

Manitoba Labour Board

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ORDER NO. 1466

Case No. 34/09/LRA

C/R Case Nos. 359/08/LRA

362/08/LRA and 379/08/LRA

IN THE MATTER OF: *THE LABOUR RELATIONS ACT*

- and -

IN THE MATTER OF: An Application by

**United Food and Commercial
Workers Union, Local No. 832,**

Applicant/Union,

- and -

**TRIPLE SEAL t/a
NORTHWEST GLASS PRODUCTS,**

Respondent/Employer,

- and -

L.B., H.B., J.C., R.G., M.H., R.M., D.M., D.S.(1), D.S.(2), W.T.,

Persons Concerned.

**BEFORE: W. D. Hamilton, Chairperson
R. Glass, Board Member
G. Rodgers, Board Member**

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

SUBSTANTIVE ORDER

WHEREAS:

1. On February 11, 2009, with an addendum to the application being filed on March 3, 2009, the Applicant/Union (the "Union") filed an Application seeking various remedies for Alleged Unfair Labour Practices (the "Application"), contrary to Section 5, 6(1), 7, 9 and 17 of *The Labour Relations Act* (the "Act"), requesting, in part, that the Board grant

Discretionary Certification to the Applicant pursuant to Section 41 of the *Act* as one of its remedies. The Applicant also claims remedies on behalf of the Persons Concerned.

2. On February 19, 2009, the Board determined that the matters raised by the Union in the Application overlap with the existing matters raised in Case No. 362/08/LRA and Case No. 379/08/LRA, and accordingly, all matters should be heard together in order to avoid unnecessary duplication and a prolonging of the proceedings. In the result, the hearing dates of February 25, 26 and 27, 2009 originally scheduled for Case Nos. 359/08/LRA, 362/08/LRA and 379/09/LRA were adjourned and new dates for all applications pending before the Board were set, following consultation with the parties.
3. On February 20, 2009, the Employer, through Counsel, filed its Reply to the Application and on March 16, 2009, the Employer also filed a reply to the Addendum filed by the Union on March 3, 2009, opposing the Union's request to amend the Application.
4. On March 23, 2009, the Union, through Counsel, filed a response to the Employer's March 16, 2009 reply, requesting that its Addendum to the Application be allowed by the Board.
5. On March 25, 2009, the Board advised the parties that, following consideration of material filed, leave had been granted to the Applicant, pursuant to Rule 4(1) of the *Manitoba Labour Board Rules of Procedure*, to amend the Application. Accordingly, the named Persons Concerned were served with copies of all relevant pleadings in accordance with the standard practice of the Board.
6. On June 15, 16, 17, 18, 2009 and August 17, 2009, the Board conducted a hearing, at which time the Union and Employer appeared before the Board and presented evidence and argument through their respective Counsel. Certain of the Persons Concerned, namely L.B., H.B., J.C., M.H., D.S(1). and D.S.(2), attended the hearing and gave evidence on behalf of the Union.
7. At the outset of the hearing on June 15, 2009, the Board, having regard to the numerous applications before it, and noting the submissions of Counsel, determined the order of proceedings.
8. Based on information provided to the Board on August 17, 2009, later confirmed in writing by Counsel for the Employer on August 25, 2009, the Board is satisfied that the Employer closed its Winnipeg facility at 909 Jarvis Avenue on June 25, 2009. Both counsel acknowledged that this closure date may be a relevant factor in determining the scope of remedial relief that may be granted to one or more of the Persons Concerned, should the Board determine such remedial relief ought to be awarded to one or more of the Persons Concerned.

9. In order to provide a proper context for its rulings, the Board provides the following distillation of the claims advanced by the Union on behalf of the Persons Concerned:

- As to the Person Concerned M.S. the Union alleges that the termination of D.S.(1)'s employment by the Employer by letter dated January 19, 2009 (Ex 5) was not for just cause or for the alleged workplace misconduct referred to in the letter of termination but, rather, was on account of M.S.' union activities and his role in the organizing drive relating to the filing of the Application for Certification on November 13, 2008 (Case No. 359/08/LRA).
- As to the Person Concerned M.H., the Union alleges that his termination of employment by the Employer on January 22, 2009 was not for just cause or for the misconduct referred to in the dismissal letter of January 22, 2009 (Ex 8), but, rather was on account of the Employer's belief that M.H. was a supporter of the Union and a Union organizer.
- As to the Person Concerned D.M., the Union alleges that he was terminated on or about January 27, 2009 on account of his involvement in and support for the Union and not on account of the reason advanced by the Employer, namely, absenteeism.
- As to the Persons Concerned H.B. and R.M., both of whom were summarily dismissed by the Employer on February 9, 2009 for violating an Employer policy (Ex 15) during a scheduled work break, the Union alleges that H.B. and R.M. were dismissed as a result of the Employer's anti-union animus and as a retaliatory move by the Employer against employees whom it believed were involved in the application for certification. The Union asserts that the Employer has applied its policy (Ex 15) in a discriminatory manner and that it did not discipline other employees who were involved in the events of February 9, 2009.
- As to the Persons Concerned R.G., J.Z., D.S.(2), J.C., L.B. and W.T., the Union alleges that the temporary layoff of these employees on or about January 26, 2009 and the permanent layoff of D.S.(2), J.C., L.B. and W.T., on February 5, 2009, while keeping junior employees in its employ disclosed an anti-union animus by the Employer and represented actions taken by the Employer against these employees because of their involvement with and/or support for the Union.
- The Union alleged that the foregoing actions taken by the employer against the Persons Concerned were in breach of Sections 5, 6(1), 7, 9 and 17 of the *Act* and it sought appropriate declarations; the reinstatement of all Persons Concerned who were dismissed or laid off, together with

compensation for wages and benefits lost; and that the Board issue a discretionary certification, if necessary, under Section 41 of the *Act*.

- The Union further asserts that the Memos posted in the workplace by the Employer in or about the month of December, 2008 [filed in the proceedings as Exs. 12(a), 12(b), 12(c) and 12(d)], constituted unfair labour practices by the Employer. These communications went beyond the permissible limits of lawful communication to employees, contrary to Section 6(1) of the *Act*.
- The Union asserts that all of the foregoing actions constituted an attempt by the Employer to inappropriately influence a certification vote, should the Board order that a vote be taken.

10. In summary form, the Employer responded as follows:

- As to the dismissal of D.S.(1) on January 19, 2009 (Ex 5), the Employer maintains that it had just cause to terminate the employment of D.S.(1) on the basis of D.S.(1)'s conduct involving a fellow employee, D.S.(3) on November 14, 2008 (See Case No. 362/08/LRA), and that D.S.(1)'s dismissal was not related to D.S.(1)'s exercise of any lawful right under the *Act*;
- As to A.H., the Employer says that A.H. was discharged for insubordinate and related misconduct on January 22, 2009, unrelated to his exercise of any rights under the *Act*.
- As to D.M., the Employer says that D.M. was properly discharged for concerns relating to his absenteeism and the Employer had no knowledge of whether D.M. was involved with or was a supporter of the Union at all.
- As to H.B. and R.M., the Employer says that they were discharged for just cause, for violating the Employer's known and published policy prohibiting certain conduct at any time on its premises. At the time the Employer only observed H.B. and R.M. engaging in the prohibited conduct, and, therefore, its actions were neither improper nor discriminatory. The dismissals of H.B. and R.M. were unrelated to their purported exercise of any rights under the *Act*.
- As to D.S.(2), J.C., L.B. and W.T., their temporary and subsequent permanent lay offs on February 5, 2009 were *bona fide*, were based on a shortage of work then being experienced by the Employer and, when selecting which employees ought to be laid off, the attendance and disciplinary records of employees (Ex 10) were used to identify the employees to be laid off. The use of these criteria were not related, to any anti-union animus on the part of the Employer nor were the lay offs related to the exercise of any rights by these employees under the *Act*.

- As to the communications it admittedly posted on its premises for its employees [Exs. 12(a), (b), (c) and (d)], the Employer asserts that such communications were made solely for information purposes; that they were consistent with the *Act* and that the Employer was only ensuring that employees were fully informed of their rights under the *Act*.

11. The Board, following consideration of material filed, evidence and arguments presented, has determined that a number of principles and/or material facts govern the disposition of this Application, as follows:

- a) In respect of the dismissals and/or lay offs of the Persons Concerned identified above, and given that a *prima facie* case was admitted by the Employer, thereby requiring it to proceed to call its evidence first, the onus is on the Employer, to satisfy the Board, on the balance of probabilities, that the union involvement, union membership, or participation in union activities of the Persons Concerned was not one of the reasons for the action(s) taken. An improper motive (here, an “anti-union animus”) does not have to be the dominant motive or reason for the Board to apply the reverse onus provisions in Sections 7 and 9 of the *Act*. Rather, the Board is entitled to assess the evidence as a whole and rely on circumstantial evidence to draw appropriate inferences concerning the Employer’s motivation. In this regard, the Board may be required to balance conflicting interests to decide whether it ought to “infer” an improper motive on the evidence. On the other hand, the Board must distinguish between unlawful conduct under the *Act*, which Board can remedy, and conduct that may be regarded as unfair conduct, which the Board cannot remedy under Section 7 or Section 9. When making such determinations, the Board does not function as a (surrogate) arbitration board.
- b) The foregoing and other principles were discussed and affirmed in the Board’s decision in *Juniper Centre Inc. and United Steelworkers of America and T. Sallis, et al* [1992] MLBd No. 2 (“*Juniper*”) particularly at pages 6 to 8 thereof. See also the references at page 12 and 13 of *Re: KT Industries Ltd* [1996] MLBd No. 13 (“*KT*”) where the Board, quoting from another Board decision, observed that the “reverse onus” does not cast an absolute liability on an employer; that the reverse onus is rebuttable and that if the Board is satisfied there was a legitimate business interest or reason for the action(s) of an employer, untainted by an anti-union animus, then the onus will be satisfied.
- c) To the extent credibility findings were required to be made in respect of a number of factual issues in this case, the Board applied the guidelines distilled in the seminal case of *Faryna v. Chorney* [1952] 2 D.L.R. 353 (BCCA), particularly the principles noted at page 357.

- d) In assessing the communications made to employees by the Employer [Exs 12(a), (b), (c) and (d)], the Board assessed the Employer's reliance on Section 32(1) of the *Act* (which, on its face, excludes the use of "... intimidation, coercion, threats, or undue influence" and also excludes from its ambit any expression of views which "... interfere with the formation or selection of a union.") in the context of the following provisions of the *Act*, namely:
- i) Section 6(1)(f) of the *Act* states that an employer will not be in breach of Section 6(1) "... by reason only that the employer ... communicates to an employee a statement of fact or an opinion reasonably held with respect to the employer's business." (emphasis added) and
 - ii) Section 47(1) of the *Act* provides that "... an employer has no status in the determination by the board of the wishes of the employees in the unit";

12. The Board has determined the following:

- a) the Board is satisfied that the communications posted by the Employer [Exs 12(a), (b), (c) and (d)] violated Section 6(1) of the *Act* in that they exceeded the permissible parameters of the type of communication(s) that an employer can lawfully distribute to its employees during an organizational drive or in anticipation of a representation vote ordered by the Board. Three of the communications focused on the amount of union dues that would be payable, with two of the notices showing a clenched fist holding money. The fourth communication (Ex 12(d)) focused on what strike action of varying weeks in length would cost the employees, with no mention being made of the legal requirement in the *Act* that, before employees in a unit can strike, the Union would be required to conduct a strike vote, by secret ballot, among all employees in the unit represented by the Union (Section 93 of the *Act*). These communications were made at a time when both the Employer and the Union contemplated that the Board may order a representation vote to determine the wishes of the employees. While it is not necessary to reproduce or re-quote the communications in their entirety, (and context and innuendo are important) all of the communications urged the employees to **VOTE "NO"**; such exhortation being immediately preceded by phrases such as

"PUT YOUR FAMILY FIRST" (Ex. 12(a);

- **"IS IT WORTH IT???"**

MOST PEOPLE WOULDN'T THINK SO" (Ex. 12(b))

- **“WHEN THE UNION MAKES YOU PROMISES, THINK ABOUT WHAT THE UNION REALLY WANTS”** (Ex. 12(c))

When read in their entirety, these communications were neither objective statements of fact nor expressions of opinion “...reasonably held with respect to the employer’s business.” The Board is satisfied that these communications were clearly expressing to the employees that the Employer did not want a union, that the Employer’s obvious preference was “no union”, and that the employees ought to follow the Employer’s preference and vote “no”, all of which positions violate the neutrality required of employers under the *Act*.

- b) the Board does not have to specifically address either the Union’s request for a “discretionary” certification or the Employer’s request for a dismissal of the Application or, alternatively, that it order a representation vote because the Board is satisfied (and so advised the parties at the hearing), that, at the time the application for certification was filed, 65% or more of the employees in the unit wished to have the Union represent them, thereby meeting the requirements of Section 40(1)1 of the *Act*.
- c) As to D.S.(1), the Board is satisfied that D.S.(1)’s participation in Union activities and the fact that he was involved in organizing the Union was one of the reasons for his termination on January 19, 2009. While the conduct of D.S.(1) on November 14, 2008 raised concerns in the Board’s mind, the evidence, in its totality, including the nature of the investigation conducted by the Employer at the time of the event; the conclusions the Employer reached resulting in the posting of the Memorandum (see Case No. 362/08/LRA – Appendix 1) without ever interviewing D.S.(1).; the timing of its decision to terminate the employment of D.S.(1) some two months after the event; its placing reliance on D.S.(2) as a corroborative witness to the event(s) (whose testimony before the Board was contradictory and unreliable); the failure to call D.S.(3) or A.G. as witnesses, has led the Board to conclude that the Employer has failed to discharge its onus, on the balance of probabilities, that D.S.(1)’s union activity was not one of the reasons for his termination. Accordingly, the Board finds that the Employer discharged D.S.(1), contrary to Section 7 of the *Act* and, in so doing, committed an unfair labour practice;
- d) As to M.H., the Board is satisfied that the Employer has met its onus under Sections 7 and 9 of the *Act*, on the balance of probabilities, and that the Employer’s decision to terminate M.H.’s employment on January 22, 2009 was based solely on M.H.’s insubordinate conduct and work performance on that day and was not related, in any way, to M.H.’s purported involvement with or participation in Union activities. Corroborative of this finding is M.H.’s own evidence on direct examination that he

left the work station which he acknowledged he had been assigned to on that day, without the permission of the Employer, and expressly refused to return to that work station when directed to do so by the Employer;

- e) As to D.M., who did not testify, the Board is satisfied that the Employer has discharged its onus under Sections 7 and 9 of the *Act* in that it was concerns with D.M.'s absenteeism that were the sole basis for the Employer's decision, unrelated to any (purported) union activity or involvement on D.M.'s part;
- f) As to H.B. and R.M., the Board is satisfied that the Employer has discharged its onus under Section 7 and 9 of the *Act*. The uncontested evidence before the Board is that a manager caught H.B. and R.M. engaging in prohibited conduct while on a break on Employer property and that this was the reason for their discharges. This was contrary to the written policies of the Employer (Ex 15). As H.B. stated in his own testimony "... J. caught us red-handed and fired us." Based on the evidence, the Board is satisfied that H.B. and R.M. were the only employees who were actually observed on February 9, 2009 engaging in the prohibited conduct and the Union's assertion of discriminatory treatment was not established on the evidence.
- g) As to D.S.(2), J.C., R.G., J.Z., L.B. and W.T., the Board is satisfied that the Employer has discharged its onus under Sections 7 and 9 of the *Act* in that both the temporary and/or permanent lay offs of these employees on February 26, 2009 and/or February 5, 2009 were based on *bona fide* shortages of work at the Winnipeg facility and that the Employer utilized the absenteeism and disciplinary records of the employees as the criteria for selecting the employees who should be laid off (Ex 10). No one disputed that absenteeism was a serious problem at the Employer's plant. There was no evidence before the Board from which it could conclude or reasonably infer that the lay offs were based on any of these employee's involvement with or participation in union activities. In fact, there was no credible evidence before the Board regarding the laid off Persons Concerned from which the Board could reasonably infer an "anti-union" animus on the part of the Employer concerning these decisions. For example, J.C. admitted to an absenteeism problem; she testified that "... I was guilty of missing Mondays" and that when she received a two day suspension a few days prior to her lay off, she testified that she was advised by a member of management that she should watch her absences because the absenteeism records will be used to determine who would be laid off.

T H E R E F O R E

Based on the findings summarized in Paragraph 12 hereof:

1. The Board **DISMISSES** the Application insofar as it alleges that the Persons Concerned, H.B., M.B., R.M. and D.M. were dismissed from their employment contrary to Sections 6(1), 7, 9 and 17 of the *Act*. The Employer has discharged the onus placed upon it under Section 7 and 9 of the *Act*.
2. The Board **DISMISSES** the Application insofar as it alleges that the Persons Concerned, L.B., J.C., R.G., D.S.(2) and W.T. were temporarily and/or permanently laid off in January and/or February of 2009, contrary to Sections 6(1), 7, 9 and 17 of the *Act*. The Employer has discharged the onus placed upon it under Sections 7 and 9 of the *Act*.
3. As to the Person Concerned, D.S.(1),
 - a) The Board **DECLARES** that D.S(1). was discharged on January 19, 2009, contrary to Section 7 of the *Act*, and, in the result, the Board **DECLARES** that the Employer has committed an unfair labour practice. The Employer did not discharge the onus placed on it by Section 7 of the *Act* and the Board is satisfied that D.S.' participation in organizing the Union constituted one of the reasons for his discharge.
 - b) The Board **ORDERS** that the Employer compensate D.S(1). for any loss of income and other employment benefits suffered by D.S(1). from the date of his termination, namely, January 19, 2009 to June 25, 2009, the date of closure of the Employer's operations. In all of the circumstances, the Board declines to order reinstatement.
 - c) If the issue of compensation cannot be resolved by way of settlement between the parties within thirty (30) days from the date of this Order, the parties may appear before the Board to resolve any outstanding issues regarding the amount of compensation owing to D.S.(1).
4. The Board **DECLARES** that the posting of the memoranda and/or notices [Exs 12(a), 12(b), 12(c) and 12(d)] in the workplace by the Employer constituted an unfair labour practice, contrary to Section 6(1) of the *Act*. The Board **ORDERS** that the Employer pay to the Union the sum of Two Thousand Dollars (\$2,000.00) pursuant to Section 34(1)(f) of the *Act*.

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Further, the Board **ORDERS** that the Employer **CEASE** and **DESIST** from issuing such communications to the employees.

DATED at **WINNIPEG, Manitoba** this 2nd day of October, 2009, and signed on behalf of the Manitoba Labour Board by

“Original signed by”

W. D. Hamilton, CHAIRPERSON

“Original signed by”

R. Glass, Board Member

“Original signed by”

G. Rodgers, Board Member

WDH/ar/rb-s