>th</sup> to vote on our offer for a new Collective Agreement. We strongly urge you to attend so your opinion can be registered.

The wage offer ensures that Palace Casino staff continues to be paid at or near the top of the Edmonton marketplace. (...) As detailed below, our offer included marketplace adjustments for some positions ranging from 3.9% to 27.7% in the first year of the proposed Collective Agreement. Additionally there are 3% Cost of Living wage increases in all wage grids ...

#### Full Wage Retroactivity

This wage offer is fully retroactive back to November 1, 2005, the expiry of the previous Collective Agreement. **This will provide average back pay entitlements of up to \$1,144.00 for each staff member.**

(...)

The following positions will see Marketplace Adjustments:

*[the affected positions are listed, with adjustments and percentage increases]*

(...)

*[discussion of the new rates for Slot Attendants, the Dealers start rate and examples of “diagonal progression” for dealers follow]*

Some points for consideration:

- Palace Casino staff has enjoyed the highest rates of pay in Edmonton Casino's *[sic]* if not Alberta, since 1990.
- Palace Casino staff has enjoyed fair and equitable opportunity in compensation and advancement in four successive collective agreements from 1995.
- Palace Casino staff will continue to receive these opportunities with the latest wage offer that has been presented.
- Palace Casino has recognized the marketplace in-equities in some of the operating departments and has provided marketplace adjustments for those staff.
- **The current proposal also includes one extra statutory holiday each year and extra holiday weeks for years worked.**

We have included for your reference the new proposed Article 43 of the Collective Agreement along with a copy of the proposed Wage Grids.

(...)

**(emphasis added)**

[9] According to Union witnesses, this letter caused confusion for some members of the bargaining unit. The discussion of retroactivity, combining as it did the mention of “average” entitlements and a quantum of “up to” \$1,144.00 per member, led to questions whether or not the \$1,144.00 was a cap on maximum retroactive pay. The offer was not clear whether employees receiving “market adjustments” would also get the 3% increase in the first year of the agreement. And the reference to an “extra” statutory holiday and “extra” holiday weeks was just mystifying, for neither the Employer’s previous monetary proposal nor the previous collective agreement contained any different list of statutory holidays or vacation entitlements than its July 28 proposal. The Employer’s evidence was that the reference to “extra” entitlements in the offer meant that the entitlements exceeded the minimum entitlements in the *Employment Standards Code*.

[10] The Union learned about the letter on Monday, August 7. It filed its unfair labour practice complaint the next day. On August 9 the vote took place. Polls were open all day. Two meetings took place. Approximately half the bargaining unit voted. The Employer’s

proposal was rejected by 88% of those voting. Union witnesses considered that the vote reflected not just dissatisfaction with the offer, but some anger at the August 4 letter.

[11] The bargaining committees met the next morning, Wednesday, August 10. The meeting got off to a late start when the Employer's chief spokesperson, Peter Parsons, was caught up in security delays at Vancouver airport. When the meeting did convene, there was palpable tension in the room. Mr. Parsons quickly remarked to Mr. O'Halloran something like, "Now that you have crapped all over our offer, what is your bottom line?" Mr. O'Halloran declined to answer and instead pressed Mr. Worrell for justification of what the Union viewed as an inadequate offer. Mr. Worrell responded. Mr. O'Halloran castigated the August 4 Employer letter; the Employer refused to discuss it because the Union had filed its complaint to the Board. At one point the Employer committee challenged Mr. O'Halloran as to whether the Union even had a bottom line on wages. Within minutes the meeting had degenerated into personal insults and profanity, principally between Mr. Parsons and Mr. O'Halloran. At one point a wadded-up paper was launched at one of the chief spokespersons. Accounts differed as to what exactly was said, in what order, who started the profane exchange, and who threw the paper missile, but on the view we have taken of the case nothing turns on the embarrassing details. It is enough to note that after only ten minutes, the meeting broke up in disarray. That day, the Union added to its existing complaint further allegations concerning the breakdown of this meeting. No meeting took place on August 11.

[12] Since then several letters have passed between Mr. Worrell and Mr. O'Halloran. Apart from some barbed comments about the breakdown of the August 10 meeting, the thrusts of the letters are these. The Union says that it wants to continue bargaining and that before it can take a position on wages it needs clarification on certain points in the Employer's August 4 letter. (Interestingly, the Union around this time wrote a letter to Human Resources and Employment Minister Cardinal seeking the appointment of a Disputes Inquiry Board to this dispute. One of the reasons offered was that after the events of August 10, the parties were at an impasse.) The Employer states that it is not willing to meet again unless and until the Union communicates a monetary position that warrants a return to the bargaining table. The Employer justifies its unwillingness to meet on the basis that the parties are at an impasse on the central issue of wages.

[13] We turn first to the Employer's August 4 letter. The Union in its pleadings took issue with the timing of the letter, complaining that the Employer purposefully and unfairly took advantage of its knowledge that the Union would not be communicating with employees about the offer until August 9. In the hearing the Union downplayed this aspect of the complaint. We consider that neither the sending nor the timing of the letter is objectionable. The law is clear that an employer is not compelled to remain silent to its employees when an offer is presented to the trade union. There is nothing inherently unfair in communicating to employees when this Employer did. It was the Union's choice not to communicate details of the offer to employees until the last minute, and a trade union cannot effectively deprive the Employer of its right to speak to employees by the simple expedient of remaining silent itself until the date of the vote.

[14] The substance of the letter is mostly unobjectionable, even under the enhanced scrutiny that the case law tells us is appropriate when employers communicate with employees at a sensitive time in collective bargaining. The letter is factual, though it predictably emphasizes the aspects of the offer that present it in its most favourable light. The passage about retroactivity payments of "up to" \$1,144.00 is not a misrepresentation, but only an innocent ambiguity. Similarly, the imprecision about whether first-year increases are contained within the market adjustments offered is only an innocent ambiguity.

[15] The reference to an “extra” holiday day and “extra” earned vacation, however, is a misrepresentation. We do not accept the argument that this passage accurately portrayed these entitlements as being superior to *Employment Standards Code* minimums. There is nothing in the context of the letter to convey that, and a bargaining unit employee of ordinary intelligence would take the sentence in question to mean that the Employer was offering holiday and vacation improvements over the previous collective agreement. It was not. Whether innocent, negligent or intentional, this misrepresentation had the predictable effect of confusing employees and the Union bargaining committee, none of whom would have been able to find anything in the Employer’s offer to reflect that these items were being improved over the previous agreement. It would have tended to paint the Union committee as being unfamiliar with the Employer’s offer, and to divert the attention of both Union and employees from the real issues presented by the offer. For this reason only, we find that the August 4 letter interfered with the Union’s representation of employees, contrary to s. 148(1)(a)(ii) of the *Code*.

[16] It is unnecessary for us to decide whether this same misrepresentation also amounts to a breach of the Employer’s duty to bargain in good faith and make reasonable efforts to conclude a collective agreement in s. 60 of the *Code*. The evidence does not point to any subjective bad faith, that is, an unwillingness to actually reach a collective agreement, on the part of the Employer. Even if we were to conclude that the Employer failed the objective test of “reasonable efforts” in misrepresenting its offer, we would not grant any different or additional remedy to the one we grant presently. For these reasons, the s. 60 allegation as it relates to the August 4 letter is surplusage and we think it best to make no finding upon it.

[17] We turn to the August 10 meeting, its breakdown, and the bargaining aftermath. In our opinion, no breach of the Employer’s duty to bargain in good faith is made out. Collective bargaining is a difficult, stressful and often emotion-laden process. This Board will not intervene in every bargaining breakdown. We will intervene only where the breakdown appears so arbitrary, unreasonable or marked by ulterior purpose that it discloses an intention to avoid a collective agreement or that it amounts to a complete failure of reasonable efforts by one or both parties. The evidence does not establish any such thing.

[18] Each side to this bargaining had some reason to be frustrated or emotional at the August 10 meeting. The Employer had to be disappointed by the solid rejection of its offer; and it was clearly frustrated at the new unfair labour practice complaint and what it saw as the Union’s unresponsiveness on wages. The Union was obviously upset at the Employer’s letter. Both sides had to be disappointed at coming to the end of the remarkable run of bargaining progress they had enjoyed since May. The situation lent itself to emotion. No matter what view we take of who said what to whom, and when, it is clear that blame for the breakdown lies on both sides of the table. Beyond that, the less said about the August 10 meeting, the better.

[19] What about the parties’ standoff over a resumption of bargaining? The Employer refuses to meet unless and until the Union alters its monetary position. Though there may be differences of opinion whether there is a true bargaining impasse at this point, this much is clear: the parties are very far apart on wages, an absolutely central issue in this bargaining. If an impasse has not been reached, one looms.

[20] The *Code* does not require parties to meet and collectively bargain if there is no realistic prospect of progress. Nor will the Board lightly substitute its opinion for that of a party on whether there is a realistic prospect of progress. The Employer has taken the position that it needs to see movement from the Union on wages. This is one rational position it can take from

the events at the bargaining table. For all the progress that has been made, it is clear that the parties have reached the point at which only difficult issues remain and positions can legitimately harden. In our view it would be entirely too intrusive upon free collective bargaining for this Board to find a breach of s. 60 and direct the parties back to bargaining at this point in the process.

[21] This is not a case of an outright refusal to meet by the Employer. If the Union desires a return to the bargaining table, it is within its power to bring that about. The Union no longer requires any clarification of the offer or of the points raised in the Employer's August 4 letter; the hearing has resolved the outstanding questions. There are no longer any impediments to the Union altering its monetary position if it wishes to. We encourage both parties to make and explore any new monetary proposals that are acceptable to them.

[22] We have found a breach of s. 148(1)(a)(ii) of the *Code*. We have dismissed the s. 60 complaints as either unnecessary or not made out. In our opinion, the appropriate remedy is a declaration of the breach and nothing more. The breach involved one isolated comment in the otherwise unobjectionable Employer letter of August 4. The misrepresentation, though real, involved a minor element of the Employer's offer. The breach was entirely unsuccessful in influencing employee opinion. We see no serious prospect that such a breach will be repeated. We therefore declare that the Employer has interfered with the representation of employees by UFCW, Local No. 401, contrary to s. 148(1)(a)(ii) of the *Labour Relations Code*, in the fashion and for the reasons expressed in these reasons.

J. Leslie Wallace, Vice-Chair