Manitoba

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DISMISSAL NO. 1949
Case No. 12/10/LRA

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

- and -

IN THE MATTER OF: An Application by

J.T.,

Applicant,

- and -

USWA 9074-35,

Bargaining Agent/Respondent,

- and -

WESTEEL LIMITED,

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 committed by the Respondent Union (the "Union"), contrary to Section 20 of *The Labour Relations Act* (the *"Act"*). The Applicant alleges that the Union, from 1994 and continuing up to the present time, has failed to properly address various pension concerns which have been raised by the Applicant over the years. The Application is unclear as to the precise nature of the dispute, but, on balance, the Applicant appears to be asserting that there has been an improper calculation of "pensionable service" under the terms of the Employer's ("Westeel") pension plan. In the Application, the Applicant states that he first became aware of this alleged violation in 1994, and that there have been continuing efforts to try to work with the Union to have these concerns investigated over the years. In particular, the Applicant asserts that "… in 1994 upon receiving our

pension statements until 1996, I asked the Union to check into our pension statements. After that I was appointed to the pension committee "… and that he and others had …" many talks about the pension until near the end of 1997". At that time, the Applicant alleges that, over the next 4 years, pension statements appeared to be accurate but no corrections were made for previous years. The Applicant also alleges that, in statements received from Westeel for the period 2002 to 2006 "…our pensions were again short hours." The Applicant refers, in general terms, to some verbal and written communications he has had with the representatives of Westeel which appear to have culminated in a pension meeting in January of 2008, and which was attended by a Union staff representative. The Applicant says that he was invited to attend this meeting but had resigned from the pension committee years earlier. The Applicant asserts that a grievance was recently filed on his behalf (the Union admits that a grievance was filed on August 11, 2009 in order to preserve whatever rights the Applicant had). The Applicant retired from his employment with Westeel in November of 2009. In respect of his having filed the Application in January, 2010, the Applicant says that he was unaware that this procedure was available with the Board.

2. As to remedial relief, the Applicant refers to a failure by the Union to have pension meetings once every 6 months "as stated in the contract". Further, the Applicant, seeks unspecified relief under Sections 31(4)(h) and (i) of the *Act*.

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 filing 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. Finally, the Union asserts that the Applicant voluntarily retired from his

employment with Westeel in November of 2009 and, as such, the Applicant does not meet the definition of employee for the purposes of Section 20 of the *Act*.

5. Based on a review of documentation filed by the parties, 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 1994, and that these concerns were pursued by him, given his membership on the Pension Committee, until 1997. Thereafter, the Applicant says that he had concerns for the years 2002 to 2006 and these were the subject of discussion with representatives of Westeel. Whether one adopts, as a reference point, 1994, 1996/1997 or 2002 to 2006, the fact is same pension concerns of the Applicant were the subject of discussion with Westeel and the Union during those years. By any standard, these periods constitute undue delay under the tests enunciated by the Board.

(e) The fact that pension issues were raised in 2008 and 2009 does not change the characterization of the findings in subparagraph (c) and (d) because the concerns addressed in those years, were, in substance, the same concerns the Applicant pursued in the previous years, going back to 1994.

(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 or 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 to any obligation to hold pension meetings is contained in a Letter of Understanding signed in 2007 between the Union and Westeel, (attached to the Union's Reply) in which the parties agreed to appoint a joint committee to review the pension plan (without any commitment to amending said plan) not later than six months following the date of signing of the Letter of Understanding. The Application, on its face, does not plead any facts from which the Board can reasonably conclude, even in a *prima facie* manner, that the Union acted in an arbitrary or discriminatory manner or has acted in bad faith, in respect of representing any rights under the Agreement regarding the Applicant.

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 the Application or the Reply, including either the scope and type of remedial relief claimed by the Applicant or the assertion that the Applicant is not entitled to file the Application because, at the time of filing, he was no longer an employee of Westeel, having retired in November of 2009. Addressing these issues is not required because the finding of the Board on the core 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 J.T. 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