Manitoba

Manitoba Labour Board
402-258 Portage Avenue
Winnipeg, Manitoba, Canada R3C 0B6
T 204 945-2089 **F** 204 945-1296
www.manitoba.ca/labour/labbrd

DISMISSAL NO. 1846
CASE NO. 376/07/LRA

IN THE MATTER OF: ***THE LABOUR RELATIONS ACT***

- and -

IN THE MATTER OF: An Application by

International Union of Operating Engineers, Local 987,

Applicant,

- and -

ABLE MOVERS LTD.,

Respondent,

- and -

G.F.,

Person Concerned.

This Decision/Order has been edited to protect the personal information of individuals by removing personal identifiers.

WHEREAS:

1. On July 4, 2007, the Applicant filed an Application (the "Application") with the Manitoba Labour Board (the "Board") on its own behalf and on behalf of the Person Concerned, G.F., seeking various remedies for alleged unfair labour practices contrary to Sections 5(3), 6(1), 7, and 12(1)(f) [alternatively 13(1)(e)] of ***The Labour Relations Act*** (the "***Act***"). In particular, the Applicant asserts that the failure to recall G.F. to work following an agreement between the Applicant and the Respondent to end a legal strike interfered with the right of G.F. to participate in the activities of the Applicant [Section 5(3)]; interfered in the administration of a union and/or the representation of employees by the Applicant [Section 6(1)]; constituted a refusal to continue to employ and/or discriminated in regard to employment against G.F. due to his participation in union activities and/or having exercised his rights under the *Act* [Section 7]; and by refusing to reinstate G.F. in order of seniority as work became available following the conclusion of the strike, the Respondent violated Section 12(1)(f) or, alternatively, Section 13(1)(e) of the ***Act***.

2. On July 19, 2007, following an extension of time, the Respondent, through counsel, filed its Reply disputing the Application and asserted, *inter alia*, that:

   a. It had not breached any section of the ***Act***, as alleged, in failing to recall G.F. to work; and

   b. the provisions of either Sections 12(1)(f) or 13(1)(e) of the ***Act*** were not violated by the Respondent because there was an agreement between the Applicant and the Respondent under which employees, including G.F., were to be returned to work following the strike, unhindered by any seniority considerations. The Respondent asserts that the lay-off of G.F. and the failure to recall him to work was done for legitimate business reasons relating to a shortage of work and was consistent with the agreement between the parties.

3. On October 11, 2007, the Board conducted a hearing at which time the parties appeared before it and presented evidence and argument through their respective counsel.

4. At the outset of the hearing, the parties filed a Statement of Agreed Facts (the "Agreed Facts") [Ex. 1] and also filed Exs. 2 to 13 by consent.

5. During the hearing, the Applicant clarified that it was not seeking the remedy of reinstatement in employment for G.F. but, rather, was seeking appropriate declaratory relief against the Respondent and that G.F. be made whole in respect of his monetary losses for the period June 25, 2007, to July 26, 2007.

6. In its submissions before the Board, the Applicant did not pursue its assertion that Sections 5(3) and 6(1) of the ***Act*** had been violated, and the Board notes that, based on the evidence adduced, the Applicant did not establish that either of these provisions had been violated by the Respondent. The core matters before the Board related to assertions that Sections 7 and 12(1)(f) [or 13(1)(e)]of the ***Act*** had been violated.

7. Following consideration of material filed, evidence and argument presented, the Board is satisfied that the material findings of fact relevant to the disposition of this case are as follows:

   a. G.F. was a journeyman heavy duty mechanic employed by the Respondent, having been hired by the Respondent in 2000.

   b. The Applicant and the Respondent were parties to a Collective Agreement between the Applicant and the Construction Labour Relations Association of Manitoba covering the term May 26, 2004, to April 30, 2007, (the "Agreement") [Ex. 2]. The Agreement applied to various heavy equipment rental companies.

c. The Agreement, consistent with most agreements in the construction industry, does not contain any seniority provisions. The Agreement recognizes that when an employee quits he is obligated to give his employer one hour's notice and when the employer lays off an employee the employer is required to give the employee only one hour's notice with pay [Sections 18(A) and (B) of the Agreement].

d. At all material times, P.W. was a heavy duty mechanic and was also the Shop Foreman at the Respondent's principal place of business at Dawson Road in Winnipeg, Manitoba. Under Section 31 of the Agreement, when the Respondent appoints a mechanic or equipment foreman then that employee (in this case, P.W.) is to be paid a premium over and above the rate in the Agreement for his normal classification.

e. At all material times, J.B. was an apprentice heavy duty mechanic employed by the Respondent, having been hired approximately two years ago [Agreed Facts].

f. G.F., J.B. and P.W. were the only mechanics who worked at the Respondent's yard on Dawson Road [Agreed Facts].

g. The Agreement was terminated by the Applicant on June 17, 2007. The Union commenced a legal strike on June 18, 2007. There were approximately 20 employees of the Respondent covered by the Agreement and all of these employees exercised their legal right to strike. Of these 20 employees, approximately 11 were assigned to and did engage in picket line duties either at the Respondent's Dawson Road yard or at job sites of the Respondent's customers [Paras. 5 and 7 of Agreed Facts and evid. of P.C.

h. From June 18 to June 22, 2007, G.F., along with some employees from both the Respondent and other struck employers, picketed the main gate at the Dawson Road yard.

i. In addition to G.F., the Union dispatched three other employees of the Respondent to picket duties at the Dawson Road site [evid. of P.C.]. G.F. was the only mechanic employed by the Respondent who picketed at the Dawson Road site [evid. of G.F.].

j. The strike ended at approximately 2:30 p.m., on June 22, 2007, when the parties to the Agreement agreed to submit their outstanding differences to final and binding arbitration. The basis of the settlement was that all items which had been agreed to between the parties during the course of collective bargaining and all other terms of the Agreement would remain in full force and effect until a new collective agreement was determined through arbitration. The parties agreed that any wages and benefits arbitrated through the arbitration process would be effective the date the

Union ended the strike [Appendix "A" to Agreed Facts]. Upon reaching these understandings, the strike ceased, including all picket line activity, and the members of the Respondent were directed to contact their respective employers to discuss when they would be returning to work.

k. On June 24, 2007, G.F. was informed (through a phone call received by his wife from a representative of the Respondent) that there was no work for him and that he should not report for work until the Respondent called him [Para. 11 of Agreed Facts].

l. G.F. was not recalled to work after the strike ended. He was issued a Record of Employment on July 6, 2007, upon which it was recorded that the reason for the lay-off was "lack of work" [Ex. 3]. The Respondent has not hired another mechanic since G.F. was laid off [Para. 13 of Agreed Facts].

m. P.W. and J.B. were recalled to work by the Respondent on June 25, 2007, as Shop Foremen/Mechanic and Apprentice Mechanic, respectively, and both of them continue to work with the Respondent to this date. All other employees of the Respondent were recalled to work.

n. On June 26, 2007, G.F. attended at the Respondent's premises on Dawson Road and spoke with D.C., the Manager of the Respondent. D.C. advised G.F. that the Respondent would not be calling him back to work and advised G.F. (when asked) that the reason for this lack of work was that the Respondent had "… sold off a lot of equipment and that it could manage with P.W. and J.B.," to which G.F. testified that he responded "… okay." G.F. was advised that he could rely on a reference from D.C. for a referral to another employer [direct examination of G.F.]. On cross-examination, G.F. said that D.C. advised him that, as the Respondent had sold off five pieces of equipment and given the amount of work available, the Respondent only needed two mechanics and had decided to retain P.W. and J.B.

o. During the two years preceding the strike, G.F. acknowledged that the Respondent was not satisfied with certain aspects of his job performance and that he received employee reviews or written notations to this effect [Exs. 5 to 9 and evid. of G.F. and Champagne]. G.F. admitted that he was aware P.W., as Foreman, had been assigned to monitor his performance.

p. Since 2006, the Respondent reduced its complement of rental cranes from 38 to 30 [evid. of D.C.]. D.C. testified that, by reason of a reduction in work, the Respondent determined that it only needed two mechanics on a full-time basis and, in the result, decided to retain the Foreman (P.W.) and J.B., who acted as supervisor in P.W.'s absence.

q. The Respondent did not take any disciplinary or other such action against

its employees who went on strike and/or picketed. The location where G.F. was picketing (the main gate) was not in use during the course of the strike and the Respondent's primary concern was customer relations with other companies at their work sites with whom the Respondent had contractual relations [evid. of D.C.].

r. G.F. commenced employment with another crane equipment company on July 26, 2007, and has been employed with this new employer since that time.

8. In the context of the material findings of fact recited in Paragraph 7 and, after considering the submissions of the parties, the Board has determined, to its satisfaction, the following:

a. The Board reaffirms its findings in Recital 6 that the evidence does not establish that the Respondent violated either Sections 5(3) or 6(1) of the ***Act***.

b. While the Board recognizes that, pursuant to Section 7 of the ***Act***, an employer bears the onus to satisfy the Board that it did not discharge or refuse to continue to employ an employee or discriminate in regard to employment against a person because of any of the reasons set out in subsections 7(a) to (h), including exercising a right under the ***Act*** (which would include participating in a lawful strike and picketing), the Respondent has satisfied its onus that G.F. participation in a legal strike and his lawful picketing activity at the Dawson Road site of the Employer was neither the reason for nor a motivating factor for G.F. lay-off. The Board accepts that the reason for not recalling G.F. to work following the cessation of the strike was on account of a lack of work in the mechanic classifications. The Board notes that there was only one employee in each of the three discrete mechanic classifications. The Board accepts that the decision of the Respondent to lay off G.F. was based on valid business reasons and not on account of his participation in lawful strike activity. The evidence as a whole does not sustain the Applicant's assertion that the Board ought draw an inference that union activity was a factor in the Respondent's decision to not recall and lay off G.F.

c. As to the contention that the Respondent failed to recall G.F. on the basis of his "seniority standing" in relation to the seniority of other employees, contrary to Section 12(1)(f) or Section 13(1)(e) of the ***Act***, the Board's findings are as follows:

i. In general terms, the applicable provision is Section 12(1) of the ***Act*** because a collective agreement was concluded between the Applicant and the Respondent [Section 12(1)(b)]. Section 13(1) of the ***Act*** is only triggered where no collective agreement is concluded. In this case, the new collective agreement covering the term, May 1, 2007 to April 30, 2010 is comprised of the "agreed to" changes arising out of the negotiating process; the eight issues to be determined by arbitration, all of which are to be incorporated into the new collective agreement without further input from the parties; and, as to all other

matters, the existing terms of the Agreement [Appendix "A" to Agreed Facts].

ii. Based on the findings in sub-paragraph 8(b) above, the work performed by G.F. at the time the strike commenced was not continued after the strike was settled, meaning that the condition precedent recited in Section 12(1)(c) of the ***Act*** has not been met in these circumstances.

iii. Further, pursuant to Section 12(1)(e) of the ***Act***, the parties did reach an agreement respecting the reinstatement of employees in the unit and the terms of this agreement included the condition that, upon cessation of the strike, the terms of the Agreement and agreed upon items would remain in full force and effect, meaning that any employer bound by the settlement, including the Respondent, retained the discretion to determine whether work was available and, if so, which employees would be required to perform that work. Under the terms of the Agreement, such decisions may be made without regard to seniority [see Para. 7(c), *supra*]. Having made this finding, Section 12(1)(f) of the ***Act*** is not applicable in the circumstances of this case.

9. Based on the determinations summarized in Paragraph 8, the Application is to be **DISMISSED**.

T H E R E F O R E

The Manitoba Labour Board **HEREBY DISMISSES** the Application filed by the International Union of Operating Engineers, Local 987, on behalf of G.F., on July 4, 2007.

DATED at **WINNIPEG**, Manitoba, this 2nd day of November 2007 and signed on behalf of the Manitoba Labour Board by

"Original signed by"

William D. Hamilton, Chairperson

WDH/dr/rb-s