# ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **0943-18-FA**

United Food and Commercial Workers International Union (UFCW Canada), Applicant v **UPS SCS, Inc.**, Responding Party

**BEFORE:** Patrick Kelly, Vice-Chair

**APPEARANCES:** Micheil Russell, Jonathan Lobo, and Ray Ramkhelawar appearing for the applicant; Michael Smyth, Veronica Kenny, Dina Maceira, Peter Bromley, Darren Jones, and Susan Cameron Breslin appearing for the responding party

**DECISION OF THE BOARD:** August 14, 2018

1. This is an application under section 43.1 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended, (the "Act") for a direction that a first collective agreement be settled by mediation-arbitration. It was filed with the Board on June 19, 2018.

2. Section 43.1 is a relatively new amendment of the first-contract provision that was found in the previous iteration of the Act. The portions of section 43.1 that are relevant to this matter read as follows:

> **43.1** (1) At any time on or after the day that is 45 days after the Minister makes an appointment under subsection 43 (5), if the parties have not entered into a collective agreement, either party may apply to the Board to direct the settlement of a first collective agreement by mediation-arbitration.
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> (2) The Board shall consider and make its decision on an application under subsection (1) within 30 days of receiving the application and, subject to subsections (3) and (4), the Board may,

(a) order the parties to engage in further mediation;

(b) dismiss the application; or

(c) direct the settlement of a first collective agreement by mediation-arbitration.

(3) The Board shall direct the settlement of a first collective agreement by mediation-arbitration unless,

(a) the applicant has contravened section 17;

(b) it appears to the Board that the process of collective bargaining has been unsuccessful because of the uncompromising nature of any bargaining position adopted by the applicant without reasonable justification; or

(c) the Board is of the opinion that further mediation would be appropriate.

3. The dispute in this matter concerns subsection 43.1(3), and to be more precise, the only issue is whether or not the Board should exercise its discretion in paragraph (c) of that subsection in favour of further mediation.

**The information before the Board**

4. A number of declarations were filed by both parties, as contemplated by Rule 12. 4 of the Board's Rules of Procedure. The parties were content to make argument at the hearing without calling further evidence. From the declarations, and other undisputed facts that were presented at the hearing, the following information emerged.

*Background*

5. The applicant ("the union") was certified via interim certification pursuant to a decision of the Board dated March 23, 2017 for an all employee unit at the responding party's ("UPS" or "the employer") warehouse in Vaughan. The warehouse is leased by UPS from an entity referred to as Baxter. UPS houses Baxter's medical

supplies exclusively in the warehouse, and delivers them to Baxter's clients.

6. The only issue that remained between the parties in the application for certification was whether or not the position of Senior Warehouse Associate should be included in the bargaining unit. That issue was slated to be dealt with at a hearing before the Board on September 5, 2018. However, on July 24, 2018, at a Board-arranged mediation session, the parties reached agreement that the disputed position fell within the bargaining unit. That has not been officially communicated to the Board as of yet, and thus the September 5 hearing date has not been cancelled. The union has a notion that that the hearing date would be conveniently used for a purpose related to this matter, and I shall return to that later.

7. Following the interim certification decision, the union served UPS with notice to bargain on May 2, 2017. Before the commencement of bargaining, the union applied for conciliation, and a conciliation officer was appointed on June 27, 2017. Subsequently, the parties' bargaining committees met on 15 occasions between July 21, 2017 and June 11, 2018. The conciliation officer first met with the parties on March 22, 2018, and attended their bargaining session on March 23, 2018. The same individual was appointed as a mediator pursuant to the union's application for the appointment of a First Collective Agreement Mediator under section 43(1) on April 27, 2018, and met with the parties on June 11, 2018.

*The collective bargaining process*

8. The negotiations between the parties began with the tabling of the union's non-monetary proposals, and the parties worked from that document in subsequent discussions. The parties agreed that, in dealing with the various proposed articles, they would only sign-off a proposed article as tentatively agreed so long as all clauses of the article were agreed. By that measure, as of the date of this application on June 19, 2018, the parties had reached full tentative agreement on 13 articles entitled Purpose, Management Rights, Discrimination & Harassment, Union Representation/Privileges, No Strikes, No Lockouts, Probation, Recalls, Discipline and Discharge, Arbitration, Statutory Holidays, Pension Plan/RRSP, and Health and Safety. They had also agreed to a withdrawal of a union-proposed Preamble to the collective agreement.

9. As of the date of application the parties had made some progress on clauses under another three articles entitled Union Security (but not clauses dealing with the employer's obligation to deduct dues and initiation fees, or with the structure of the union's negotiating committee, or with the right of union stewards to speak with new employees during orientation); Seniority (but not the definition of seniority, or the extent of the application of seniority, or the contents of the seniority list, or the effect of sickness/injury/leave of absence on seniority); and Grievance Procedure (but not the actual steps of the grievance procedure, or the right of a potentially aggrieved worker to the presence of a union steward).[1] No agreement had been reached about any clause under 16 articles headed Job Postings, Hours of Work and Scheduling, Premium and Overtime Pay, Call-In Pay, Emergency Closings, Meal and Break Periods, Annual Vacations, Leave of Absence, Wages/Classifications, Bonuses/Incentives, Personal/Option Days, Health & Welfare Benefits, Severance Pay, Transfers, General (covering clauses dealing with uniforms, shoe allowance, equipment, mileage allowance, continuing education, and so forth), and Duration.

10. I turn next to describe briefly a couple of developments that may explain, at least in part, why the parties did not make greater progress towards the completion of a collective agreement by the time this application was filed. One of these developments concerned the issue of union recognition and the parameters of the bargaining unit. It would appear that the parties reached agreement on a union recognition clause defining the union's bargaining unit jurisdiction on October 3, 2017 (but did not reach agreement on the entire article headed Union Recognition). That clause excluded temporary agency employees. However, on November 29, 2017, the union had second thoughts about that exclusion, and took the position that, indeed, the temporary agency employees were in the bargaining unit. This caused a digression in the normal flow of the bargaining, until ultimately, on February 8, 2018, the union conceded that the temporary agency employees were properly excluded.

11. The second development concerned an announcement by the employer to the union's bargaining committee on March 23, 2018, that the warehouse in which the bargaining unit employees are employed

[1] The parties apparently did reach full agreement on the Union Security and the Grievance Procedure articles on July 24, 2018 in the course of a Board-supervised mediation meeting.

would be closing by no later than the end of 2019.[2] UPS suggested that the parties should shift their focus to a closure agreement, and the union initially concurred. However, after further thought, the union informed the employer that it preferred to continue regular collective bargaining. When the union so advised the employer is unclear. The employer's notes of the next two meetings in May 2018 suggest that nothing of substance was discussed, at least not by the fully constituted bargaining teams. The union submitted notes in respect of a May 2, 2018 meeting, but those notes do not describe any discussion of substance. The parties were, however, negotiating intently on collective agreement provisions on June 11, 2018, in the presence of the first collective agreement mediator.

12. Sometime in or around early April, the union requested a "no board" report from the Minister of Labour. The Minister of Labour issued the "no board" report on April 13, 2018. As indicated earlier, on April 27, 2018, the union applied for the appointment of a first collective agreement mediator ("the mediator"), and the mediator met with the parties once prior to the union filing this application.

13. Two applications to terminate the applicant's bargaining rights were filed in April and May 2018, and both were dismissed as untimely.

14. The parties disagree about certain facts. For one thing, the employer does not agree with the union's assertion that the employer never presented the union with a comprehensive proposal to reach a collective agreement. The employer says it did so on March 23, 2018. What happened that day, aside from UPS's announcement of the impending warehouse closure, was that the employer's bargaining committee responded to all of the union's outstanding proposals and tabled counterproposals. In my view, it is unnecessary to affix any particular label on that event.

15. The parties also disagree on the extent of the bargaining items that they have tentatively agreed upon. However, this is not really a disagreement of any substance. There is no serious dispute that the outstanding articles, as of the application filing date, are as set out in paragraph 9 above.

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[2] A few days after notifying the union, UPS notified all the warehouse employees in writing that its contract with Baxter would expire on December 31, 2019 and would not be renewed. UPS further advised the employees that it would be working with Baxter to finalize a transition plan. The written notification did not say specifically that the facility would close or that employees would lose their jobs.

16. Thirdly, the parties have diametrically opposed views as to why agreement on the union recognition clause remained elusive throughout their negotiations. Each blames the other. In my view, it is not a question of which party bears the blame. Their agreed process, whereby only fully agreed articles would be signed off, gave rise to the possibility that either one of the parties might reasonably reconsider having agreed to any particular clause within an article. Moreover, each of these parties explicitly, in writing, presented their proposals on a without prejudice basis, i.e., they reserved the right to change their minds on any particular proposal. So, in my view, nothing turns on this dispute, and in any event, the parties did reach tentative agreement on the union recognition clause after the application was filed.

17. In summary, the factual disputes between the parties are not material in terms of the issue that is before the Board. Accordingly, the Board need not resolve them one way or the other.

**Positions of the parties**

18. The positions of the parties, amplified in the final section of this decision, may be briefly summarized as follows.

19. Both parties acknowledge that, having regard to the amendments to section 43.1 it is the employer in this case that bears the onus of persuading the Board that it is appropriate in all the circumstances to direct the parties to engage in further mediation. The union focuses on the items in bargaining that remain outstanding (all the monetary proposals, mainly) and the time that it has taken to come to agreement on most of, but not all, the non-monetary proposals. The union says the less than brisk pace of the bargaining reflects a strategy by the employer - albeit not an unlawful one - to take as long as possible to bargain with the hope that no collective agreement will ever emerge. That, speculates the union, is the true reason that UPS asks the Board to order further mediation. The union submits further that it has given the bargaining a fair chance, and waited until the spring of 2018 to ask for a no board report, thus triggering the provisions of section 43.1. Unless the Board is satisfied that further mediation is likely to result in a first collective agreement, the Board should reject the employer's position, and instead make the direction contemplated by subsection 43.1(2)(c) of the Act.

20. In support of its argument, the union referred only to one authority: *Labourers' International Union of North America, Local 183 v Across Canada Construction Ltd.*, 2018 CanLII 48447 (ON LRB), discussed below.

21. The position of UPS is this. The employer says bargaining has been productive, keeping in mind that there have been a couple of digressions during the negotiations to deal with the unanticipated issues regarding temporary agency workers and the pending closure of the warehouse. Despite those issues, the process has not stalled, and the parties are nowhere near an impasse. Collective agreements get fashioned article by article. Further mediation would likely produce further agreement on outstanding matters, given what has happened to date. Subsection 43.1(3)(c) does not say that further mediation ought to be ordered only if it will likely result in a first collective agreement, and ought not to be read that way. A direction that a collective agreement be settled by mediation-arbitration is not automatic under subsection 43.1(3) (as it was, long ago, under Bill 40) – subparagraph (c) ought not to be given any less weight simply because subparagraphs (a) or (b) do not apply in this matter. The Act's purposes have not changed with the amendment of subsection 43.1, and they emphasize that free collective bargaining ought to prevail wherever possible over the imposition of a collective agreement by an arbitrator.

22. In support of its argument, UPS referred me to the following cases: *Nepean Roof Truss*, [1986] OLRB Rep. July 1005; 1986 CarswellOnt 1360; *Teledyne Industries Canada Limited*, [1986] OLRB Rep. October 1441; 1986 CanLII 1447 (ON LRB); *Formula Plastics Inc.*, [1987] OLRB Rep. May 702; 1987 CanLII 3266 (ON LRB); *Juvenile Detention (Niagara) Inc.*, [1987] OLRB Rep. January 66; 1987 CanLII 2988 (ON LRB); *Atway Transport Inc.*, [1991] OLRB Rep. April 425; *Metro Taxi Ltd. (c.o.b. as Capital Taxi*, [1986] O.L.R.D. No. 3226; *Ontario Power Generation Inc.*, [2000] OLRB Rep. May/June 533; 2000 CarswellOnt 5702; *Across Canada Construction Ltd., supra*.

## Analysis and Conclusions

23. For convenience, subsection 43.1(3) is set out again, below;

> (3) The Board shall direct the settlement of a first collective agreement by mediation-arbitration unless,
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> (a) the applicant has contravened section 17;

> (b) it appears to the Board that the process of collective bargaining has been unsuccessful because of the uncompromising nature of any bargaining position adopted by the applicant without reasonable justification; or
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> (c) the Board is of the opinion that further mediation would be appropriate.

24. The only dispute between the parties concerns the issue of further mediation. The employer does not assert that the union has violated its duty to bargain in good faith under section 17 of the Act, nor that the applicant has adopted an uncompromising bargaining position without reasonable justification. Rather, the employer says that the circumstances of this case warrant a Board direction to continue with mediation, if not to reach a first collective agreement, then to narrow the issues for arbitration. The union, on the other hand, sees it otherwise. It says the Board should bring the bargaining to a head and direct settlement of a first collective agreement by mediation-arbitration before an arbitrator of the parties' choosing (or, in the absence of any agreement, before the Board). The union says that it is quite willing to continue bargaining with UPS in the intervening period between the issue of this decision and the date of the mediation-arbitration. In fact, since the Board has not cancelled the September 5, 2018 hearing date that was scheduled to deal with the outstanding issue in the application for certification, the union says the parties could endeavour to schedule a mediation-arbitration before an arbitrator (or the Board) on that date.

25. There have been very few decisions of the Board concerning section 43.1, and only one that has dealt with an application under this new provision on the merits: *Across Canada Construction Ltd.*, *supra*. Moreover, the decision in *Across Canada Construction Ltd.*, insofar as it determined the section 43.1 issue, was made without the benefit of any response or submissions by the responding party or the Court-appointed Manager of all of the responding party's assets, undertakings and properties. Accordingly, this is for all intents and purposes a case of first impression.

26. In the course of its submissions, the union relied upon one case, the decision in *Across Canada Construction Ltd.* The union submits that subsection 43.1(3) flips the statutory landscape on its head. Whereas before, an applicant (almost inevitably, a trade union)

seeking a direction for a settlement of a first collective agreement by arbitration bore the burden of proving that the other party (almost inevitably, an employer) was responsible for the lack of success in the process of collective bargaining, now it is the other way around. Now, under subsection 43.1(3), where an applicant trade union engaged in collective bargaining seeks a direction under section 43.1, it is the responding party employer that must persuade the Board that, pursuant to one or more of the enumerated provisions in the subsection, the Board should not make the direction. In other words, as observed by the Board at paragraph 20 in *Across Canada Construction Ltd.*, "first contract mediation-arbitration is now the default response unless the responding party can show that one of the enumerated conditions has been satisfied."

27. In terms of the analysis of subsection 43.1(3)(c), the union submits that in order to trigger the Board's discretion in favour of further mediation, UPS must demonstrate that mediation will probably result in a first collective agreement. The union contends that in all the circumstances, such a result is not probable and that in fact all indicators point to delay and resistance by the employer to the achievement of a collective agreement. The union submits, further, that if the employer had a genuine interest in mediation, it could have and should have asked the mediator to set more dates since June 11, 2018 in an attempt to resolve the items in dispute, but it has not done so.

28. The employer acknowledges that section 43.1 represents a significant statutory change. It allows that the provision places a responding party in the position of having to satisfy the Board that it ought not to make a direction, whereas previously it was the applicant's burden to show that the declaration should be made. Nevertheless, UPS submits that the new provision does not go as far as the union suggests. Paragraph (c) of subsection 43.1(3) does not say "unless the Board is of the opinion that further mediation would probably result in a first collective agreement". To interpret the language in that manner would be to read in words that simply are not there. The discretion in paragraph (c) is not circumscribed in the manner suggested by the union.

29. Furthermore, UPS submits, the Board should resist any notion that a direction to settle a first collective agreement by arbitration-mediation is automatic in the absence of culpable conduct on the part of the applicant. If that were the case, paragraph (c) would not

appear in the Act. Paragraph (c), UPS submits, is on an equal footing with paragraphs (a) and (b) of subsection 43.1(3).

30. Moreover, the employer submits, first contract mediation-arbitration should not be viewed as a substitute for free and meaningful collective bargaining. The purposes in section 2 remain part of the Act and must be taken into account in the exercise of the Board's discretion in paragraph (c), including the purpose of the Act in facilitating collective bargaining and promoting employee involvement in the workplace. In other words, a first contract direction ought not to be used to undermine, or substitute for, collective bargaining that is a reflection of employee involvement in the workplace.

31. In assessing the appropriateness of further mediation, UPS submits that Board should consider that neither party has declared that the bargaining has reached impasse (unlike the situation in the *Across Canada Construction Ltd.* decision, where it was obvious that bargaining was at a standstill). In fact, the parties have not stopped talking, and progress has been made throughout the pre-application and post-application bargaining. Tentative agreement has been reached on substantive matters even as late as the day prior to the hearing in this matter. Furthermore, the union does not deny the possibility that further agreement could be obtained. Just as was the case in *Ontario Public Service Employees Union v. Juvenile Detention (Niagara) Inc.*, 1987 CanLII 2988 (ON LRB), a case decided under the previous first collective agreement provisions, there is still room for further discussion, clarification and compromise.

32. The employer is correct that the test proposed by the union – whether mediation will probably result in a negotiated collective agreement – is not supported by the express language of subsection 43.1(3). That provision signals that the Board *must* direct the settlement of a first collective agreement unless, among other things that are not applicable in this case, "the Board is of the opinion that further mediation would be appropriate." It would have been easy, had the Legislature so intended, to say that the Board must direct the settlement of a first collective agreement unless the Board is of the opinion that further mediation would likely result in a freely negotiated first collective agreement. The Legislature did not use such specific language. Instead, it conferred upon the Board a wide-open discretion to order the parties to engage in further mediation where the Board is of the view that that would be the appropriate outcome.

33. It is not evident to me that the Board should attempt to articulate a test of the kind proposed by the union. In a recent decision concerning a similarly amended provision (section 98) under the Act on the Board's power to make interim decisions and orders, the Board (differently constituted) also declined to formulate a test. [3] At paragraph 36, the Board observed the following about section 98 of the Act:

> ...The authority given to the Board under the Act is broad, and establishes no test. I am satisfied the Board should adopt a test which can be applied to the wide variety of labour relations circumstances which the Board may face...

34. Instead of a test, *per se*, the Board adopted an analysis of a non-exhaustive list of factors that would be taken into account in deciding whether or not to grant interim relief. The Board included among those factors the purposes of the Act, the nature of the interim relief sought, delay and so forth.

35. It seems to me that the same approach makes sense in the analysis of subsection 43.1(3)(c). Like section 98, this provision provides the Board with a broad discretion, and therefore, the Board's approach to it ought to be sufficiently flexible to enable consideration of a "wide variety of labour relations circumstances".

36. In this matter, in making a determination of the appropriateness of ordering the parties to engage in further mediation, the Board will take into account factors that arise from the arguments advanced by the parties. As I have indicated, the union's focus in argument was on the breadth and significance of the outstanding proposals and the time it has taken to sort out the more standard non-monetary proposals. The employer, on the other hand, emphasized that progress on agreed items has been consistently steady, including during the conciliation/mediation sessions, and that the Act places an imperative on free collective bargaining. Accordingly, the factors that I take into account in this matter, recognizing that other considerations may well emerge in future section 43.1 applications in accordance with the facts and arguments particular to those cases, are:

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[3] *The Society of Energy Professionals, IFPTE Local 160 v National Judicial Institute*, 2018 CanLII 51312 (ON LRB)

- The purposes of the Act and the purpose of section 43.1.

- The progress of the bargaining – how often have the parties met (including with a first contract mediator), over what period of time, and what have they agreed upon?

- The extent and nature of any outstanding proposals.

37. The parties have been engaged in many bargaining sessions (15) over a significant period of time (approximately 11 months). They have made some progress in reaching agreement on a significant number, but not all, non-monetary items. There remains much to address of substance in important non-monetary proposals dealing with seniority, transfers, and duration of the collective agreement for example. Overall, the agreed articles are not, for the most part, particularly significant compared to the outstanding monetary proposals, such as Wages/Classifications, Bonus/Incentives, Health & Welfare Benefits, Severance Pay, Premium Pay, and Overtime Pay, in respect of which no progress has been made at all.

38. The parties met in the presence of a conciliation officer on at least two occasions, and once on June 11, 2018, in the presence of the same person in her capacity as first contract mediator. Although some progress was made with the assistance of the conciliator/first contract mediator, nothing that one might call a breakthrough occurred. Apparently, the parties have recently reached full agreement on a grievance procedure and on union security, but again that does not, in my view, constitute a breakthrough either in all the circumstances of this matter.

39. Among the Act's purposes that are relevant in this matter is the statutory mandate to facilitate collective bargaining between employers and trade unions that are the freely-designated representative of the employees. Also, the Act is designed to promote employee involvement in the workplace. These purposes suggests that the Act should be read as placing primacy on free collective bargaining. However, section 43.1 itself recognizes that there are circumstances in first contract bargaining where that principle may have to give way to the imposition of a collective agreement by a third party.

40. Given that the recent amendment of subsection 43.1(3) places first contract mediation-arbitration as the default response, in order for the employer's position to prevail in this matter, it must persuade me that further mediation is preferable to a direction. Or, to put it another way, as counsel for UPS stated, the Board has to decide "what makes the most sense" in the particular circumstances of this case.

41. In my view, even taking into account the distractions caused by what appear to have been misunderstandings between the parties concerning temporary agency employees and the employer's announcement regarding the warehouse closure, only modest progress has been made in the bargaining over a lengthy period of time, including bargaining in the presence of the conciliation officer/ mediator. Subsections 7(2) and 63(1) of the Act, provisions which set out respectively when a displacement application and a termination application by an employee may be made in circumstances where no collective agreement has been concluded, suggest that one year is the maximum period that it ought to take parties bargaining in good faith to conclude a collective agreement following notice to bargain. By that measure, the collective bargaining in this case is quite behind schedule. It seems doubtful in all the circumstances that further mediation is preferable to an interest arbitration hearing. It is true, as the employer submits, that there is no bargaining impasse here, and that there is room for further compromise. The union, in fact, stated at the hearing that it was prepared to engage in any form of further collective bargaining with UPS to attempt to narrow the issues in dispute. But the bargaining history of these parties to this point in time suggests that mediated bargaining would be incremental and slow. After more than a year since the parties began talking, there are simply too many significant items still on the table, and no reason to believe that meaningful momentum would build through a mediated process. Moreover, though it was open to both parties to request further dates from the first contract mediator since the meeting on June 11, 2018, neither of them had done so when the hearing in this matter commenced.

42. For these reasons, I am of the opinion that further mediation would not be appropriate.

43. Accordingly, the Board directs the settlement of a first collective agreement by mediation-arbitration.

"Patrick Kelly"
for the Board