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DISMISSAL NO. 2411
Case No. 108/21/LRA

IN THE MATTER OF: *THE LABOUR RELATIONS ACT*

- and -

IN THE MATTER OF: An Application by

Z.B.,

Applicant,

- and -

UNIFOR Local 3003,

Respondent,

- and -

NEW FLYER INDUSTRIES,

Employer.

BEFORE: D. Lewis, Vice-Chairperson

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

SUBSTANTIVE ORDER

I. Procedural History

1. On July 6, 2021, the Applicant, through counsel, filed an Application with the Manitoba Labour Board (the “Board”) seeking a remedy for an alleged unfair labour practice contrary to section 20 of *The Labour Relations Act* (the “Act”).
2. On August 5, 2021, following an extension of time, the Respondent filed its Reply denying the allegations against it and any allegations of an unfair labour practice

contrary to section 20 of the *Act*. The Respondent further submits that the Application does not disclose a *prima facie* case amounting to a breach of section 20 of the *Act* and asked the Board to dismiss the Application without a hearing pursuant to the Board's powers under section 30(3) and 140(8) of the *Act*.

3. On August 6, 2021, following an extension of time, the Employer, through counsel, filed its Reply. The Employer submits that the Application does not disclose a *prima facie* case and requests that the Board dismiss it without a hearing.
4. On August 18, 2021, following an extension of time, the Applicant, through counsel, filed a Response to the Replies asserting that the Application did establish a *prima facie* case and that the Board should hold a hearing.
5. On August 23, 2021, the Employer, through counsel, in response to the Applicant's Response to the Replies, filed correspondence with the Board, correcting allegations set forth in the Applicant's response.

II. Material Facts

6. The Applicant has been employed by the Employer since June of 1993. Prior to May of 2013, he was employed as a Stock Keeper in inventory control. In this position, he was identified as a production employee pursuant to the Collective Agreement.
7. In May of 2013, the Applicant pursued an apprenticeship to become an industrial electrician. The Collective Agreement identified this position as a skilled trade.
8. On January 25, 2021 the Applicant was advised by the Employer that he was being laid off indefinitely.
9. The Applicant was laid off from the position of Apprentice Electrician on February 5, 2021 and was returned to the position of Stock Keeper in the Production Unit, the position he had held until 2013, when he commenced the apprenticeship.
10. The Employer credited the Applicant with seniority in the Stock Keeper position that had been earned while in the apprentice position in skilled trades. The Respondent advised the Applicant that in their view, pursuant to the Collective Agreement, the Applicant's seniority upon his return to the Stock Keeper position would be the seniority he had as of May 2013 and would not include any seniority accrued while in the apprenticeship program.
11. The Respondent communicated with the Employer their interpretation of the Collective Agreement regarding the seniority of the Applicant upon his return to the

Stock Keeper position. The Employer, upon review, agreed with the Respondent's interpretation and adjusted the seniority of the Applicant to the seniority of May 2013.

12. The Applicant urged the Respondent to file a policy grievance, with the goal of having the seniority accrued while in the apprenticeship program credited to the seniority in the Stock Keeper position. Another member who was similarly affected also asked the Respondent to file a grievance.
13. On March 22, 2021, the Respondent advised both the Applicant and the other member that they would not file a grievance because, in their view, the seniority provisions of the Collective Agreement had been applied correctly and there was no breach of the Collective Agreement. This decision was reached by the Respondent's bargaining committee.
14. The Applicant requested that the bargaining committee's decision be reviewed by the Respondent's executive committee. The Applicant provided a detailed written explanation of his concerns to be considered by the executive committee.
15. The executive committee met on April 14th, 2021, and voted to uphold the bargaining committee's decision.

III. Analysis and Decision

16. The Board is satisfied that a hearing is not required as this matter may be determined on the basis of the material filed.
17. Section 20 of the *Act* establishes the duty of fair representation:

Duty of fair representation

20 Every bargaining agent which is a party to a collective agreement, and every person acting on behalf of the bargaining agent, which or who, in representing the rights of any employee under the collective agreement.

...

(b) in any other case, acts in a manner which is arbitrary, discriminatory or in bad faith;

commits an unfair labour practice.

18. The Board may decide a matter without conducting a formal hearing pursuant to the provisions of subsection 30(3)(c) of the *Act*, which states that it may, "at any time decline to take further action on the complaint". Similarly, subsection 140(8) of the *Act* permits the Board to dismiss a complaint at any time if it is of the opinion that the complaint is "without merit or beyond the jurisdiction of the board".

19. As this case does not involve a dismissal, clause (b) of section 20 of the *Act* is applicable. The onus is on the Applicant to establish a violation of section 20 of the *Act*.
20. The standard of care under section 20(b) of the *Act* is expressed in the negative. Bargaining agents must not represent employees in a manner that is arbitrary, discriminatory or in bad faith.
21. A summary of the meaning ascribed to the terms “arbitrary”, “discriminatory” and “bad faith” by the Board appears in *J.H.B. v. Canadian Union of Public Employees* (2009), 164 C.L.R.B.R. (2d) 182 at page 190:

“Arbitrary” conduct has been described as a failure to direct one’s mind to the merits of the matter, or to inquire into or to act on available evidence, or to conduct any meaningful investigation to justify a decision. It has also been described as acting on the basis of irrelevant factors or principles, or displaying an attitude which is indifferent, summary, capricious, non-caring or perfunctory. Flagrant errors consistent with a non-caring attitude may also be arbitrary, but not honest mistakes, errors of judgment, or even negligence. “Bad faith” has been described as acting on the basis of hostility or ill-will, dealing dishonestly with an employee in an attempt to deceive, or refusing to process the grievance for sinister purposes. A knowing misrepresentation may constitute bad faith, as may concealing matters from the employee. The term “discriminatory” encompasses cases where the union distinguishes among its members without cogent reasons.
22. The onus is on the Applicant to establish a *prima facie* violation of section 20 of the *Act* before the onus shifts to the Respondent. The Applicant has failed to assert any facts to support his assertion that section 20 of the *Act* is triggered. Specifically, he has failed to demonstrate that the Respondent has acted in a manner that is arbitrary, discriminatory or in bad faith in representing him under the Collective Agreement.
23. The Applicant’s workplace is governed by a Collective Agreement covering the period of April 1st, 2018 to March 31st, 2023. This Collective Agreement states in Article 14:08 that seniority shall be computed as days of service with the Company since date of last hire, less any period of time during which employees do not accrue seniority pursuant to this agreement.
24. Article 14:07 of the Collective Agreement notes that a separate seniority list shall be maintained for skilled trades pursuant to Appendix D.
25. Appendix D of the Collective Agreement is entitled Skilled Trades. This article governs the Employer’s apprenticeship program. The article contains a provision

regarding rights of apprentices and states that apprentices shall be governed by the Collective Agreement and Appendices and attachments thereto except as modified by this Appendix.

26. The appendix states as follows in regard to seniority of apprentices:

Apprentices will exercise seniority in their own group. Upon satisfactory completion of the apprenticeship program the apprentice will be given seniority equal to 100% of time spent as an apprentice. An employee with seniority who is selected for an apprenticeship shall be permitted, if affected by layoff or cancellation of the program to return to his/her former job classification with the same seniority that they held prior to becoming an apprentice.

27. It is this provision of the Collective Agreement that the Respondent relied upon when communicating to the Applicant that they could see no violation of the agreement and, accordingly, would not be advancing a grievance on his behalf.

28. The Respondent provided the Applicant with an explanation of why they would not be advancing a grievance. Further, the Applicant was afforded the opportunity to appeal this decision to the Respondent's executive committee. That committee met to review the Applicant's complaint, considered the issue, and voted to uphold the decision not to pursue a grievance.

29. The relief sought in the Application is that the Board order the Respondent to advance his grievance in accordance with the Collective Agreement and that the Employer respond to the grievance.

30. In *B. D. v. Manitoba Nurses' Union* at paragraph 7, citing *AESES and University of Manitoba*, Case No. 1/12/LRA, the Board stated:

...as the Board has stated in many decisions, it is not the function of the Board to assume the role of a surrogate "rights" arbitrator under a collective agreement and decide whether an applicant would have succeeded on a grievance or potential grievance at arbitration. In assessing the conduct of the union, an objective standard of review must be used, meaning that the proper focus is to ask whether the union's decision is one that reasonably could have been made in the circumstances. The fact that an employee may disagree with a decision made by his bargaining agent does not, standing alone, provide a foundation for a Section 20 complaint. The Board is not the forum where disputes are resolved on their merits.

31. In the present case, the Respondent considered the request of the Applicant, reviewed the applicable sections of the Collective Agreement, and applied those

sections to the Applicant's situation. In doing so they reached a conclusion as to the meaning of the Collective Agreement. The Respondent then spoke with the Employer, who ultimately concurred with the Respondent's interpretation. One of the considerations of the Respondent was the effect that the Applicant's desired interpretation would have on the other members of the bargaining unit. The Applicant claimed in his Response to the Reply that a former Union representative who was the chairperson when the collective agreement language was first introduced in 2009 supported his interpretation. The Board notes, however, that the Collective Agreement had been renewed twice since 2009 and that there were changes in the language of the applicable sections of the Collective Agreement. Like the reasoning in *AESES* above, the fact that an employee may disagree with a decision made by his bargaining agent as to the meaning of a particular clause of his Collective Agreement does not, of itself, provide a foundation for a section 20 complaint. The Board does not sit as a substitute arbitrator. Under the circumstances, the Board is satisfied that the Respondent fulfilled its obligations under section 20 of the *Act*.

32. The Application is, therefore, dismissed pursuant to section 30(3)(c) and 140(8) as it does not establish a violation of section 20 of the *Act*.

T H E R E F O R E

The Manitoba Labour Board **HEREBY DISMISSES** the Application filed by Z.B. on July 6, 2021.

DATED at WINNIPEG, Manitoba this 9th day of November, 2021, and signed on behalf of the Manitoba Labour Board by

"Original Signed by"

D.L. Lewis, Vice-Chairperson

DL/st/mg/lo-s