

**In the Matter of a Labour Arbitration pursuant to the *Ontario Labour Relations Act***

**Between:**

**ARTERRA WINES CANADA  
WINE RACK STORES**

**(the “Employer” or the “Company”)**

**-and-**

**SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 2, ON  
BREWERY, GENERAL & PROFESSIONAL WORKERS UNION**

**(the “Union”)**

**Bulletin Board Grievance**

**Arbitrator:** Randi H. Abramsky

**Appearances**

**For the Union:** Robert Logue Counsel  
Taylor Akin Counsel

**For the Employer:** Dirk Van de Kamer Counsel

**Hearing:** May 3, 2021, via videoconference.

## **AWARD**

1. This case involves a policy grievance filed by the Union, alleging a violation of Article 15.03 of the parties' collective agreement when the Employer did not grant approval to the Union to post a poster in regard to steward recruitment on bulletin boards, which the Union claims was "unreasonable." The Employer denies that it violated the collective agreement under the specific circumstances of this case. Article 15.03 states:

The Company agrees to permit the Union to post notices of meetings and other Union business and affairs on bulletin boards, in binders or such locations as may be easily accessed by employees. It is agreed, however, that such notices must be first approved by the Company which approval shall not be unreasonably withheld.

### **Facts**

2. The Employer operates 45 retail wine stores in the metropolitan Toronto area, and 119 other wine stores in Ontario. Employees who work at the Toronto-area stores are referred to as "merchants" and are represented by the Union. At the present time, there are approximately 270 employees, all of whom are part-time and predominantly young in age. The Union has represented the Company's employees for decades, since before 1974 when the current Director of Operations Stephen Murphy joined the Company.
3. In light of the number of stores, the number of employees at each store is limited, usually "a handful." Under Article 4.01, each store is entitled to have a Union steward. In practice, however, there were usually only a few stewards, although the number has varied. More recently, the number of stewards has varied between ten to twelve. The Union stewards also serve on the Union Committee, which plays a role in collective bargaining.
4. According to SEIU Business Representative Ted Mansell, who services this Local, it has been difficult to attract employees to volunteer to be a steward. Many employees do not understand the role or the responsibilities of a steward. Union stewards, he testified, play a critical role in the day-to-day administration of the collective agreement and keep members informed. In his view, stores without a steward often "feel cut off."

5. In early 2021, the existing Union Stewards wanted to increase the number of stewards and “brainstormed ideas” to attract more employees to the role. The idea of creating a poster came up. One of the stewards was aware of an artist who might create such a poster. After some modifications by the group of stewards, a final version was created. In Mr. Mansell’s view, the poster, with its colorful graphics, would more likely capture employees’ attention versus a letter format. A copy of the poster is appended to this Award (Appendix “A”).
6. Mr. Mansell testified that the original poster depicted a group of employees holding signs, which were left blank by the artist, and the faces of the individuals were scowling. The group wanted a more “upbeat and inviting” image, with smiles, and made suggestions for the messaging on the signs. The messaging that was included on the signs was: “Improve Scheduling Rights”, “Solidarity” and “Demand Living Wage Now.”
7. At the time the Union sought to post the poster, the parties were (and still are) engaged in collective bargaining for a new agreement. The current collective agreement expired on April 30, 2021. Among the issues was scheduling and wages. In terms of wages, however, the Union had proposed a \$1.00 increase to the current wage rate of \$14.15 per hour, which was nowhere near what Director of Operations Mr. Murphy (and many others) understood the term to mean in Toronto – about \$22.00 per hour.
8. Mr. Mansell testified that scheduling rights are a “very near and dear issue” for employees because there is currently no scheduling language in the collective agreement. He acknowledged, however, on cross-examination, that no changes to scheduling had occurred (except for COVID). Further, except for a few COVID-related disputes, he had no discussions with Mr. Murphy about scheduling. He also testified that wages are important as the current wage rate is “close to” the minimum wage.
9. At the end of February, Mr. Mansell sent the poster to Director of Operations Stephen Murphy for approval to post on the bulletin boards in the stores. The bulletin boards, in most cases, are in “back rooms” in the stores with no public access. In some kiosk stores, there is no bulletin board and the employees, instead, have a binder for notices. Most stores have a bulletin board.

10. Mr. Murphy, who has been the Director of Operations since 2005 and is the Company official who approves of postings, testified that he had not seen anything like this poster before, and had concerns about it. He planned to discuss those concerns at his weekly update telephone call with Mr. Mansell on Friday, March 5. Throughout the pandemic, Mr. Mansell and Mr. Murphy have had a regular weekly call.
11. According to Mr. Murphy, the call did not proceed well. Friday was a payday, and apparently, an employee who was supposed to receive a payment as a result of the settlement of another grievance, did not receive the payment. Prior to the call, Mr. Murphy was unaware of the situation. In his view, Mr. Mansell was angry about the missed payment, and when the discussion turned to the poster, he was adamant that the poster be posted, as is, or the Union would grieve. He testified that Mr. Mansell appeared to be agitated, spoke over people, and in his view, they were unable to discuss the Company's concerns. He stated that the call ended "fairly abruptly."
12. Mr. Mansell disputed that he did not allow the Company to voice its concerns, stating that they had a "robust, free-flowing conversation" about it. He agreed, however, that he was not prepared to change the poster, and that if the Company did not post it "as is", the Union would grieve it. He felt that no changes were necessary, and stated that "we stand behind the messages" which he felt were relevant and pertinent as they were workplace issues. He acknowledged that the Union had not used the words "living wage" during collective bargaining, or proposed \$22.00 per hour, as it would be "unrealistic to jump to \$22.00".
13. On the evening of March 8, 2021, Mr. Mansell sent an email to Mr. Murphy, sending the Union's grievance, dated March 5, alleging a violation of Article 15.03 of the collective agreement. The email states:

Good evening Stephen,

Further to our telephone conference call of Friday please find grievance attached. Please feel free to call or email me to arrange a grievance meeting date and time otherwise se can do so on Friday's scheduled update call. Let me know.

14. The following day, March 9, 2021, Mr. Murphy responded by email:

Good afternoon Ted,

As discussed on our call last Friday the poster was under legal review.

While the section of poster encouraging the recruitment of stewards likely can be classified as union business and affairs, the references to “improve scheduling rights” and “demand living wage now” are bargaining messaging and the company is not obligated to facilitate or publish bargaining messaging or demands. Our recommendation is that if the references to “improve scheduling rights” and “demand living wage now” are removed, we would be amenable to allowing the union to post the revised poster under section 15.03 of the CBA.

15. Mr. Murphy testified that he put the Company’s concerns in the email since he had not had the opportunity to discuss them at the meeting. In his view, he was not cutting off the grievance process or further discussion.
16. Mr. Murphy testified that he also had concerns about the “tone” of the poster, which depicted a protest with picket signs and fists raised, along with a megaphone. At no time had relations between the parties involved such protests – it was not part of their culture or experience. He was concerned about the message in regard to “scheduling rights” as he was not sure how employees would interpret it. He testified that scheduling concerns had not been raised frequently in the past, and it was “more of a collective bargaining position than our current situation within the stores.” In regard to “demand living wage now”, no such demand had ever been raised. He had no issue with the purpose of the poster – to attract potential stewards. He believed that had the parties truly discussed the Company’s concerns, they might have resolved the issues. If it had been changed “to reflect the current situation”, he was prepared to post it. He could live with the tone, but not the messaging. He felt, however, that Mr. Mansell had no interest in listening to the Company’s concerns.

17. Mr. Mansell interpreted the Company's email response as its response to the grievance. The Union's next step was to take the grievance to arbitration. Mr. Mansell advised the Company that the grievance would be referred to arbitration on March 15, 2021.
18. The relationship between the parties has generally been positive. After the Company denied the posting, the Union emailed it to the membership. According to Mr. Mansell, for a "variety of reasons", emails were "fraught with issues." Posting was preferable, he stated, because it's the "most effective" means of communication: employees show up at work, see it and discuss it.

### **Reasons for Decision**

19. At issue is whether the Company unreasonably denied the Union's request to post the poster seeking Union stewards. There is a significant body of arbitral caselaw on the issue going back to the late 1950s, which has evolved over time.

20. The first step is to look at the language in the collective agreement. In this case, Article 15.03 states:

The Company agrees to permit the Union to post notices of meetings and other Union business and affairs on bulletin boards, in binders or in such locations as may be easily accessed by employees. It is agreed, however, that such notices must be first approved by the Company, which approval shall not be unreasonably withheld.

21. A few things stand out about this provision. In it, the Company agrees to "permit the Union to post notices of meetings and other Union business and affairs on bulletin boards..." This is a relatively broad clause as it goes beyond "notices of meetings" and includes "other Union business and affairs." Without doubt, encouraging employees to become Union stewards is part of "other Union business and affairs." Stewards play a significant role for the Union, and it can be a challenge to get employees to volunteer their time. The poster, at the bottom, mentions some of the advantages of becoming a Union steward: "gain

valuable leadership experience”, “have your voice heard”, “make new friends and have fun”. In big bold letters, the poster states: “WE WANT YOU for Union Steward”. The Company did not object to this.

22. Its concerns focused on the depiction of employees engaged in some sort of protest, with their arms and fists raised, and one with a megaphone – the militant “tone” of the poster – but mostly on the messages on the picket signs, particularly “improve scheduling rights” and “demand living wage now.” As stated in Mr. Murphy’s March 9th email, the Company felt that those were “bargaining messaging and the Company is not obligated to facilitate or publish bargaining messaging or demands.”
23. I am not persuaded that “Union business and affairs” do not include “bargaining messaging or demands.” The main purpose of the Union is to represent the employees, as a group, in regard to wages and terms and conditions of employment. The Union’s role is to negotiate the collective agreement. Information about bargaining and bargaining demands would be encompassed within the words “Union business and affairs.”<sup>1</sup> Further, the stewards play a role in collective bargaining.
24. While the Company viewed the messages on the poster as “bargaining demands”, which may be understandable given that the parties were negotiating a new collective agreement at the time, the poster’s words differed from the Union’s actual bargaining proposals. While it is not clear what the Union’s proposal concerning scheduling is, its wage proposal of \$1.00 per hour increase was very different from a “living wage” proposal. Consequently, it appears more likely that the messages involved workplace issues designed to engage employee interest to become a steward – rather than bargaining demands.
25. The more recent cases in regard to bulletin board posting set out a “balancing of interests” standard between the employer and the union. The Union has an interest in communicating with its members. As stated in *Re Plainfield Children’s Home and S.E.I.U, Local 183*

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<sup>1</sup> I am aware that there is another posting concerning the status of collective bargaining that is in dispute before the Ontario Labour Relations Board, but it is my understanding, from one of the documents presented there and introduced into evidence in this case, that the document was viewed by the Company to contain “misrepresentations and disparaging comments”.

(1985), 19 L.A.C. (3d) 412 (Emrich), at par. 28, quoted in *Re City of Regina and C.U.P.E., Local 21 (Union Workplace Notice Boards Grievance)*, 2016 CarswellSask 113 (Ponak), at par. 33:

[The Employer's interests] are weighed and balanced against the right of the bargaining agent to inform its members of union activities, pursuant to its duty to represent its members and concomitant with its entitlement to be free from interference, restraint or coercion by management in that regard.

26. The Employer has an interest in ensuring that union notices “do not interfere with management’s control and direction of the workforce, interfere with operations, promote disobedience or labour relations conflict or are inflammatory or malicious.” *Re City of Regina, supra* at par. 37. Under provisions like Article 15.03, the Union does not have an unfettered right to post any notice it wishes; and the Employer does not have an unfettered right to determine what will and will not be posted. Instead, the Union’s interest in communicating with its members is balanced against the Employer’s legitimate operational interests.
27. The fact that an employer may find the notice objectionable is not a sufficient basis to reject a request to post. As stated in *Re Quality Meat Packers Ltd. and U.F.C.W., Locals 175 and 633*, 2003 CarswellOnt 1384 (Solomatenko), at paras. 23-24:

23. The fact that it is a partisan notice, or expresses a partisan view-point, does not itself make it ineligible for approval for posting. Article 17.1 does not restrict the subject matter to neutral topics such as announcements of meetings, births and deaths. There is express provision for “other matters to interest to Union members.” It stands to reason that those other matters may not be of interest to the company or may express opinions not endorsed by the company. However, whether it is reasonable for the company to withhold its approval to post such a notice will be determined by whether it brings or could bring real harm to the company’s legitimate business interests, not whether the company likes it or endorses the subject matter.



28. Potential harm or adverse impact must be determined objectively, and not be “merely imaginary or speculative.” *Re Casco Inc. and United Food Processors Union, Local 483*, 2002 CarswellOnt 44 (Simmons), at para. 32. Management’s legitimate interests are then “weighed and balanced against the right of the bargaining unit to inform its members of union activities, pursuant to its duty to represent its members...” *Re Plainfield Children’s Home, supra*.
29. In this case, while counsel argued that the messages of “improve scheduling rights” and “demand living wage now” were inflammatory, I am not persuaded that is the case. While not everyone agrees with the “living wage” approach, the Union may express views on terms and conditions of employment that are not endorsed by the Company.
30. Nor could the poster potentially harm the Company’s reputation. The poster here was aimed solely at the membership, and would not be seen by the public. Despite the “protest” scene depicted, the poster did not promote labour relations conflict. It was aimed to pique members’ interest in workplace issues and consider becoming a steward. There is also nothing defamatory against the Company contained in the poster.
31. The Company argued that that onus is on the Union to establish that the Company “unreasonably withheld” its approval to post the poster. It submits that means the Company’s decision was “not guided by reason” or “irrational.” It submits that it was not irrational for the Company to take exception to the tone and messaging of the poster.
32. Although the onus is on the Union, the case law suggests “reasonableness” is an objective assessment. In *Re Quality Meat Packers Ltd., supra* at par. 15, a similar argument was made, where the employer argued that to be found “unreasonable” “one must find that its actions were irrational, foolish or absurd.” In that case, the Union sought to post a document urging employees to boycott Fortino’s, a significant customer of the Employer, with whom the Union had a labour dispute. The Employer refused to allow the posting based on its concern that the posting would potentially harm its relationship with the customer. The arbitrator stated, at par. 16:

In applying the test of reasonableness, an arbitrator or adjudicator must always take care not to merely superimpose a personal opinion. The use of the term reasonable or unreasonable always arises in a specific context and whether an action meets the test of reasonable must be determined within that context. In this case the question to be addressed is basically did the company have valid or objective reasons to believe that it would suffer economic harm, either immediate or more because of some damage to its future relationship with Fortino's.

33. Based on the evidence presented, the arbitrator concluded at par. 20, that he could not “concur with the company’s submission that there was at least a possibility that it would directly suffer economic harm.” He continued:

To meet the test of reasonableness, the perceived harm must be more than a theoretical possibility. There must be some objective basis from which it could be concluded that it was a real potential for lost sales.

34. In this case, there is no objective evidence that any harm to the Company’s legitimate operational concerns would occur by posting the steward poster. As a result, when balancing the Union’s interest in communicating with its members and its rights under Article 15.03 (which includes matters relating to “Union business and affairs”) and the Company’s legitimate operational concerns, the balance favours the Union in the specific circumstances of this case. Consequently, on the evidence presented, I am persuaded that the Company’s decision not to post the poster was unreasonable in the circumstances and violated Article 15.03 of the collective agreement.
35. The availability of other forms of communication – emails, texts, direct mail – does not impact the analysis under Article 15.03. That provision is a negotiated right, and the Union is entitled to enforce it – subject to the Company’s legitimate operational needs. As stated by Business Agent Mansell, the bulletin board is the preferred method of communicating with the membership.

**Conclusion:**

36. For the reasons set out above, I conclude:

1. The grievance is allowed.
2. In this case, based on the specific facts of this case, the interests of the Union in communicating with its members outweighs the Company's concerns about the poster.
3. Consequently, the Company's refusal to post the steward poster violated Article 15.03 of the collective agreement and I so declare.
4. The Company is to post the steward poster on company bulletin boards, and in binders for those locations that do not have bulletin boards.
5. I shall remain seized with respect to the interpretation and implementation of this Award.

Issued this 13<sup>th</sup> day of May, 2021.

/s/ Randi H. Abramsky

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Randi H. Abramsky

APPENDIX 'A'

**ATTN: UNION MEMBERS (WINE RACK MERCHANTS)**

# WE WANT YOU

**FOR UNION STEWARD!**

IMPROVE SCHEDULING RIGHTS!

SOLIDARITY

DEMAND LIVING WAGE NOW

**GAIN VALUABLE LEADERSHIP EXPERIENCE • HAVE YOUR VOICE HEARD • MAKE NEW FRIENDS • HAVE FUN • DID YOU KNOW EVERY WINE RACK STORE IS ENTITLED TO ITS OWN UNION STEWARD? CONSIDER VOLUNTEERING IN THIS IMPORTANT AND REWARDING ROLE •**

**SEIU 2**

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