INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL UNION NO. 838, Applicant v. BRIDGEVIEW MANUFACTURING INC., Respondent

LRB File No. 009-19; September 6, 2019
Chairperson, Susan C. Amrud, Q.C.; Board Members: Allan Parenteau, John McCormick

For the Applicant: Eric Bohne
For the Respondent: Dale Kotzer

Unfair labour practice application dismissed – Union alleged contraventions of s. 6-62(1)(a) and (g) of *The Saskatchewan Employment Act* but did not provide evidence that established that an employee of reasonable intelligence and fortitude would have been coerced or intimidated by the conduct of the Employer.

Unfair labour practice application dismissed – Union alleged contraventions of s. 6-62(1)(d) and (e) of the Act but provided no evidence to support the allegations.

REASONS FOR DECISION

Background:

[1] Susan C. Amrud, Chairperson: On January 17, 2019 an Unfair Labour Practice Application was filed with the Board by the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local Union No. 838 ["Union"]. The Application alleged that Bridgeview Manufacturing Inc. ["Employer"] had contravened section 6-62 of *The Saskatchewan Employment Act* ["Act"]. Clause 3(g) of the Application sets out the following summary:

> *The employer has demonstrated anti union animus towards the union, its representatives and its shop stewards. It has violated Section 6 of the Saskatchewan Employment Act. The employer targeted the unions representatives for doing their jobs and communicating with its stewards over alleged and perceived violations of the collective agreement and the occupational health and safety regulations of the province of Saskatchewan. The employer then targeted the stewards and gave the stewards a written warning and docked them pay for speaking with the union representatives.*

[2] In the Written Submissions the Union filed, it made the following comment:

> *While the Union may not agree with the employer's assessment of whether there was just cause to discipline the workers, this is not the determination this Board is asked to make. Instead, this is an unfair labour practice application alleging unfair labour practices in the employer's course of conduct in yelling abusive matters at union officials, refusing union officials access to its workers and worksite, and disciplining workers for having spoken to union officials.*

[3] At the hearing on May 6, 2019, evidence was heard respecting the events that occurred on December 13, 2018 that led to this Application being filed. Two Union representatives (Dan Wallace and Gord Lidgett) attended the Employer's production plant with the intention of talking to Union members during their unpaid lunch break. The Union representatives had no issues to discuss with the Employer when they came to the production plant that day. They were not there to "investigate any matter" covered by the collective agreement. The purpose of the visit was to remind the members of a Union meeting scheduled for that evening and encourage them to attend. There was also a suggestion that they were hoping that Lidgett, being new, might get a brief tour of the plant.

[4] Two employees (Oleksandr Stalnenko and Sheldon Godlien), who are also shop stewards, were aware that the Union representatives were coming for a visit that day but neither they nor the Union representatives advised the Employer in advance of the intended visit.

[5] The employees' unpaid lunch break is from 12:00 noon until 12:25 p.m. (the bell rings at 11:58 a.m.). When Wallace and Lidgett arrived at the production plant at 11:40 a.m., Wallace texted Godlien to tell him they had arrived.[1] Contrary to the Employer's cellphone policy, Godlien read the text when it arrived. Stalnenko and Godlien left their work stations and went outside the building to talk to Wallace and Lidgett in the parking lot sometime between 11:50 a.m. and 12:02 p.m. (the witnesses' evidence on this issue was inconsistent). Sometime shortly after, Stalnenko, Godlien, Wallace and Lidgett entered the building through a side door that led directly into the lunch room. Wallace and Lidgett did not, as the collective agreement requires, inform the Employer of the purpose of their visit. When supervisor John Haubrich discovered them in the lunch room, they were reminded of the requirement in the collective agreement. Wallace and Lidgett proceeded to the main office to sign in. They alleged that, when they arrived at the main office, Dale Kotzer, the Employer's Operations Manager, yelled at them (in the presence of non-unionized employees) for not following the proper procedure. They then left the building. At the

[1] Exhibit U-1.

Union meeting that evening they relayed their version of what occurred in the office to the Union members in attendance.

[6] On December 17, 2018, the two shop stewards each received a Verbal Warning and Godlien was also docked 15 minutes' pay ($6.23) "for the time he was conducting Union business". After indicating that the "Required Improvement" was that they must not do Union business on work time as per the collective agreement unless, in an emergency they first have permission, the documentation of the Verbal Warning included the following statement:

> ***CONSEQUENCES: What will happen if employee fails to meet the specified actions for improvement?***
> *Further disciplinary action up to and including termination.*[2]

Relevant Statutory Provisions:

[7] The relevant provisions of section 6-62 of the Act are as follows:

> ***Unfair labour practices – employers***
> *6-62(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:*
>
> *(a) subject to subsection (2), to interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by this Part;*
>
> *. . .*
>
> *(d) to fail or refuse to engage in collective bargaining with representatives of a union representing the employees in a bargaining unit whether or not those representatives are the employees of the employer;*
>
> *(e) to refuse to permit a duly authorized representative of a union with which the employer has entered into a collective agreement or that represents the employees in a bargaining unit of the employer to negotiate with the employer during working hours for the settlement of disputes and grievances of:*
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> *(i) employees covered by the agreement; or*
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> *(ii) employees in the bargaining unit;*
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> *. . .*
>
> *(g) to discriminate with respect to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including termination or suspension or threat of termination or suspension of an employee, with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in a proceeding pursuant to this Part;*

[2] Exhibits U-2 and U-4.

(4) For the purposes of clause (1)(g), there is a presumption in favour of an employee that the employee was terminated or suspended contrary to this Part if:

(a) an employer or person acting on behalf of the employer terminates or suspends an employee from employment; and

(b) it is shown to the satisfaction of the board or the court that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right pursuant to this Part.

(5) For the purposes of subsection (4), the burden of proof that the employee was terminated or suspended for good and sufficient reason is on the employer.

Relevant Provisions of the Collective Agreement between the Union and Employer for the period September 1, 2016 to August 31, 2019[3]:

[8] The following Articles of the collective agreement were at issue in this application:

3.02 There shall not be any Union activity, except as provided for by this Agreement, on the premises of the Company, without the permission of the General Manager or his designated representative.

. . .

19.01 An authorized representative of the Union shall be permitted to visit the office of the Company at all reasonable hours and after informing a designated representative of the Company of the purpose of the visit, will be permitted to visit the Company's shop during working hours to investigate any matter covered by this Agreement, but he shall in no way interfere with the progress of the work.

Argument on behalf of the Union:

[9] The Union argued that their representatives' visit did not interfere with the progress of work. The shop stewards did not leave their workstations before their lunch break. The Union representatives apologized for not following the requirement in the collective agreement to inform the Employer of their visit. The members have a right to talk to their Union representatives and it is an unfair labour practice for the Employer to refuse to permit Union work to be done during working hours. Articles 3.02 and 19.01 of the collective agreement are invalid because they are contrary to section 6-62 of the Act.

Argument on behalf of the Employer:

[10] The Employer argued that it has never denied the Union's representatives entrance to its production plant. The Union can meet with the employees during their lunch break. It decided to strictly enforce its rights under the collective agreement and its employees' hours of work in this

[3] Exhibit E-1.

situation because the Union representatives were disrespectful of them and their interests. Article 19.01 does not apply to this situation because the Union representatives were not there to investigate a matter covered by the collective agreement.

Analysis and Decision:

[11] The issues for the Board to determine in this matter are:

(a) whether the Employer interfered with, restrained, intimidated, threatened, or coerced its employees in the exercise of their rights conferred by Part VI of the Act, contrary to clause 6-62(1)(a) of the Act;

(b) whether the Employer failed or refused to engage in collective bargaining with representatives of the Union, contrary to clause 6-62(1)(d) of the Act;

(c) whether the Employer refused to permit a duly authorized representative of the Union to negotiate with the Employer during working hours for the settlement of disputes and grievances, contrary to clause 6-62(1)(e) of the Act;

(d) whether the Employer discriminated with respect to any term or condition of employment or used coercion or intimidation of any kind, including threat of termination or suspension of an employee, with a view to discouraging membership in or activity in or for the Union, contrary to clause 6-62(1)(g) of the Act.

[12] In the Union's view, the following conduct by the Employer provides evidence of attempts to threaten or intimidate its employees, to discourage them from participating in Union activity, contrary to clauses 6-62(1)(a) and (g): enforcement of "its rules"[4] forbidding Union business during working hours; yelling at Union representatives in the main office; denial of the right to speak to Union employees without the Employer's permission; ensuing discipline and docking of pay.

[13] The Union referred the Board to several authorities[5] that describe the test used by the Board in determining whether the Employer's conduct constituted a breach of clause 6-62(1)(a). These authorities establish that the test is an objective test; a recent description of the test is

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[4] Throughout its argument, the Union referred to the requirements of Articles 3.02 and 19.01 of the collective agreement as "the Employer's rules".

[5] *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Temple Gardens Mineral Spa Inc.*, 2007 CanLII 68775 (SK LRB) ["*Temple Gardens*"]; *Retail, Wholesale and Department Store Union, Local 558 v Canadian Linen Supply Company Limited*, [1991] 1st Quarter Sask Labour Rep 63, LRB File No. 029-90; *Industrial Wood and Allied Workers Canada, Local 1-184 v Cabtec Manufacturing Inc.*, 2002 CanLII 52895 (SK LRB).

found in *United Food and Commercial Workers, Local 1400 v Moose Jaw Co-operative Association*[6]:

> *The Board agrees with the Employer that the Union must satisfy the Board on the evidence presented that the actions of the Employer have interfered with, intimidated, threatened, or coerced an employee of reasonable intelligence and fortitude against the exercise of a right conferred by the Act. This test involves a contextual analysis of the probable consequences of the Employer's conduct on employees of reasonable intelligence and fortitude. It is an objective test. If the Board is satisfied that the probable effect of the conduct would have been to interfere with, restrain, intimidate, threaten or coerce an employee in their exercise of their protected rights, the Board may find a breach. Prohibited conduct is that which would compromise the free will of the employees.*

[14] The test is whether employees of reasonable intelligence and fortitude would be intimidated or coerced in the exercise of their rights under the Act; the Union is not required to prove that any particular employee was actually intimidated or coerced.

[15] The Union argues that the Employer's response to their non-compliance with Article 19.01 was disproportionate and indicative of an anti-union animus. The discipline meted out to the shop stewards interfered with their right to participate in the Union, and the other members' right to have effective union representation.

[16] The Employer indicated that, from its perspective, the reason for Article 19.01 is safety, of the Union representatives and its employees. The Employer does not allow anyone to enter its premises without following this procedure. The Union admitted in its Written Submissions that, for the purpose of the hoped-for tour of the plant "As was always the case, the union had its own PPE [personal protective equipment] for such tour".

[17] The Union representatives could provide no evidence of a situation in which they had been denied access to the production plant after following the procedure set out in Article 19.01. On the other hand, the Employer filed a copy of a letter dated September 30, 2015 that it sent to a previous Union representative[7] reminding him of the requirements of Article 19.01:

> *You did not inform us of your visit nor did you request a tour via our front office. Your team entered our plant via the warehouse door and proceeded to tour yourselves. This is not acceptable practice for the union nor any other visitor to our plant. This a breach of our Collective Agreement as well as our company safety policy. You ignored signs on our entrance doors indicating that protective eyewear be worn at all times during the plant and by failing to report to the office, our supervisors were not able to accommodate your properly.*

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[6] 2019 CanLII 43225 (SK LRB), at para 73.
[7] Exhibit E-6.

[18] The Union has not satisfied the Board that an employee of reasonable intelligence and fortitude would have been intimidated or coerced by Kotzer's reported yelling at the Union representatives (if it occurred, which he denies). Neither would the ensuing discipline.

[19] With respect to clause 6-62(1)(d), the Union says the Employer failed to collectively bargain and negotiate its own workplace dispute with the Union, but provided no further indication of what this means.

[20] With respect to clause 6-62(1)(e), the Union referred the Board to *United Food and Commercial Workers International Union, Local 226-2 v Western Canadian Beef Packers Inc.*, [1998] Sask LRBR 743 (SK LRB), which quoted the following comment from *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Regina Exhibition Association Limited*[8]:

> *In our view, Section 11(1)(d) is intended to make clear that an employer cannot insist that discussions with employees who are chosen to represent their fellow employees for the purpose of resolving disputes or handling grievances take place outside working hours, or that wages be deducted for the time taken up by this process.*

[21] The Union argues that the Employer and its rules have forbidden the Union representatives from speaking or negotiating regarding workplace grievances and concerns and otherwise collectively bargaining with the Employer. While the Union makes this assertion in its Written Submissions, it led no evidence regarding this. It admits that the Employer has not refused to meet with the Union during working hours. The Union asserts, in its Written Submissions, that the Employer has refused to permit its employees, and particularly Mr. Godlien, to conduct Union business during work hours, however no evidence was led to support this assertion. It should be noted that clause 6-62(1)(e) refers specifically to negotiating with an employer.

[22] With respect to clause 6-62(1)(g), the Board has often noted that if an employer is inclined to discourage activity in support of a union, there are few signals that can be sent to employees more powerful than those that suggest that their employment may be in jeopardy.[9] This issue is taken so seriously that, if the action in question taken by an employer is to terminate or suspend an employee from employment, the burden of proof shifts to the employer to show that the

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[8] [1993] 4th Quarter Sask Labour Rep 216 at 224.

[9] *Saskatchewan Government Employees Union v Regina Native Youth and Community Services Inc.*, [1995] 1st Quarter Sask Labour Rep 118; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Moose Jaw Exhibition Co. Ltd.*, [1996] Sask LRBR 575; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Sakundiak Equipment*, 2011 CanLII 72774 (SK LRB).

employee was terminated or suspended for good and sufficient reason, and that union activity played no part in the decision. In this case, the discipline imposed was not a termination or suspension, so the onus remains on the Union to satisfy the Board that the Verbal Warnings and docking of pay were imposed with a view to discouraging membership in or activity in or for the Union.

[23] The Board made the following comment respecting the application of this provision, in *SEIU, Local 333 and Metis Addictions Council of Saskatchewan Inc., Re*[10]:

> *A general comment should perhaps be made about the three applications which we have granted with respect to Section 11 (1)(e). During the period when a trade union is attempting to obtain the support of employees for certification, and also during the period following certification when the parties have not concluded a collective agreement, this Board must be particularly vigilant with respect to any actions taken by an employer which may be intended to draw attention to the risks of open support for the union. In a mature collective bargaining relationship, it may be possible for the parties to be more confident about the distinctions between actions which are taken for legitimate purposes and actions which are aimed at undermining the influence of the union. Prior to a first agreement, however, the trade union and the employees it represents are particularly vulnerable. Anything done by an employer which appears to punish - or reward - an employee for a particular opinion concerning the trade union may have a significant effect on the ability of other employees to make a truly free choice of union representation, as The Trade Union Act entitles them to do.*

[24] In this workplace, the Board is dealing with a mature collective bargaining relationship: the Union was certified in 1996 and the parties have entered into collective agreements since that time.

[25] The Union argues that the shop stewards were singled out for discipline for conduct that would not normally result in discipline, and this is evidence of an intent to discourage activity in the Union. It relied on *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Temple Gardens Mineral Spa Inc.*:

> *The role of the Board is not to judge the "justness" of discipline. We are confined to determining whether the Employer was motivated by anti-union animus in imposing discipline on the employees in question. An absence of any sense of proportion between the alleged disciplinary offence and the penalty imposed can cause the Board to infer that the motivation for the discipline was related to the employees' activities in support of the Union. In this case, the Board concludes from the lack of merit surrounding the incident that the Employer was motivated by anti-union animus. Ms. Thorn was clearly concerned with the role of the shop stewards in the workplace as she had expressed to Mr. Hollyoak that they were trying to "run the shop." No doubt, there are some growing pains in the relationship between employees and the Employer in relation to their respective roles in*

[10] 1994 CarswellSask 764 (SK LRB) at para 56.

> *the Union environment. Neither are totally blameless and we are sure that their relationship will mature over time.*[11]

[26] As the Union has acknowledged, the role of the Board in determining this application is not to decide if the discipline imposed was appropriate. The Board does not find, in this case, an absence of any sense of proportion between the alleged disciplinary offence and the actual penalty imposed. The Union has not proven a contravention of clause 6-62(1)(g). However, the statement in the Notices of Employee Warning (Exhibits U-2 and U-4) that performing union business on work time in the future will lead to further disciplinary action up to and including termination appears to blow this minor situation out of proportion.

[27] The Union stated in paragraph 50 of its Written Submissions that its application is based on "the employer's course of conduct in yelling abusive matters at union officials, refusing union officials access to its workers and worksite, and disciplining workers for having spoken to union officials". The Board finds that the Union has not proven any of these allegations. To be sure, neither party is blameless in this incident. While the Employer is entitled to enforce a safety protocol for visitors to its production plant and to expect that its employees will work during their working hours and comply with its policies, the Employer needs to understand and accept that its employees have the right to be represented by a Union of their choosing and it is obligated to allow the Union representatives to do their jobs in representing their members.

[28] A number of issues raised in this matter fall outside the jurisdiction of the Board and are more appropriately dealt with through the grievance and arbitration process in the collective agreement or at the bargaining table.

[29] As a result of its evidentiary findings, the Board dismisses this application.

[30] This is a unanimous decision of the Board.

DATED at Regina, Saskatchewan, this **6th** day of **September, 2019.**

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson

[11] [2001] Sask LRBR 320 (SK LRB) at para 31.