Manitoba

Manitoba Labour Board
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DISMISSAL NO. 1950
Case No. 13/10/LRA

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

IN THE MATTER OF: An Application by

C.B.,

Applicant,

- and -

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial, and Service Workers International Union, Local 9074-34,

Bargaining Agent/Respondent,

- and -

WESTEEL, DIVISION OF VICWEST OPERATING LIMITED PARTNERSHIP,

Employer.

BEFORE: W.D. Hamilton, Chairperson

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

SUBSTANTIVE ORDER

WHEREAS:

1. On January 13, 2010, the Applicant filed an application (the "Application") with the Manitoba Labour Board (the "Board") seeking certain remedies for an alleged unfair labour practice contrary to Section 20 of *The Labour Relations Act* (the *"Act"*). The Applicant alleges that the Respondent Union (the "Union"), from approximately 1998 and continuing up to the present time, has failed to properly address, various pensions concerns which have been raised since 1998 by the Applicant and other employees regarding what the Applicant asserts is an improper calculation of "pensionable service" under the terms of the Employer's ("Westeel") pension plan. In the Application, the Applicant recites certain events and various communications he and/or other employees have had with representatives of Westeel, the Pension Commission of Manitoba (the

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"Commission"), and various representatives of the Union regarding the calculation of "pensionable service". In particular, the Applicant alleges, *inter alia*, that while a written opinion dated September 15, 1998 furnished to him by the Union appears to suggest that he (the Applicant) should be credited with a full year of pensionable service in respect of the issues raised in that opinion, nothing was ever done with this opinion either by the Union or Westeel since 1998. A copy of the 1998 opinion was attached as Item 11 to Schedule A of the Application.

2. As to remedial relief, the Applicant requests the following:

> "I am asking the board to order that the union and/or Westeel compensate me as well as every other present or former employee and their beneficiaries under the pension plan for monies not paid to former employees and amounts not credited to present and future employees by Westeel from the date of inception of the pension plan, which I understand to be June 1, 1973, to the present.
>
> I ask that the board order the union to continue to police Westeel in the future in order to ensure that employees of Westeel receive all benefits due them.
>
> I would ask for an amount to cover the cost of time spent over many years in preparing various documentation and correspondence and many hours spent in discussions and on phone calls.
>
> I ask for this order pursuant to section 31(4)(h) and (i) of The Labour Relations Act of Manitoba."

3. On February 4, 2010, following an extension of time, Westeel, through Counsel, advised the Board that it would not be filing a Reply in respect of the Application as Westeel was of the view that it had no interest in an application filed pursuant to Section 20 of the *Act.*

4. On February 4, 2010, following an extension of time, the Union, through Counsel, filed its Reply disputing the Application and asserting that the Applicant is not entitled to the remedies sought. The Union says that the Application ought to be dismissed without a hearing on a number of grounds, the primary ground being that the Application is untimely on account of undue delay in the filing of the Application. Further, the Union says that the Applicant has failed to identify a right under the collective agreement (the "Agreement") between the Union and Westeel in respect of which the Union owed or owes any obligation to represent the Applicant's interest and, therefore the Applicant has failed to establish a *prima facie* case under Section 20. In this regard, the Union contends that, aside from a reference (unrelated to the Application) to employer pension contributions in Article 31.06 of the Agreement, the Agreement contains no other reference to Westeel's pension plan. Accordingly, the issue on which the Applicant is seeking Union representation is not a right arising under the collective agreement which can either be

grieved or taken to arbitration. The Union also alleges that the Application fails to disclose any *prima facie* case that the Union has acted in a manner which is arbitrary, discriminatory or in bad faith in representing any right of the Applicant under the Agreement.

5. Based on a review of the Application, the Union's Reply and the documentation attached to these pleadings, the Board has determined, to its satisfaction, the following:

   (a) an oral hearing is not necessary as the matters at issue can be determined by a review of the written material filed by the parties.

   (b) Section 30(2) of the *Act* provides that the Board may refuse to accept a complaint where its filing has been unduly delayed. Undue delay has been interpreted by the Board to mean periods of as little as six (6) months in duration.

   (c) On the issue of undue delay, see the Board's decision in *Kepron v. Brandon University Faculty Association* (2004), 103 CLRBR (2d) 102, particularly the review of the principles and jurisprudence of the Board commencing at page 137. In *Kepron*, the Board noted that the discretion reserved to the Board under Section 30(2) may be invoked regardless of whether or not a *prima facie* case is established under Section 20, meaning that the issue of delay can be addressed as an independent issue. The Board also noted that where the delay is an excessive one, then the Applicant bears a clear onus to convince the Board that the circumstances of his/her case are extraordinary.

   (d) The Applicant, in the current circumstances, has unduly delayed the filing of the Application because the pension concerns which form the basis of the Application were raised by the Applicant, by his own admission, in July of 1998. As noted in paragraph 7(A) of the Application, the Applicant says that he and other employees "… have been asking the Union to look into pension concerns since the mid 1990's". The Applicant does not dispute that he received the opinion dated September 15, 1998 regarding his pensionable service. The fact that the Applicant received and, in some respects, relies on this opinion points to the fact that the issues now complained of were matters of concern to him and were raised with the Union in 1998. By any standard, a period excess of 11 years constitutes undue delay.

   (e) The fact that pension issues were raised in 2008 and in the summer and fall of 2009, and that another legal opinion was obtained by the Union, (which, according to the Union's Reply does not support the Applicant's position on pensionable service) does not change the characterization of the finding in sub-paragraph (c) because the concerns resurrected or addressed in 2008 and 2009 were, in substance, the same concerns that had been raised by the Applicant in

1998 and/or earlier years. The Board also notes that, in July of 2005, the Applicant wrote to the Westeel/Pension Committee raising the "pensionable service" issue following receipt of his personal pension report on benefits as at January 1, 2004. This was followed up with a detailed memo dated August 21, 2006 from the Applicant to the Pension Committee asserting that as of January 1, 2006 "… I am rightfully entitled to 32.41 years of pensionable service and requesting a response in writing as to why Westeel considers me only eligible for 31.37 years." That same memo records the pensionable service attributed to him under the pension plan during the years 1998 to 2006. The Applicant also referred to Memorandum of Understanding between Westeel and the Union entered into in September of 2007 (Item 5 of Schedule A to the Application) under which the Union and Westeel agreed to review the pension plan that was then in place on the understanding that said letter of understanding does not constitute a commitment to alter or change the pension plan in any way. These documents reveal that the Applicant was aware of the pensionable service issues of which he now complains in the Application throughout many years.

(f) Notwithstanding the foregoing finding on delay, the Board is satisfied that the Applicant has failed to establish a *prima facie* case because the Application does not refer to any facts that disclose a failure on the part of the Union to represent the Applicant in respect of any "rights … under the collective agreement", as required by Section 20. The only reference in the Agreement (See Article 31.06 as attached to both the Application and Reply), to pensions is the monthly contributions required of Westeel but there is no provision in the Agreement which otherwise addresses what service would constitute a year of "pensionable service" and, in order to resolve any dispute over that issue, one must have regard to the terms of the Westeel's Pension Plan, which is not part of the Agreement.

6. In the result, the Board has determined that the Applicant has unduly delayed the filing of the Application, contrary to Section 30(2) of the *Act* and, further, that the Application does not, on its face, disclose that the Union has failed to represent the Applicant in respect of a "right" arising under the terms of the Agreement. Accordingly, the Board has determined that the Application is without merit within the meaning of Section 140(8) of the *Act* and the Board declines to take any further action on the complaint pursuant to Section 30(3) of the *Act*. Accordingly, the Application is to be dismissed.

7. It is not necessary to address other issues raised in either the Application or the Reply, including the scope and type of remedial relief claimed by the Applicant. Addressing these issues is not required because the finding of the Board on the issue of undue delay is dispositive of the Application.

T H E R E F O R E

The Manitoba Labour Board hereby dismisses the Application filed by C.B. on January 13, 2010.

DATED at **WINNIPEG**, Manitoba this 26th day of February, 2010, and signed on behalf of the Manitoba Labour Board by

"Original signed by"

W. D. Hamilton, Chairperson

WDH/ar/rb-s