



Talking Union is a bi-monthly newsletter highlighting matters of interest to the labour relations community. We welcome your questions and comments.

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BOARD ORDERS EMPLOYER TO RETURN PRODUCTION WORK

The Ontario Labour Relations Board has issued a decision giving strong and effective remedies to a newly-certified trade union after an employer engaged in a two year long process of avoiding the trade union, discriminating against union supporters, and transferring away bargaining unit work. In Rapid Transformers Ltd., Marcus Transformer of Canada Ltd., (unreported, OLRB, July 21, 1999), the Board considered several complaints filed by the CEP under the Labour Relations Act, 1995, and the Occupational Health and Safety Act. The CEP alleged that, since it was certified in 1997, the Employer had transferred work out of the unionized location in Cornwall to its Quebec facility in order to avoid dealing with the union, reducing the bargaining unit from 27 to 15 employees. The CEP also alleged that the Employer had discriminated against union supporters by selecting them for lay-offs, refusing them normal wage increases, transferring them to less lucrative work, cutting their hours, disciplining them without just cause, and committing reprisals against them for participating in health and safety issues.

The Board heard extensive evidence and assessed the Employer's credibility and motivations. The Board stated that while an employer is free to expand or contract its business, contract out its work, or change methods of production, it may do so only for genuine and legitimate business considerations; an employer will breach the Act if its motivations, even in part, are to avoid its obligation to bargain collectively or to otherwise defeat or impede employees' statutory rights under the Act. The Board concluded that the Employer's reasons for dismantling the Cornwall plant included a desire to avoid dealing with the CEP. Similarly, the Board found that the Employer had laid off employees, transferred some to less lucrative jobs, disciplined employees, and awarded wage increases based on the employees' support for, or opposition to, the Union; the Employer had also refused to deal with the Union's selected representatives, instead of its own favourites. The Board found that the Employer's conduct seriously breached the Act and sent a message to the Cornwall employees that their jobs were in jeopardy because they had chosen to bargain collectively, a particularly significant message in the sensitive period following certification when the parties should have been negotiating a first collective agreement.

The Board commented on its long history of providing practical remedies where an employer shuts down a location or otherwise removes work to avoid dealing with a newly certified trade union; the relief needs to be adapted to the particular facts. Accordingly, after finding several breaches of the Act and the OHS Act the Board ordered the Employer to:

- return to the Cornwall plant all production and pre-fabrication work removed since the CEP's application for certification on September 11, 1997;
- reinstate and reimburse, with interest, all employees laid off as a result of the removal of work from Cornwall;
- pay a wage increase retroactively to all employees who had been denied one;
- restore certain employees to their previous, bonus-generating positions, with compensation for lost bonuses;
- remove discipline found to be unjustified;
- post and mail to employees a Board notice describing their rights under the Act.

The Board concluded by remaining seized to deal with any matters arising out of these remedies, on short notice and on request. Clearly, in this decision, the Board has sent its own message: that the Act guarantees a right to bargain collectively and that the Board will do its utmost to protect that right in a meaningful way.

LEAFLETING AS PROTECTED ACTIVITY

The Supreme Court of Canada has released two decisions in which it finds that distributing leaflets during a labour dispute is protected as an exercise of freedom of expression under the Canadian Charter of Rights and Freedoms, s. 2, even where the leafleting occurs at sites other than that of the primary employer.

U.F.C.W., Local 1518 v. K Mart Canada Ltd. (unreported, SCC, September 9, 1999) arose during a strike at two K Mart stores in British Columbia. Union members distributed leaflets at other K Mart stores, the "secondary sites", which described K Mart's unfair labour practices and urged customers to shop elsewhere. The BC labour code prohibited picketing at secondary sites and defined picketing broadly enough to include distributing leaflets. The K Mart stores complained to the BC Labour Board, which then ordered the UFCW to cease picketing at secondary sites. The Union appealed unsuccessfully in the lower courts.

At the SCC, however, the UFCW was successful. The SCC noted the importance of work for individuals. Given the inherent inequality of the relationship between management and employee, the Court noted that it is particularly important that employees be able to

speak freely on matters that relate to their working conditions. Canadian labour statutes recognize the right of trade unions and their members to communicate information to the public with regard to labour disputes, except in a manner which may constitute unlawful picketing. The distribution of leaflets has always been an effective and economic method of providing information and assisting rational persuasion.

In *KMart*, the SCC distinguished consumer leafleting from the traditional picket line. Picket lines act as a barrier and impede public access to goods and services or impede employees' access to their workplace. Consumer leafleting seeks to persuade members of the public to take a certain course of action. While the enterprise subject to the leafleting may lose some revenue, that is no different than other consumer boycotts obtained through other means.

The Court found that for consumer leafleting activity to be lawful, it must allow the consumers to determine for themselves what course of action to take without being unduly disrupted. The Court analyzed the leaflet distributed at the K Mart stores and found:

- The message on the leaflet was accurate, not defamatory, and did not entice people to commit unlawful or tortious acts;
- The leaflet, although distributed at a neutral site, clearly identified the struck employer;
- The manner in which the leafleting was conducted was not coercive, intimidating, or otherwise unlawful;
- The activity did not involve so many people as to become intimidating by sheer force of numbers;
- The leafleting did not impede access or egress from the leafleted premises;
- The leafleting did not interfere with employees and suppliers carrying on their business at the neutral site.

The SCC then examined the legislation and found it would restrict leafleting even in these peaceful circumstances. The Court determined there was no rational justification for such a broad restriction. A total prohibition on leafleting does not recognize the importance of an employees' right to freedom of expression under the Charter. Accordingly, the SCC struck down the definition of picketing in the British Columbia Labour Code, making its order effective in six months.

The Court followed its own reasoning in *K Mart* in *Allsco Building Products Ltd., et al, v. U.F.C.W., Local 1288P* (unreported, SCC, September 9, 1999). Here, the employees of Allsco, a manufacturer of building products in New Brunswick, were locked out. They distributed leaflets at the premises of three distributors and one customer of Allsco's products. The leaflet asked the

reader to "Please think twice" before purchasing Allsco products because it had locked out its employees. Again, the leaflets were distributed in a peaceful manner, without impeding access or egress.

Although in the lower courts the secondary businesses had obtained an injunction prohibiting the distribution of the leaflets, the SCC allowed the Union's appeal. The Court held that a legal prohibition on "persuasion" can only mean persuasion tainted by coercion, intimidation, undue influence, or threats; any other interpretation would offend the freedom of expression found in the Charter. Since the leafleting here was peaceful and did not impede access and egress, it follows that the lower courts had mis-read the law and that no injunction should have issued against the leafleting activity.

These decisions should be a comfort to trade unions which want to bring issues in a labour dispute to a wider audience than just the primary employer, provided they ensure the leaflet distribution is conducted in a peaceful, non-intimidating manner. The public can be persuaded to act in support of the employees, but must make that decision free of coercion or undue influence.

NO DUTY TO ARBITRATE EVERY GRIEVANCE

In *Yvan Beauparlant v. RWDSU Local 5454*, (unreported, OLRB August 30, 1999), an employee in a grocery store complained to the Board that his union had breached its duty of fair representation by not referring his discharge grievance to arbitration. After 20 years of employment, the grievor was discharged for dishonest conduct and the union refused to proceed to arbitration after it could not settle the grievance.

The Board held a consultation at which each party described the nature of its case and the evidence it would call should the matter proceed to a formal hearing. In then deciding to dismiss the complaint, the Board reviewed the standard expected of trade unions. A breach of the duty of fair representation requires proof of a "flagrant error" consistent with a "non caring attitude", or union conduct which is "implausible" or "so reckless as to be unworthy of protection"; an honest mistake will not breach the Act. Where the complaint is a refusal to refer a grievance to arbitration, however, the Board's inquiry into the union's conduct will vary in nature and in level of scrutiny from case to case; with a refusal to forward a discharge grievance to arbitration, the Board will likely shift onto the Union an onus of explanation.

Here, the Board found that the RDWSU made a reasonable assessment of its chances of success at arbitration. Although the Board's role is not to assess the merits of the grievance, it did consider the alleged grounds of mis-conduct, the Complainant's explanations, and the Union's response in order to determine the quality of the union's representation. The Board concluded that, given problems with the grievor's credibility, his continued insistence that he was blameless even in the face of obvious,

unexplained discrepancies and damaging circumstances, the Union's assessment of its poor chances of success at arbitration was not unreasonable. Accordingly, even though the Board itself may have reached a different decision, the Union's decision not to refer the grievance was not unlawful.

This decision, which follows the Board's earlier case law, emphasizes once again the necessity for unions to carefully consider any decisions they must make in processing grievances. If challenged by a disappointed grievor under the duty of fair representation, the Union will be called upon to justify to the Board its decisions. In order to successfully argue it has met its duty, the Union must be able to show that a reasonable assessment, based on all relevant facts in the circumstances, led to its decision not to arbitrate the grievance.

WHAT'S NEW?

At Koskie Minsky:

New Pension / Benefits Lawyer: Andrew J. Hatnay

We are revising our TALKING UNION mailing list. Please contact our editors with errors, omissions, or additions.

Do you want your TALKING UNION by e-mail? If so, please forward your e-mail address to emitchell@koskieminsky.com

At The CIRB:

The Canada Industrial Relations Board is seeking community input into improving and changing its current practices and procedures. Initial submissions must be made by October 18, 1999. A discussion paper will follow. If interested, contact the CIRB for further information: 613-947-5460, or discuss your ideas with our editors.