Manitoba Labour Board
Suite 500, 5th Floor - 175 Hargrave Street Winnipeg, Manitoba, Canada R3C 3R8
T 204 945-2089 **F** 204 945-1296
www.manitoba.ca/labour/labbrd
MLBRegistrar@gov.mb.ca

DISMISSAL NO. 2457
Case No. 106/21/LRA

IN THE MATTER OF: *THE LABOUR RELATIONS ACT*

- and -

IN THE MATTER OF: An Application by

The River East Transcona Teachers' Association of the Manitoba Teachers' Society,

Applicant,

- and -

THE RIVER EAST TRANSCONA SCHOOL DIVISION,

Respondent.

BEFORE: C.S. Robinson, Chairperson

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

SUBSTANTIVE ORDER

A. Procedural History

1. On June 30, 2021, the Applicant filed an Application Seeking Remedy for Alleged Unfair Labour Practice contrary to section 6(1) of *The Labour Relations Act* (the "*Act*") with the Manitoba Labour Board (the "Board"). The Applicant requested a range of remedies including, but not limited to, an order requiring the Respondent to provide a written apology and to distribute a copy of the Board's order to employees.

2. On July 30, 2021, following an extension of time, the Respondent filed its Reply submitting that the Application should be dismissed because the Applicant unduly

delayed in filing. Further, the Respondent denied that it engaged in an unfair labour practice in violation of section 6(1) of the *Act* as alleged, or at all.

3. On August 3, 2021, following an extension of time, counsel for the Applicant filed a Response to the Reply clarifying that "the only Order and Remedies that my client seeks in this Application are with regard to the written memorandum issued by the Respondent on January 26, 2021" and that the "actions by the Respondent in 2018 and 2019 are provided solely as background facts leading to the alleged unfair labour practice which occurred on January 26, 2021".

4. The Board conducted a videoconference hearing on February 1 and 2, 2022 at which both parties, represented by counsel, submitted evidence and argument.

B. Issue

5. This case is about whether correspondence distributed by the Respondent to the Applicant's membership on January 26, 2021 constituted improper interference with a union and its representation of employees contrary to section 6 of the *Act*. The Respondent's communication concerned a program in which employees are incentivized to provide early notice of retirement.

6. The Applicant maintained that the Respondent's communication was inaccurate, one-sided, and presented select facts so as to cast the Applicant in a negative light with its members. It is alleged that this created division between it and the individuals it represents. The Respondent countered that its communication did not violate section 6 of the *Act*. It further noted that it constituted protected speech under the legislation as it expressed views without the use of intimidation, coercion, threats, or undue influence or interference with the formation or selection of a union. The Respondent states that its communication was factually accurate and the Applicant, with which it has a longstanding and mature bargaining relationship, could have responded if it had any issue with the content of the message.

C. Facts

7. The Applicant and Respondent each submitted a book of documents in support of their positions. Mr. Chris Darazsi, President of the Applicant, and F.T., the Respondent's Assistant Superintendent Human Resources, testified at the hearing. Although the unfair labour practice complaint relates to correspondence sent by the Respondent on January 26, 2021, the Board also heard historical evidence which provided contextual background.

8. The Applicant is the certified bargaining agent for more than 1,500 employees of the Respondent employed as teachers, as defined by *The Public Schools Act*.

9. The Respondent provides education to students in 42 schools operated throughout the School Division.

10. When the alleged unfair labour practice was committed, a collective agreement with a term of July 1, 2014 to June 30, 2018 was in force. On June 11, 2021, the parties signed a new collective agreement the term of which is July 1, 2018 to June 30, 2022.

11. As noted above, this case involves communications about an early notification of retirement incentive ("ENRI") program. In accordance with the Teacher - General Agreement, teachers intending to resign or retire must notify the Respondent at least two months in advance of June 30 in each school year (for those teachers who signed an Agreement with the Respondent in 2004 or later), or at least one month in advance of June 30 (for those who signed an Agreement with the Respondent prior to 2004). The ENRI program provided a monetary payment to teachers who gave written notice of their intention to resign or retire to the Respondent earlier than as required under the Teacher - General Agreement. Earlier notice assists the Respondent in planning and staffing for the next school year. In the last several years in which the ENRI has been offered, roughly two dozen employees per year have provided early notice of retirement. Not every employee who retires elects to participate in the program.

12. F.T. testified regarding the operation of the ENRI program. He outlined his understanding of the Respondent's multi-step implementation process as follows:

    a) The Board of Trustees approves the offer of the ENRI program by passing a motion;

    b) He consults with the Respondent's senior administrative team;

    c) The Respondent communicates with the Applicant to attempt to reach agreement to offer the program;

    d) Following that agreement, notification is sent to employees regarding the program details;

    e) Employees who wish to participate in the program provide him with notice on or before the established deadline;

    f) He acknowledges the notice via email and later follows up with correspondence which provides additional information to the employee.

13. The ENRI program was first introduced in the 2005/2006 school year. The Respondent proposed the program, and the Applicant, on behalf of its members, accepted. Agreements to provide the ENRI program continued up to and including the 2017/2018 school year. Some of the agreements were for a single school year;

others spanned multiple years. The amount of the lump sum payment as well as other terms and the format of the agreement has changed over time.

14. The ENRI program was not included in the collective agreement between the parties in force when the alleged unfair labour practice is said to have been committed. In the previous collective agreement, the parties had negotiated a Letter of Understanding respecting the ENRI program; however it expired on June 30, 2018. During the last round of collective bargaining, the Applicant proposed a new Letter of Understanding regarding the ENRI program; however it withdrew that proposal shortly after it was tabled. The new and existing collective agreement signed by the parties on June 11, 2021, does not contain any provisions (or a Letter of Understanding) about the ENRI program.

15. On or about November 20, 2018, the Division's Board of Trustees passed a motion to offer an early retirement incentive to its teachers for the 2018/2019, 2019/2020, and 2020/2021 school years. Mr. Darazsi testified that the Applicant did not receive notice that the motion was being brought to the Board of Trustees. The Applicant only became aware of it when the minutes of the meeting were produced. He acknowledged, during cross-examination, that the motion simply authorized the Respondent to enter into an agreement with the Applicant respecting the ENRI program and that it was "standard practice" to pass an authorizing motion.

16. On December 3, 2018, without first obtaining the agreement of the Applicant, the Respondent sent a memorandum to the Applicant's members advising that it was offering the ENRI. Those eligible to retire, who declared their retirement by February 1, 2019, would receive a lump sum payment of $1,500. The Applicant was provided with a copy of the memorandum.

17. On December 14, 2018, the Applicant sent an email to the Superintendent stating that the ENRI was "offered to members prior to discussion with the association and so the association did not have an opportunity to provide input or suggestions with respect to the offer". The Applicant proposed changes to the ENRI program and attached a draft Letter of Understanding. The suggested changes included an option of selecting an additional week of vacation rather than a lump sum payment and language to protect any payment from claw back under *The Public Service Sustainability Act*. The Superintendent, responded on December 17, 2018. He declined to enter into the Applicant's proposed Letter of Understanding and advised that the Respondent would "continue to administer the Early Notice of Retirement Incentive as it has done for the past number of years". It is acknowledged by the Respondent that it continued to offer the ENRI for the 2018/2019 school year.

18. The next written communication regarding the ENRI program is a letter dated January 14, 2019 sent by Mr. Darazsi to the Superintendent, advising that, in the

Applicant's view, the Respondent's decision to offer the ENRI in the 2018/2019 school year constituted an unfair labour practice. The letter referred to the possibility of bringing an unfair labour practice application and further indicated that "future action of this type will not be tolerated, and recourse will be taken to the Labour Board". The Respondent did not reply to Mr. Darazsi's letter. In cross-examination, Mr. Darazsi agreed that by allowing the Respondent to offer the ENRI, subject to potentially filing grievances on behalf of members if amounts were clawed back, the Applicant effectively agreed to the ENRI program for the 2018/2019 school year. He later attempted to resile from that response by indicating he struggled with calling what occurred an "agreement".

19. Notwithstanding the Applicant's threat of advancing an unfair labour practice application in 2019, no such application was filed. Approximately 24 of the Applicant's members applied to the program and received payment for the 2018/2019 school year. Mr. Darazsi testified that the decision not to file an unfair labour practice was influenced by a number of factors. He stressed that he and F.T. were new to their roles and he did wish to start the relationship on an adversarial footing. In any event, members applied under the ENRI that year and the Applicant did not file any complaint with this Board or file a grievance.

20. On October 18, 2019, Mr. Darazsi wrote to the Superintendent once again regarding the ENRI program. Noting that he had received no reply to his January 14, 2019 letter, Mr. Darazsi indicated that the Applicant was prepared to negotiate respecting the ENRI program if the Respondent wished to offer the incentive again. Mr. Darazsi warned the Respondent that if it planned to unilaterally offer the ENRI again without negotiating with the Applicant, an unfair labour practice application would be filed with the Board.

21. On November 18, 2019, Mr. Darazsi and F.T. exchanged emails regarding the ENRI program for the 2019/2020 school year. On behalf of the Applicant, Mr. Darazsi agreed to the payment of a $1,500 lump sum incentive for those who provided early notice. However, he noted that the Applicant was only prepared to agree for one year. It was Mr. Darazsi's evidence that he was attempting to convey to F.T. that by agreeing to a single year, the Applicant wanted to negotiate something better in the future.

22. Subsequent to that exchange, the Superintendent wrote to Mr. Darazsi on December 4, 2019 in response to his October 18, 2019 letter. The Superintendent claimed that it was not the Respondent's intention to unilaterally offer the ENRI program without the concurrence of the Applicant. The parties ultimately agreed to terms respecting the ENRI program for the 2019/2020 school year, and, in accordance with that agreement, the incentive plan was offered to the Applicant's members in that year.

23. On November 12, 2020, Mr. Darazsi sent F.T. an email outlining the Applicant's proposal for the ENRI program in the 2020/2021 school year. The proposal included an option for members to elect to receive either five days of leave or a lump sum payment ranging from $1,000 to $3,000 depending on the amount of early notice of retirement provided. F.T. acknowledged receipt of the email and indicated that they would "chat soon". Apparently, F.T. forgot about this exchange and, on January 4, 2021, wrote to Mr. Darazsi to canvass his thoughts on the program. Mr. Darazsi responded that he previously sent the Applicant's proposal. Shortly thereafter, they had a telephone conversation during which F.T. advised Mr. Darazsi that the Respondent was only prepared to offer a lump sum of $1,500 to those who provided early notice of retirement as it had in the previous two years.

24. Following the Respondent's refusal to engage in any meaningful discussion regarding the Applicant's proposal to enhance the benefits to its members under the ENRI program, the Applicant's Executive voted unanimously to refuse to agree to the ENRI program for the 2020/2021 school year. Mr. Darazsi testified that the decision was animated in part by what the Applicant viewed as the dismissive response of the Respondent. It was felt that the Respondent was attempting to impose the program rather than negotiate it with the Applicant.

25. On January 6, 2021, Mr. Darazsi notified F.T. of the decision of the Executive and advised that the Applicant would not agree to the Respondent's proposal for the ENRI program. F.T. acknowledged the update and indicated that he would "follow-up with a response later today".

26. Mr. Darazsi further advised F.T. that the Applicant had prepared draft correspondence to be sent to its membership regarding the decision to decline the Respondent's offer of the ENRI program. F.T. replied that he would appreciate seeing the correspondence in advance. Mr. Darazsi complied with that request and sent a draft letter to F.T. on January 7, 2021. However, rather than sending that draft letter to its membership, the Applicant elected to raise the issue with the Chairperson of the Respondent's Board of Trustees, R.Z.

27. Accordingly, on January 11, 2021, Mr. Darazsi wrote to R.Z. The letter provides some background respecting the Applicant's concerns and sets out a revised offer to the Respondent whereby an increase in the lump sum payment to $2,000 would be provided to those who provided early notice of retirement. The letter concludes that much had changed since the Respondent's Board of Trustees approved offering the ENRI back in November of 2018 and that the Applicant's members had "gone above and beyond during this pandemic". Mr. Darazsi expressed the view that agreeing to the proposed enhancement of the ENRI program could be "a wonderful opportunity for the Board to show its appreciation for the hard work and dedication demonstrated by RETTA members during these extremely challenging times". F.T. acknowledged,

in cross-examination, that Mr. Darazsi's letter was a genuine attempt to negotiate and find common ground. He also accepted that, in the context of a multi-million dollar budget, a $500 increase to the ENRI was not a significant amount of money. He agreed that based upon the anticipated number of teachers who would participate in the program, the total expenditure would be approximately $14,000.

28. The Respondent acknowledged receipt of the letter and indicated that the next Board of Trustees meeting was scheduled for January 19, 2021, after which it would provide an update.

29. On January 20, 2021, R.Z., on behalf of the Respondent, sent the following response:

> Thank you for your letter dated January 11, 2021 regarding the Early Notification of Retirement Incentive. The board accepted the letter from RETTA as information and no further action was given.
>
> Thank you for your advocacy on behalf of our teachers.

30. F.T. was unable to shed any light on how this decision was reached.

31. Mr. Darazsi testified that the he was "frustrated" by the very brief reply. He noted that the Applicant's letter was a page and a half long and fully presented its perspective. The Respondent's reply was viewed as "dismissive" and effectively stymied yet another attempt by the Applicant to negotiate in good faith.

32. On January 25, 2021, Mr. Darazsi wrote to the Applicant's members stating as follows:

> Several members have been asking about the delay in the Early Notification of Retirement Incentive (ENRI). This delay has been because we have been working hard over the last several weeks in hopes of negotiating an incentive that is appropriate for what the Division is asking of our retirees. Unfortunately, despite our best efforts at achieving compensation that is not only appropriate but fair and equitable with what other comparable associations receive, the Board of Trustees has been unwilling to negotiate with us.
>
> This has been extremely disappointing and frustrating considering that in comparison to the RETSD $1,500 Incentive for a January 31st notification, both Seven Oaks and St. James-Assiniboia have a negotiated $2,000 incentive in their collective agreement for an end of February notification. That's *more money*, and *a later deadline* than RETSD. Louis Riel offers five (5) paid days of leave in their collective agreement. RETSD used to offer five days of leave but retracted it years ago.

> Our members deserve better.
>
> While we very much understand this will be a hard pill to swallow for our retiring members, it was voted upon by the RETTA executive and unanimously passed that we had to draw a line in the sand and deny the ENRI. *Enough is enough*. The Division benefits significantly from our members declaring retirement up to four months earlier than contractually obligated. In our view, if the Division wants to pay RETTA members and ask for something very significant - irrevocably declaring retirement early - in return, they are legally obligated (according to the Labour Relations Act) to *negotiate* this. Thus, we have already advised the Division that we are considering legal steps, including the possibility of filing an Unfair Labour Practice with the Manitoba Labour Board.
>
> Please know that much sleep was lost over this decision. The last thing we want to happen is to have our retiring members who have dedicated a career to education pay the price for the unwillingness of the trustees to bargain with us, especially during these difficult times when, over and over again, our members have been taking it on the chin.
>
> Our members deserve more respect, and please know that our RETTA executive continues to fight for you. If you have any questions, don't hesitate to contact me.

33. During cross-examination, Mr. Darazsi accepted that his January 25, 2021 correspondence to the members could be seen as disparaging to towards the Respondent's Board of Trustees. He further acknowledged that his letter does not expressly state that the Respondent was prepared to offer the ENRI program on the same terms as the prior year.

34. The following day, January 26, 2021, F.T. sent a Memorandum to all Principals with instructions that they immediately distribute it to all of the Applicant's members. It is this communication that the Applicant asserts is an unfair labour practice. F.T. testified that he collaborated with the Respondent's senior administrative team and obtained legal advice in preparing the impugned Memorandum. The Memorandum states:

> The Division is aware that principals and the Senior Administration Team have received numerous inquiries from teachers regarding the anticipated release date of the 2020-2021 Early Declaration of Retirement Incentive application.

> As you know, in past, the Division has gratuitously offered an Early Notice Retirement Incentive (ENRI) which provides a payment to teachers who provide early notice of their intention to retire at the end of the school year. The earlier notice assists the Division in planning and staffing for the next school year.
>
> Relative to a letter shared by RETTA on January 25, 2021 here is an update from Senior Administration:
>
> - Through board motion, the ENRI was approved for 2018-19, 2019-20 and 2020-21.
> - As noted in the communication from the Association, the Association is not prepared to agree to the Division's terms for 2020-21.
> - While the Board, through its motion, was willing to continue the ENRI for 2020-2021, on the same terms as last year, it is not permitted to do so.
> - The Division cannot pay its teachers who wish to provide early notice of their intention to retire without the consent/approval of the Association.
>
> Should the status of the Early Retirement Incentive change we will inform you as soon as possible.

35. F.T. testified that the Respondent was inundated with questions regarding the ENRI program for the 2020/2021 school year. He felt that the Respondent needed to communicate with staff to address the “concerns, angst, and confusion” that had arisen. In his direct examination, he also expressed the opinion that Mr. Darazsi’s January 25, 2021 letter to the membership omitted important facts (in particular that the Respondent was prepared to offer the ENRI program), that its tone was disrespectful to the Board of Trustees, and that the suggestion that the Respondent was not respecting teachers was inaccurate. However, during cross-examination, F.T. accepted that Mr. Darazsi’s letter was “more or less accurate”. Nevertheless, he reiterated his concern that Mr. Darazsi’s letter was not clear that the Respondent was prepared to offer the ENRI program with a lump sum payment of $1,500. He also disagreed with any suggestion that teachers were being treated in a disrespectful manner by the Respondent. He did not share a copy of his Memorandum with Mr. Darazsi in advance of it being delivered to teachers.

36. F.T. maintained that the information contained in his Memorandum was true and accurate. According to F.T., the Respondent's intent in sending the Memorandum was to clarify the facts and to help people by informing them about what was going on. He denied that the Memorandum amounted to a "counterstrike". However, F.T. acknowledged, during cross-examination, that his Memorandum did not indicate that the Applicant had advanced a proposal for the ENRI in November of 2020, or that it proposed a compromise in January of 2021 which was met with a very brief reply. He did not agree that the Memorandum was designed to put pressure on the Applicant to capitulate.

37. Mr. Darazsi testified regarding the Applicant's concerns about the Memorandum. He expressed the view that the reference to the Respondent having "gratuitously" offered the ENRI in the past was inaccurate and misleading. He testified that this wording was a "red flag". His second concern was that the Memorandum created the misleading impression that the Applicant was backing out of a previous three-year agreement with the Respondent respecting the ENRI program. The Applicant entered into no such agreement and, in fact, raised concerns when the Respondent had offered the ENRI in the 2018/2019 school year without the Applicant's agreement. Third, Mr. Darazsi took issue with the portion of the Memorandum that indicated the Respondent cannot pay teaches who wish to provide early notice of retirement without the consent and approval of the Applicant. His objection is that the statement is misleading given the Respondent's offer of the ENRI program in 2018/2019 without the Applicant's agreement. That said, he conceded that the disagreement regarding the ENRI program that year was not broadly communicated to the Applicant's membership. Finally, Mr. Darazsi felt that the Memorandum created the impression that the Respondent wished to offer the ENRI program but the Applicant simply refused. He testified that the Memorandum created a false, misleading, and negative impression of the Applicant because it omitted any reference to the fact that the Applicant made repeated attempts to negotiate with the Respondent. However, he ultimately agreed that each of the bulleted points set out in the Respondent's January 26, 2021 Memorandum was true. Mr. Darazsi further acknowledged that there was nothing preventing the Applicant from communicating with its membership in order to clarify any statement in the January 26, 2021 Memorandum which it believed was misleading. He estimated that between 24 and 36 members raised concerns with the Applicant following the issuance of the Memorandum.

38. In cross-examination, Mr. Darazsi accepted that the Respondent was not obliged to accept the Applicant's demands; however he maintained that the Respondent failed or refused to negotiate with the Applicant respecting the terms of the ENRI program. He also acknowledged that the Respondent cannot pay teachers an incentive to provide early notice of retirement without the agreement of the Applicant.

39. Although Mr. Darazsi maintained that the ENRI ought to be included in the collective agreement, he agreed that the Applicant did not table a proposal until 2021 (which it withdrew). He also agreed that while the ENRI program was available from 2005 until the 2020/2021 school year, the Respondent was not obligated to offer it (aside from a three-year agreement to do so), as there was no collective agreement provision requiring it to do so.

40. As acknowledged by Mr. Darazsi during cross-examination, the Applicant is a strong union which benefits from statutory protection.

D. Submissions

Applicant

41. The Applicant contends that the Respondent's January 26, 2021 Memorandum constitutes improper interference with the union contrary to subsection 6(1) of the *Act*. Counsel emphasized that context is critical to this complaint. That context, it maintains, includes a long history of the Applicant attempting to negotiate the terms of the ENRI program only to have those attempts met with disrespectful and dismissive responses by the Respondent.

42. The Applicant relied upon cases from this and other labour relations boards which conclude that direct communication by an employer with employees about matters relating to their terms and conditions of employment, or their representation by a bargaining agent, is subject to close scrutiny. The case law acknowledges that communications by employers carry considerable weight with employees. Such communications may undermine the credibility of a bargaining agent and affect its ability to represent employees. Given that unions are the exclusive representatives of bargaining unit employees, employers must be cautious and circumspect when they communicate with employees. The Applicant submits that it is important for the Board to carefully consider the content and tone of such communications as well as the manner in which they are conveyed to employees. The test for assessing whether the communication constitutes improper interference under section 6 of the *Act* is objective and requires the trier of fact to consider the likely effect of the communication on an employee of average intelligence and fortitude.

43. Counsel for the Applicant noted that where improper interference contrary to section 6(1) of the *Act* is alleged, proof of ill-intent or anti-union animus is not required to establish a breach. An employer may be guilty of an unfair labour practice, even in cases where it did not consciously seek to undermine the union or create division between the union and the employees it represents. The Applicant notes that communications by employers that disparage the union or drive a wedge between employees and their union has been found to constitute improper interference and is

not protected by the freedom of expression. Similarly, labour boards have concluded that communications which, in reality, represent an attempt to bargain directly with employees are impermissible. Counsel also highlighted case law which indicates that while employers may be permitted to communicate accurate statements, they must not patently misrepresent the facts. The Applicant notes that misleading, selective, or incomplete statements by employers may be deemed inaccurate and constitute an unfair labour practice.

44. Following a review of the contextual background, counsel for the Applicant turned to his analysis of the January 26, 2021 Memorandum which is the focus of the current complaint. It is the Applicant's position that the Respondent had a visceral reaction to Mr. Darazsi's letter to members sent the previous day. The Applicant contends that the Respondent's Memorandum in response went far beyond simply clarifying the facts. Rather, counsel argued that the Memorandum presented only select facts such that the Applicant was cast in a negative light. In particular, counsel states that the Memorandum suggested to members that the Applicant backed out of a three-year deal with the Respondent in relation to the ENRI program. That suggestion is untrue. The Memorandum made no mention of the repeated attempts by the Applicant to engage in negotiations about the ENRI with the Respondent. Counsel suggested that the Memorandum was one-sided and designed to divide the Applicant and its members. Counsel emphasized the last line of the Memorandum in which the Respondent advised that if the status of the ENRI changed, it would inform employees as soon as possible. The Applicant contends that the average member would understand that to mean if the Applicant capitulated, then employees could have the program reinstated. Such a suggestion, in the context of the Respondent's refusal to negotiate, was divisive and created a wedge between employees and their union.

45. While acknowledging that the *Act* recognizes the right of employers to express statements of fact or reasonably held opinions and views, counsel for the Applicant submits that the statements made by the Respondent in the impugned Memorandum are not protected by subsection 6(3)(f) or subsection 32(1) of the *Act*. In the present case, the Applicant says that the Respondent's communication to employees crossed the line and constituted an unfair labour practice.

Respondent

46. The Respondent denies committing an unfair labour practice as alleged or at all. Counsel commenced his submission by noting what the case is <u>not</u> about. He pointed out that the Applicant accepted, in its response to the Reply, that the issue which arose between the parties regarding the ENRI program in 2018 was merely background to the current allegation. Moreover, with respect to the circumstances which occurred in 2018, there was no evidence that members of the Applicant were

even aware of the issue which arose at that time. In any event, no unfair labour practice was filed and, had one been filed, it would have been open to the Respondent to argue that the Applicant had agreed to proceed with the ENRI based upon its conduct at the time. Counsel further noted that this case is not an interest arbitration regarding what the parties should have negotiated.

47. Counsel for the Respondent discussed the statutory provisions applicable in this matter. He pointed out that subsection 6(1) is expressly subject to the freedom of speech provisions set forth in subsection 32(1) of the *Act*. That provision permits the Respondent to express its views providing that it does not use intimidation, coercion, threats or undue influence, or interfere with the formation or selection of a union. The Respondent submits that the impugned Memorandum constitutes a proper expression of its views in a manner which is free from the prohibited elements set out in the provision. Accordingly, it is the position of the Respondent that the content of the Memorandum falls outside the scope of subsection 6(1) of the *Act*. Unlike certain authorities relied upon by the Applicant, in the present case the Respondent did not take any action, it simply expressed honestly held views in response to a communication by the Applicant.

48. In the alternative, even if the Board accepted that interference occurred, counsel submitted that clause (f) of subsection 6(3) of the *Act* provides that an employer does not commit an unfair labour practice if it only communicates statements of fact or opinions reasonably held with respect to its business. The Respondent maintains that the content of the Memorandum is permitted under that clause.

49. Counsel for the Respondent added that the onus is on the Applicant to establish that the Memorandum constitutes improper interference contrary to subsection 6(1) of the *Act*. In order to discharge that onus, the Respondent maintains that the Applicant must establish that an average employee would be negatively influenced against it because of the Memorandum. In the context of what the average employee would have known, the Respondent contends that the facts set out in the Memorandum, viewed objectively, would not have influenced members against the Applicant. Counsel pointed out that even Mr. Darazsi agreed that the statements set out in the Memorandum were (at least in isolation) true.

50. The Respondent also pointed out that the Applicant is a strong bargaining agent that enjoys special statutory protection. The Applicant is not weak or vulnerable. The context in which the communication arose does not involve a certification drive. Rather, the Respondent points out that the parties have a longstanding and mature bargaining relationship and the risk of harm is, accordingly, very minimal. Indeed, counsel for the Respondent noted that the Applicant could have considered a “self-help remedy” and communicated with its members regarding any statements which it believed were incomplete or inaccurate.

51. The Respondent referred to case law which holds that employers have the right to reply to inaccurate propaganda or other material directed against it by a union, as well as the right to respond to statements about specific aspects of its business. Counsel suggested that the Memorandum was written in response to the Applicant's January 25, 2021 letter to its members. Counsel described the Applicant's letter as clearly disparaging of the Respondent's Board and that it was incomplete and unclear. Counsel noted that both the Applicant and the Respondent fielded questions about the ENRI program following the January 25, 2021 letter and the Memorandum was issued to address the resulting confusion. Counsel for Respondent underscored that the Memorandum was accurate and that employers may respond to issues and are not required to remain "bound and gagged".

52. In summary, counsel for the Respondent submitted that the communication set out in the Memorandum was "relatively benign" and did not constitute a breach of subsection 6(1) of the *Act.* Moreover, counsel stated that subsection 32(1) and subsection 6(3)(f) protected the Respondent's right to express its views as it did in the circumstances.

E. Analysis

53. The Applicant has alleged a breach of section 6 of the *Act*. Section 6 is an unfair labour provision which prohibits employers from, amongst other things, participating in, or interfering with, the administration of a union or its representation of employees. Subsection 6(1) states:

> **Employer's interference with union**
> 6(1) Subject to subsection 32(1), every employer or employers' organization, and every person acting on behalf of an employer or an employers' organization, who participates in, or interferes with, the formation, selection, or administration of a union, or the representation of employees by a union that is the bargaining agent for the employees, or contributes financial or other support to a union, commits an unfair labour practice.

54. In response to the Applicant's allegations, the Respondent relies upon the opening phrase of subsection 6(1) which makes that provision specifically subject to the right to freedom of speech set out in subsection 32(1) of the *Act* which provides:

> **Freedom of speech**
> 32(1) Nothing in this Act deprives any person of his freedom to express his views if he does not use intimidation, coercion, threats, or undue influence or interfere with the formation or selection of a union.

55. In the event that Board concludes that there has been interference, the Respondent maintains that clause (f) of subsection 6(3) of the *Act* applies. That provision establishes the following exception to an unfair labour practice finding under subsection 6(1):

> **Exception**
> 6(3) An employer, employers' organization or a person acting on behalf of an employer does not commit an unfair labour practice under subsection(1) by reason only that the employer, employers' organization or person
>
> ….
>
> (f) communicates to an employee a statement of fact or an opinion reasonably held with respect to the employer's business.

56. The *Act* strictly limits employer communications with employees when they are exercising their rights to organize and select a bargaining agent. During the early stages of establishing a collective bargaining relationship, statutory protection is provided to employees and unions in recognition of the fact that employees may be particularly vulnerable to employer influence at that time (see, for example, *Greensteel Industries Ltd, and IMAW, Local 174*, 1982 CarswellMan 493 at paragraph 28).

57. Employer communications to employees must be reviewed in their appropriate context, including the timing of the comments on the continuum of the relationship between the parties. Accordingly, the Board must consider the maturity of the collective bargaining relationship when assessing a claim that an employer's communication with employees violates subsection 6(1) of the *Act.* Discussion of this principle appears in *Jack Juunsola Sales Ltd, v. Retail, Wholesale Canada, Local 700*, 1998 CarswellBC 3287. In that case, the British Columbia Labour Relations Board, at paragraphs 60 to 62, commented that greater restraint is placed on employer speech at the initial stages of the relationship compared to when collective bargaining rights have become more established. Accordingly, that board noted that although the policy concerns restricting employer communications with employees "do not completely dissipate once certification is achieved", following certification and negotiation of a first collective agreement "there is less concern about employer interference because employee security and union representation have been secured by the terms and conditions of the collective agreement".

58. Similarly, in *Marusa Marketing Inc. and U.F.C.W., Local 832*, 2001 CarswellMan 664, the majority of an expanded panel of this Board commented on the stricter constraints placed upon employer communications during an organizing period as opposed to when the collective bargaining relationship has matured. In arriving at this

conclusion, the Board also commented upon the scope of the freedom of speech provision set out in subsection 32(1) of the *Act*:

> 29. The amendment to section 6(1) providing that it is subject to section 32(1) ("Freedom of speech") does not permit communications which would amount to interference with the formation or selection of a union.
>
> 30. Clearly then, the employer's freedom of speech in relation to the formation and selection of a union is strictly limited. Clauses 6(3)(d) and (f) do permit employer communications with its employees that might otherwise be considered interference, but only if the employer communications can fit within those specific provisions. Otherwise, the communications constitute an unfair labour practice…
>
> 31. This interpretation of these provision of the *Act* is consistent with the *Act* as a whole, and in particular with section 47(1) of the *Act* which requires the employer to maintain strict neutrality in relation to the certification process before the Board …
>
> 32. The *Act* does not restrict to the same degree employer communications at other times.

59. It is well established that an objective test is applied to assess whether an employer's communication should be considered interference contrary to subsection 6(1) of the *Act*. As noted in *Marusa, supra,* at paragraphs 39 and 40, this requires the Board to objectively evaluate the likely effect of the impugned conduct upon an employee of average intelligence and fortitude.

60. Not all employer communications with employees are prohibited by the *Act*. However, employers must always be circumspect when communicating with employees represented by a bargaining agent. Unions are granted the exclusive right to represent employees. That fundamental right is essential to the collective bargaining regimen established under labour legislation in this and other Canadian jurisdictions, and it has significant implications for an employer's direct communications with employees. As the Board noted in *Greensteel, supra*, at paragraph 26, when considering where the line between permissible and improper employer communications falls, one must consider whether the communications represent an attempt to bargain directly with employees. Direct bargaining with employees is impermissible as it conflicts with the union's exclusive right to represent employees and because it is regarded as an attempt to unduly influence employees in matters related to their terms and conditions of employment.

61. Furthermore, when an employer communicates directly with employees, it must not malign or discredit the union. As discussed in *Red Deer Catholic Regional Division No. 39 and Alberta Teachers Association*, [2018] A.L.R.B.D. No.29, at paragraph 57, employer speech "which disparages the Union or its officers, or intends to drive a wedge between employees and their union has also been found to constitute interference and is not protected under the freedom of expression". In that case, the Alberta Labour Relations Board pointed out that to "express one's views" is different from using "communication to influence" employees. The Alberta board concluded that an employer communication intentionally designed to interfere with a union meeting was not protected by the free speech provisions in that legislation.

62. The content of employer communications with employees and the manner that the communication is conveyed must be carefully scrutinized by the Board in cases alleging a violation of section 6(1) of the *Act*. Accurate and complete employer communication with employees in the context of an established bargaining relationship is generally considered to be permissible speech. Furthermore, the Board accepts that an employer has a right to reply, in a reasonable and proportionate manner, to inaccurate propaganda or other material directed against it by a union or its officials (see, for example*, Ed Klassen Pontiac (1994) Ltd. and Teamsters Local Union No. 213*, 1996 CarswellBC 3005 at paragraph 202).

63. Conversely, as noted in *Saskatchewan Association of Health Organizations and SEIU (West)*, 2014 CarswellSask 214 at paragraph 111, an employer's direct communication with employees must not be false or misleading:

> While employers and trade unions may see the same facts differently and they may express their views from differing perspectives (i.e. they may place their own "spin" on their message), the views given by employers must not patently misrepresent significant facts or contain knowingly false information. Misinformation by an employer, by its very nature, is injurious to the free will of employees.

64. Furthermore, an incomplete statement by an employer to employees that leaves out critical facts or context, may also be considered by the Board to be misleading.

65. Having reviewed the applicable statutory provisions and the general principles respecting employer communications with employees, the Board will now turn to the facts of this case.

66. The employer communication in question did not arise during the formation or selection of the union. Rather, the Applicant and the Respondent are in a long-term collective bargaining relationship. The Applicant is not a fledgling union and the

employer's communication did not arise in the context of an organizing drive or at a time where the Applicant was particularly vulnerable.

67. Employers have the right to communicate with employees provided that they do not violate the legislation. Furthermore, an employer does not have to remain mute when faced with inaccurate statements or accusations made against it by a union. In this case, the parties' interactions with one another in relation to the ENRI program have become increasingly acrimonious over the past few years. The Respondent's refusal to seriously engage in discussions with the Applicant regarding improvements to the ENRI program has clearly (and understandably) rankled the Applicant and its leadership. The dismissiveness that the Respondent has exhibited towards the Applicant with respect to its repeated requests to engage in such bargaining is particularly evident in R.Z.'s January 20, 2021 correspondence. That correspondence was provocative. It led, at least in part, to Mr. Darazsi's January 25, 2021 correspondence to the Applicant's membership, the tone of which was forceful. The Respondent's decision to directly communicate its views to employees in response thereto was understandable in context.

68. The Board has carefully considered the Applicant's submission that the Respondent's January 26, 2021 Memorandum to employees was "on the wrong side of the line" and, therefore, constituted an unfair labour practice. However, the Board is satisfied that the likely effect of the Respondent's communication upon an average employee would not have created a negative impression of the Applicant or otherwise interfered with its representation of its members.

69. There is nothing particularly objectionable about the impugned document. It makes no patently inaccurate statements. It does not employ intimidation, coercion, threats, or undue influence and it does not make any overtly negative statements about the Applicant. Although it provides a somewhat truncated review of the facts, the Board did not believe that it was so incomplete as to be considered misleading. The Board is satisfied that the Memorandum did not constitute direct bargaining with employees, it did not disparage the Applicant or its officials, and it did not seek to drive a wedge between the Applicant and its members. In short, the Respondent's communication, having regard to all of the relevant context, did not violate subsection 6(1) of the *Act*. The Respondent's communication was permissible having regard to the freedom of speech provision set out in subsection 32(1) of the *Act*. Furthermore, the Board agrees that any concern that the Applicant had about the contents of the Memorandum could have been addressed by additional communication with its membership.

70. Accordingly, the Application is dismissed.

T H E R E F O R E

The Manitoba Labour Board **HEREBY DISMISSES** the Application filed by The River East Transcona Teachers' Association of the Manitoba Teachers' Society on June 20, 2021.

DATED at **WINNIPEG**, **Manitoba** this 28th day of June, 2022, and signed on behalf of the Manitoba Labour Board by

"Original signed by"

C.S. Robinson, Chairperson

CSR/st/lo/lo-s