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ORDER NO. 1471
CASE NO. 169/09/LRA

IN THE MATTER OF: *THE LABOUR RELATIONS ACT*

- and -

IN THE MATTER OF: an Application by

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Services Workers International Union, Local 9469,

Applicant,

- and -

THE REAL CANADIAN WHOLESALE CLUB AND CASH & CARRY DIVISION OF WESTFAIR FOODS LIMITED, a duly Incorporated Company with head office in the City of Calgary, WESTERN GROCERS, DIVISION OF WESTFAIR FOODS LTD., D.M. and B.D.,

Respondents,

- and -

L.S., N.E. and all other employees represented by the Applicant Union as employed by both of the Respondent Companies,

Persons Concerned.

BEFORE: C. S. Robinson, Vice-Chairperson

L. Sigurdson, Board Member

Y. Milner, Board Member

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

INTERIM ORDER (SUBSTANTIVE)

WHEREAS:

1. On June 8, 2009, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Services Workers International Union, Local 9469 (the "Applicant"), through counsel, filed an Application Seeking Remedy for Alleged Unfair Labour Practice contrary to Sections 5, 6, 26, 62, and 63 of *The Labour Relations Act* (the *"Act"*).

2. On July 7, 2009, following an extension of time, the Respondent, Western Grocers, Division of Westfair Foods Ltd. ("Western Grocers"), through counsel, filed its Reply asking that the Application be dismissed.

3. Further on July 7, 2009, following an extension of time, the Respondent, The Real Canadian Wholesale Club and Cash and Carry Division of Westfair Foods Ltd. ("RCWC"), D.M. and B.D., through counsel, filed its Reply to the Application, submitting that the proper forum for this type of grievance is Arbitration and asking that the Application be dismissed.

4. On August 11, 2009, the Board informed the parties that it had determined the matter should proceed to hearing and, further, that the parties may address the preliminary issue as to whether Arbitration is the proper forum at the commencement of the hearing.

5. On November 6, 2009, the Applicant, through counsel, filed documentation with the Board, seeking leave of the Board to amend its original Application to include further particulars.

6. On November 10, 2009, the Respondents, through counsel, filed correspondence with the Board asking the Board to refuse to accept the Amended Application.

7. On November 12, 2009, the Applicant, through counsel, filed correspondence with the Board in Reply to the Respondents' objection to the Applicant's request to amend its Application. Further, the Applicant clarified that the parties listed in the Amended Application should be the same as those contained in the original Application and that the Applicant did not intend to include any new parties or exclude any existing parties by amending its Application.

8. On November 13, 2009, the Board informed the parties that following consideration of material filed, it had determined that counsel may address the Applicant's request to amend its Application together with the issue as to whether Arbitration is the proper forum, at the commencement of the hearing.

9. On November 16, 2009, the Board conducted a hearing, at which time the parties and their respective counsel appeared before the Board and presented their submissions with respect to the preliminary issues raised by counsel, namely:

a) the Applicant's Application seeking leave of the Board to allow it to amend its original Application; and

b) the Employer's motion that the proper forum for this matter is Arbitration, and further requesting that the Application be dismissed.

Certain of the Persons Concerned, namely L.S. and N.E. attended the hearing.

10. At the commencement of the hearing on November 16, 2009, counsel informed the Board that the parties had agreed to the order of the proceedings, and proceeded to present their respective submissions in relation to the Applicant's request to amend its original Application. At the conclusion of the submissions of counsel, the Board adjourned the hearing to deliberate on the issue.

11. Further, on November 16, 2009, the hearing reconvened, at which time the Board verbally informed the parties of its decision respecting the issue of the Applicant's request to amend its original Application. The Board proceeded to hear the submissions of counsel with respect to the Employer's motion that the proper forum for this matter is Arbitration. The Board reserved its decision in this regard and the hearing was adjourned.

12. On November 17, 2009, the Board advised the parties of its decision relating to the Employer's motion and further indicated that this Interim Order would follow.

13. For the purposes of determining the preliminary motions advanced by the parties, the Board considered all the material filed and the submissions of counsel, review of which indicates the following:

a) The Applicant is a trade union and the certified bargaining agent for certain employees of the Respondent Employer(s). The Application indicates that there are approximately 325 individuals included in the bargaining unit.

b) The essence of the original Application filed June 8, 2009 is a complaint that the Respondents violated sections 5, 6, 26, 62, and 63 of the *Act* when they, at various points in time following collective bargaining, negotiated directly with three employees without involving, consulting or otherwise advising the Applicant regarding wage increases that exceeded what the employees were otherwise entitled to under the collective agreement(s) in force between the parties. The Applicant added that the wage increases were offered directly to the three employees shortly after the conclusion of collective bargaining between the parties during which the Union had requested increases for employees and the Respondent(s) had replied that further increases were not necessary for recruitment and retention purposes. There is no allegation that anti-union animus motivated the Respondents' conduct or that the employees who received the wage increases in question were treated differently as a

result, in whole or in part, of union activity, opposition or other unlawful considerations.

c) The original Application claimed that Respondents directly negotiated wage increases with employees commencing in the fall of 2008, however, the Applicant only became aware of rumours of the impugned conduct by the Respondents in January of 2009 and received confirmation of such conduct in approximately April of 2009.

d) The Respondent, Western Grocers, filed a separate Reply on the basis that it is a separate entity and further that the only involvement it had in any of the matters at issue was that it was present during collective bargaining for the current collective agreement. Each of the Respondents replied, in part, that they acted in good faith and in accordance with the collective agreement(s) and requested that the Application be dismissed. RCWC, M.D., and B.D., asserted in their Reply that the Application fundamentally involves an alleged breach of the collective agreement and, accordingly, grievance arbitration rather than the Board is the proper forum in which the allegations should be heard. The Reply further noted that RCWC has the right to offer wages to individual employees in accordance with Articles 1 and 14(a) and the wage scale of the collective agreement given that the agreement expressly stipulates that the rates of pay set out therein are the "minimum rates" to be paid.

e) The Applicant asserts that the Application is properly before the Board and should not be deferred to arbitration. Counsel for the Applicant noted that the remedial powers of the Board may differ from those of a labour arbitrator and advanced an argument, in the alternative, that if the Board elected to defer to arbitration, it ought to retain jurisdiction in order to consider whether any remedy which may be imposed by an arbitrator is satisfactory.

f) On November 6, 2009, the Application filed its Amended Application requesting leave of the Board to amend its original Application by including additional particulars relating generally to allegations pertaining to events which transpired and statements allegedly made during collective bargaining for the current collective agreement which concluded in April 2008 and to a previous unfair labour practice complaint which was tentatively settled in July of 2008 and concluded in the fall of 2008.

g) In response, the Respondents submitted that the Applicant unduly delayed in filing the allegations contained in the Amended Application and given that the events that allegedly occurred as set out in those particulars were within the knowledge of the Union when it filed its original Application, the Union failed to file its notice of intention "promptly" as required by section 3(3) of the *Manitoba Labour Board Rules of Procedure*, R.M. 184/87 R ("*Rules of Procedure"*) and the Board should

accordingly refuse to consent to the amendment and prohibit the Applicant from adducing evidence relating to the further particulars at the hearing.

h) Counsel for the Applicant responded to the Respondents' objection to the Amended Application in part by submitting that the additional particulars were important to provide an overall context for the Board but did not raise any new issues. By way of explanation for the delay in filing the Amended Application, counsel for the Applicant submitted that he was not advised of the additional particulars until recently and the representatives of his client did not appreciate the potential relevance or importance of the said particulars. In addition, the Applicant's lead negotiator, it was pointed out, has left the organization to take a new position and was not aware of the original Application when it was filed. Counsel submitted that while the failure of the Applicant to submit the particulars in the original Application was regrettable, any inconvenience to the Respondents could be remedied by allowing them additional time to respond and adjourning the hearing if necessary.

i) The Respondents do not deny the fact that wage increases were granted to two employees and that those specific increases were not the subject of direct negotiations with the bargaining agent. The primary defence of the Respondents to the unfair labour practice allegations is that they had a right to act as it did and increase the wages of the individual employees based upon the provisions of the collective agreement in force between the parties.

j) Article 14(a) of the collective agreement reads, in part, as follows:

> Article 14 – Wage Scale
>
> (a) Classifications of employees covered by this Agreement, and minimum hourly rates, shall be as set out in the Appendix attached to and forming part of the Agreement…
>
> Any employee who at the time of signing this Agreement is receiving a higher rate of pay than that specified in the wage scale shall not have his rate reduced merely by reason of signing this Agreement.
>
> The rate of pay provided in Appendix "A" are minimum rates and apply to the job classifications and not to the individual.

k) The wages of the employees in question do not exceed the wages set out in the collective agreement, although the Applicant advanced the position that those employees are receiving greater wages than they are entitled based upon their hours worked with the Respondent RCWC.

l) The collective agreement contains provisions for the final settlement of disputes concerning the interpretation, application, operation or any alleged violation of the terms of the agreement. Specifically, Article 3 concerns the adjustment of grievances by way of a specific grievance procedure and Article 4 provides for final and binding arbitration by one of a panel of experienced sole arbitrators.

m) The Applicant has not filed any grievance relating to the conduct and actions complained of in the Application.

14. Following consideration of the Application, the Amended Application, the Replies thereto, material filed by the parties, and the submissions of counsel, and having regard to the facts recited in Paragraph 13, the Board determined the following:

a) Request of Applicant to Amend Application

i) The *Rules of Procedure* indicate that where improper or irregular conduct is alleged, the party advancing the allegation must include in the application, or file a notice of intention that contains, a concise statement of the material facts, actions or omissions upon which the applicant intends to rely as constituting the improper of irregular conduct. The information to be contained in the concise statement of material facts is specified in section 3(2) of the *Rules of Procedure*. Section 3(3) of the *Rules of Procedure* goes on to provide:

> **3(3) Where filing not prompt**
> Where, in the opinion of the board, a person has not filed a notice of intention promptly upon discovering or becoming aware of the alleged improper or irregular conduct, the person shall not adduce evidence at the hearing of the application of such facts except with the consent of the board; and, if the board deems it advisable to give such consent, the board may do so upon such terms and conditions as it considers advisable.

ii) The Board is satisfied that the particulars alleged in the Amended Application were known to the Applicant at the time it filed its original Application on June 8, 2009. The delay in filing the additional particulars set out in the Amended Application is approximately five months beyond the date of filing the original Application.

iii) Having particular regard to the nature of the information alleged in the Amended Application, the quantum of delay in filing the Amended Application, and the reasons advanced for the delay, the Board **DETERMINED** that the Applicant did not file the particulars set out in the Amended Application promptly as contemplated by Section 3(3) of the *Rules of Procedure* and the Board refused to grant its consent to the amendment of the Application.

b) Employer's Motion Requesting Deferral to Arbitration

i) The Application involves the interpretation of provisions of the collective agreement in force between the parties.

ii) The Reply of the Respondents indicates that they claim to have acted in accordance with the terms of the collective agreement, including Article 14(a) and the management rights clause set out in Article 1. The Respondents emphasized that the reference in the collective agreement to "minimum hourly rates" and "minimum rates" accorded them the right to increase the wages of the employees in the manner that they acknowledge has been done. The Applicant disagrees that the collective agreement permits the action taken by the Respondent and itself pointed to provisions of the collective agreement in support of its position in that regard. It is clear that the present Application necessarily involves consideration and interpretation of the relevant provisions of the collective agreement and that such interpretation is central, rather than peripheral or ancillary, to the adjudication of the Applicant's complaint.

iii) As a central issue in the present case concerns the resolution of a dispute regarding the meaning and application of the collective agreement, the complaint demands the contract interpretation expertise of a labour arbitrator more than the labour relations expertise of this Board. The collective agreement provides a mechanism by which the actions of the Respondents may be grieved and arbitrated.

iv) It is not the role of the Board to function as a "surrogate arbitrator in respect of a matter that can be adequately determined under the provision of a collective agreement" (see *Burntwood Regional Health Authority v. M.A.H.C.P.* [2009] M.L.B.D. No. 26).

v) The Board's powers in relation to any proceeding before it are set out in section 142 of the *Act*. In addition, in section 140(7) of the *Act*, the Legislature has granted the Board the authority and discretion to defer a matter to arbitration. Section 140(7) reads as follows:

> **Deferral to arbitration**
> **140(7)** The board may refuse to hear or continue to hear any matter which it considers can be adequately determined under the provisions of a collective agreement for final settlement of disputes between the parties or under the deemed arbitration provisions set out in subsection 78(2) of this Act.

vi) The Board is satisfied that the issues raised by the Applicant in its Application dated June 8, 2009 fundamentally relate to a disputed interpretation of the collective agreement between the parties that may be adequately determined under the grievance and arbitration provisions of the said collective agreement. Accordingly, pursuant to subsections 140(7) and 142(1) of the *Act*, the Board HEREBY DECLINES to hear the Application at this time and DEFERS the matters raised therein to the grievance and arbitration provisions of the collective agreement.

DATED at **WINNIPEG**, Manitoba, this 16th day of December, 2009, and signed on behalf of the Manitoba Labour Board by

"Original signed by"

C. S. Robinson, Vice-Chairperson

"Original signed by"

L. Sigurdson, Board Member

"Original signed by"

Y. Milner, Board Member

RL/acr/rb-s