The Labour Relations Board
Saskatchewan

JASON MERONIUK, Applicant v. RURAL MUNICIPALITY OF PREECEVILLE No. 334, Respondent

LRB File Nos. 063-02, 064-02 & 065-02; January 8, 2003
Chairperson, Gwen Gray, Q.C.; Members: Pat Gallagher and Don Bell

For the Applicant: Randy P. Kachur
For the Respondent: Carmen Gattinger

Remedy – Monetary loss – Award – Board finds employer's failure to comply with original order unnecessarily complicated reinstatement and compensation issues – Board awards applicant solicitor-client costs for hearing on remedial issues.

Remedy – Monetary loss – Calculation – Board calculates quantum of monetary loss based on what applicant would have earned had he not been improperly laid off and orders employer to pay amount plus interest, statutory holiday pay and vacation pay.

***The Trade Union Act,* ss. 5(e)(ii) and 5(g).**

REASONS FOR DECISION ON REMEDIAL ISSUES

Background:

[1] On August 15, 2002, the Board found that the Rural Municipality of Preeceville (the "Employer") had committed an unfair labour practice by terminating the employment of the Applicant. The Board ordered his immediate reinstatement to his position of patrol operator without loss of seniority as if he had continued to be employed from the date of his termination on February 15, 2002; and further ordered that the Employer make the Applicant whole for all monetary loss suffered as a result of his termination. The Board reserved jurisdiction to determine the monetary loss suffered if the parties were unable to agree on this issue.

[2] The parties did not agree to the amount of monetary loss suffered by the Applicant and the matter was referred back to the Board. The Investigating Officer was directed to report to the Board on the outstanding matters. The Investigating Officer reported that the Applicant and the Respondent disagreed in a fundamental way over the method of calculating the Applicant's monetary loss. The Applicant proposed that

the loss be calculated by referring to his income during the same period of time over the past two seasons, while the Respondent proposed that the monetary loss be calculated by dividing the total hours performed by the two remaining operators during the period in question by three and paying the Applicant for 1/3 of the total hours.

[3] The Investigating Officer reported that after the Applicant was reinstated, the Employer passed a resolution indicating that only two graders are to be in operation (as opposed to three that operated prior to the termination of the Applicant's employment) and that the Applicant was to work eight hour days, Monday to Friday, from 8:00 A.M. to 5:00 P.M. and that he be assigned other duties, i.e. not operator duties.

[4] The Investigating Officer also reported that subsequent to the original resolution, the Employer passed a further resolution requiring the grader operators to work a rotating shift of 14 days – 10 hours/day on graders and 7 days – 8 hour/day on other duties. This resolution was passed after a meeting held between the shop committee of the Employer and the maintenance employees.

[5] Both parties agreed that the Applicant is owed 74 hours pay for the month of March 2002. This takes into account the pay in lieu of notice that he received with his termination and the guaranteed hours of work arrangement that employees have with the Employer for the winter season.

[6] At the hearing of this aspect of the Application on December 4, 2002, the Applicant testified that the Employer notified his wife on September 3, 2002 that he should report for work on September 4, 2002. The Applicant farms in addition to working as an operator for the Employer and he has an arrangement with the Employer that allowed him in the past to take unpaid time off during spring and fall to farm. On September 3, 2002, the Applicant was farming and was unable to immediately report to work. He told his supervisor, Mr. Wardle, that he would return to work the following Monday, September 9, 2002. At that time, Mr. Wardle informed the Applicant that he would not be returning to his job as an operator but would be assigned shop duties.

[7] On September 5, 2002, two members of the R.M. council attended at the Applicant's home and advised him that he was expected to return to work on Friday, September 6, 2002 at 8 A.M., which he did.

[8] On September 6 and 8, 2002, the Applicant worked doing various jobs none of which involved operating the grader. He contacted his solicitor, who wrote the Employer's solicitor to complain about the Employer's failure to reinstate the Applicant to his former position. The Applicant did not return to work again until September 18, 2002. On September 20, 2002, members of council and the maintenance employees held a meeting at which the employees and councillors agreed to the shift arrangement set out above. Council members agreed at that time to permit the Applicant to continue his arrangement of taking unpaid leave to work on his farm. The Applicant did not claim monetary loss for the period subsequent to September 5, 2002 and indicated that he was satisfied with the arrangement worked out on September 20, 2002.

[9] The Employer led evidence through its Administrator, Ms. Lynn Larson, which demonstrated that the Applicant performed duties other than grader operating duties during his tenure with the Employer. The evidence suggested that all of the operators spent between 52 to 57% of their work time performing grader operator duties, while the remaining time was spent on other duties, such as sign repair, beaver dam removal, grass cutting and other duties.

[10] Mr. Ted Wardle, the maintenance foreman, also testified for the Employer. Mr. Wardle relayed the details of the September 20, 2002 meeting between the employees and members of council and indicated how pleased he was that a resolution of the hours of work and work assignments was resolved among the employees and council. Mr. Wardle also indicated that he explained to the members of council the Applicant's need to take unpaid time off for farming. Mr. Wardle indicated that the members of council agreed that this arrangement could continue. Mr. Wardle was not aware that council passed a resolution confirming the shifts, hours of work and assignments at a later council meeting.

Arguments:

[11] The Applicant took the position that the Employer did not comply with the Board Order when it reinstated him to a non-operating position. He bases his claim for compensation on the average hours worked by the two remaining employees since February 15, 2002 or the average hours worked by the Applicant during the same period in the two preceding years, based on a 10 hour, as opposed to an 8 hour, day. The Applicant claims that the payroll records show that he worked an average of 10.5 hours/day in April to November 2000 and 10.2 hours/day during the same period in 2001. In addition, the Applicant claims that there is no sound business reason for reducing the number of graders from three to two and that the Employer's decision to reorganize the work was not done in good faith. Based on this understanding, the Applicant asked the Board to set the monetary loss at the average of the hours worked in the same period in the years 2000 and 2001. The Applicant's hourly rate is $14.00 and he is also entitled to receive 3.5% as compensation for statutory holidays and 3/52's as compensation for annual vacation leave. The Applicant also sought costs on a solicitor-client basis for the monetary loss hearing based on the conduct of the Employer in failing to obey the Board's reinstatement Order.

[12] The Employer took the position that the monetary loss should be calculated as 1/3 of the hours worked by the two employees who remained working as operators after the Applicant's employment was terminated. This approach was taken based on an assertion that there was a legitimate reduction of work and the need to lay-off one employee. Had the Applicant been kept on, he would have shared the hours of work with the remaining two employees. The Employer opposed the request for solicitor-client costs and argued that it was not appropriate in these circumstances.

Analysis:

[13] The Board's Order of August 15, 2002 was intended to make the Applicant "whole" with respect to his employment and monetary loss. The Board expressly found in paragraphs 38 to 40 of the Reasons for Decision that the decision to lay-off the Applicant was not made for good and sufficient reasons that were unrelated to the Applicant's union activity. The Board also questioned the credibility of the Employer's decision to reduce the number of operators from 3 to 2. In addition, the Board heard evidence from the Applicant's foreman, Mr. Wardle, that if a lay-off were

required, the Applicant would not have been selected for lay-off due to both his work performance and his seniority.

[14] In this application, the employees, including the Applicant, have agreed to an hours of work and shift arrangement that meets all of their needs. As a result, the Board does not address issues arising after the Applicant's reinstatement. We are only required to determine the monetary loss suffered by the Applicant from the date of his dismissal to September 5, 2002. The Applicant does not make any claim for wages after that date.

[15] In our view, the Applicant should be paid the amounts paid during the same period to the junior employee, Mr. Nagy. This calculation accurately reflects the amount of work that would have been available to the Applicant as a result of the Employer's decision to reduce the workforce and lay off one employee. Had the decision been made without an overlay of anti-union animus, Mr. Nagy, the junior employee, would have been selected for lay-off, according to the foreman. In these circumstances, the Board can make the Applicant "whole" by compensating him based on this assumption – that is, that he would not have been the employee selected for lay-off but for the discriminatory conduct.

[16] In relation to the hours of work agreement entered into between the employees and the Employer, the Applicant is satisfied to share the hours of work among the three operators. This agreement therefore limits the liability of the Employer for any further monetary loss arising from the reinstatement of the Applicant and avoids the need for any lay-off of operators. The agreement represents a positive compromise on the part of both the employees and the Employer.

[17] As a result of our ruling, the monetary loss owing to the Applicant can be calculated on a monthly basis as follows:

February:	no monetary loss owing;
March:	74 hours owing (based on guarantee of 130 hours and reduction from amounts paid in lieu of statutory notice). The parties agree to this amount;

April: 205 hours based on the hours worked during this period by Mr. Nagy;

May: 267 hours based on the hours worked during this period by Mr. Nagy;

June: 213.5 hours based on the hours worked during this period by Mr. Nagy;

July: 250 hours based on the hours worked during this period by Mr. Nagy;

August: 214.5 hours based on the hours worked during this period by Mr. Nagy;

September: the Applicant's reinstatement was delayed by the Employer but this was not without advantage to the Applicant as he wanted to complete his farming operations and was not prepared to return to work when requested to do so by the Employer. In these circumstances, we will not order any monetary loss for September 4 and 5, 2002 as requested by the Applicant.

Total Hours: 1224

[18] The calculation of the amount of monetary loss is as follows:

Total hours x hourly rate= gross hourly wages + (gross hourly wages x 3. 5%) + (gross hourly wages x 3/52) = Monetary Loss

1224 x $14/hour = $17,136.00 + $599.76 (Statutory Holiday Pay) + 998.62 (Annual Vacation Leave Pay) = $18,734.38

[19] An Order will issue directing the Employer to pay to the Applicant the sum of $18,734.38, less any deductions required to be made by law. Interest will be paid on this sum at rates calculated in accordance with *The Pre-judgment Interest Act*, R.S.S. 1984-85-86, c. P-22.2, from August 15, 2002 to date of payment.

[20] We have considered the request for solicitor-client costs. The Applicant has gone to the expense of appearing with counsel on two occasions before this Board. The Employer did not comply with the Board's Order reinstating the Applicant to his position as an operator until the September 20, 2002 meeting. In our view, this failure made the Applicant's return to work more complicated than was necessary had he

simply been placed in his previous position operating a grader along with the two other operators. We are of the view that the Applicant should be reimbursed for the legal fees and expenses incurred in relation to the December 4, 2002 hearing of the monetary loss issue upon submitting a copy of the legal fees and expenses to the Employer. The Order will direct to the Employer to pay the Applicant these solicitor-client costs.

DATED at Regina, Saskatchewan this **8th** day of **January, 2003.**

LABOUR RELATIONS BOARD

Gwen Gray, Q.C.
Chairperson