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MANITOBA LABOUR BOARD INFORMATION BULLETIN NO. 14 BARGAINING AGENT'S DUTY OF FAIR REPRESENTATION

This bulletin is intended to inform employees who are represented by a bargaining agent of the procedure to be followed when an application is filed with the Manitoba Labour Board (the "Board") alleging that a bargaining agent, in representing the rights of any employee under a collective agreement, has acted in a manner which is arbitrary, discriminatory or in bad faith, or, in the case of the dismissal of the employee, where it is alleged that the bargaining agent has acted in a manner which is arbitrary, discriminatory or in bad faith or has failed to take reasonable care to represent the interests of the employee.

What is the nature of a union's duty in representing employees covered by a collective agreement?

The Labour Relations Act, C.C.S.M. c. L10, (the "Act") [Section 20] imposes a duty upon a bargaining agent to fairly represent all of the employees in a bargaining unit covered by a collective agreement, whether the employees are members of the bargaining agent or not, in any matter arising out of the administration of a collective agreement. It is an unfair labour practice for a bargaining agent to represent employees in a manner that is arbitrary, discriminatory or in bad faith in representing the rights of any employee under the collective agreement. In dismissal cases, a bargaining agent must also not fail to take reasonable care to represent the interests of an employee.

What actions on the part of a union will be considered arbitrary, discriminatory or in bad faith?

Arbitrary conduct may be 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 obtain the data to justify a decision. The Board has also determined that acting on the basis of irrelevant factors or principles, or displaying an attitude which is indifferent and summary, or capricious and non-caring or perfunctory may constitute arbitrary conduct. Bargaining agents may be found to act arbitrarily when they completely ignore a grievance or when they treat a matter in an indifferent fashion. However, it is not arbitrary for a union to put its mind to a complaint or grievance and honestly decide not to advance a complaint or grievance to a further or to arbitration.

The duty not to act in a **discriminatory** manner protects against making distinctions between employees and groups of employees for reasons that have no relevance to legitimate concerns, for example on the basis of a prohibited ground such as age, race, religion, sex, or disability. A bargaining agent is only entitled to treat members of a bargaining unit differently when it has valid or cogent reasons for doing so. However, this does not mean that every instance of differential treatment is discriminatory.

Bad faith includes conduct motivated by ill will, hostility, knowing misrepresentation or an attempt to deceive.

This provision requires that a bargaining agent act honestly and free of any personal animosity toward employees in representing their rights under the collective agreement.

In addition to not acting in a manner which is arbitrary, discriminatory or in bad faith, in a case concerning the dismissal of an employee, a bargaining agent must also take "reasonable care to represent the interests of the employee." **Reasonable care** is the degree of care which a person of ordinary prudence and competence would exercise in the same or similar circumstances.

If, for example, an employee's complaint concerns an alleged mishandling of a grievance, a breach of that duty will not be established if employees simply show that a union could have, or even should have, treated a grievance differently. It is not whether a union is right or wrong that is the concern of the Board, but whether a union's actions are motivated by bad faith, it was discriminating against an employee or it acted in an arbitrary manner, and in a dismissal case, whether a union failed to take reasonable care.

The focus of the Board in evaluating a duty of fair representation complaint is the process used by the bargaining agent in representing the employee's rights under the collective agreement. The Board generally does not second guess the actual decision made by the bargaining agent, so long as the decision is made in compliance with the principles set out in Section 20 of the **Act**. The Board may also consider degree to which the employee cooperated with the bargaining agent in dealing with his or her issue(s) in making its conclusions regarding the Application.

Can a union refuse to process a grievance or refer it to arbitration?

Employees do not have an absolute right in all circumstances to have a grievance filed on their behalf, to have the grievance advanced through the grievance procedure set out in the collective agreement, or to be referred to arbitration. The duty of fair representation does not impose an absolute duty on a bargaining agent to advance a grievance to arbitration. In fact, the bargaining agent may decide not to pursue a grievance or may settle a grievance even without the employee's agreement, provided that the decision is not arbitrary, discriminatory or made in bad faith, or in dismissal cases, indicative of a failure to take reasonable care.

Bargaining agents may support their decision to not take further action with respect to an employee's issue with a legal opinion from legal counsel. The Board has in the past indicated that a legal opinion supporting the bargaining agent's decision in this regard is a strong defence to a duty of fair representation complaint.

What factors must a union consider when deciding whether or not to process a grievance or refer it to arbitration?

A bargaining agent is entitled to consider many factors including merits of a grievance, relative chances of success and interests of a bargaining unit as a whole. Bargaining agents may make honest mistakes or exercise poor judgement but these occurrences may not in themselves be a violation of the **Act**. The standard of care required will vary according to the seriousness of the consequences and the nature of the job interest at stake. On matters of critical job interest, such as dismissals, a high degree of recognition of individual rights will prevail in a duty of fair representation complaint. This means that in such cases there is a higher standard imposed on a bargaining agent and its officials.

Does the Board resolve the merits of an employee's grievance when a union refuses to refer it to arbitration?

No. While the merits of a grievance may be relevant in assessing a union's conduct, the Board will not resolve the merits of a grievance. This is a matter for an arbitrator or arbitration board which is established according to the terms of a collective agreement. However, when a union is found to have breached the **Act**, the Board may refer a grievance to arbitration. For this reason, the Board may add an employer as a party in a duty of fair representation complaint.

Why is an employer added as a party?

The remedy sought by an employee alleging a breach of the duty of fair representation usually affects an employer. Therefore, an employer is named as a party and is accorded the right to reply to the application.

What can be done if an employee feels a union has acted contrary to its duty?

It is not necessary for an employee to be a bargaining agent member to file a complaint against a union under the **Act**. Any employee in the bargaining unit who is subjected to union treatment that is arbitrary, discriminatory or in bad faith, or in the case of a dismissal without reasonable care, may file such a complaint. An employee who thinks that a bargaining agent has violated its duty may submit a complaint to the Board on a form specified by the Board.

How is a complaint filed?

Section 20 applications must be filed utilizing **FORM XX: Application Alleging an Unfair Labour Practice Contrary to Section 20** supplied by the Board. It is important that you review all of the information in this document prior to completing the form. The application must also be supported by a statutory declaration that the facts set out therein are true or where based upon information and belief, true to the best knowledge of the applicant. The source of the information and belief must also be identified.

It is important for an applicant to include particular facts upon which they intend to rely in support of their Application. Those particulars should concisely indicate the basis upon which the applicant believes that the bargaining agent acted in a manner which was arbitrary, discriminatory or in bad faith, or in the case of a dismissal, failed to exercise reasonable care in representing the employee's interests under the collective agreement. An applicant may wish to file copies of documents which he or she feels supports those allegations.

An applicant must include all of the circumstances relevant to the complaint including what happened, where and when it happened, and the names of the people who he or she says acted improperly. The applicant must also indicate what he or she wishes the Board to order in order to remedy the alleged violation. If an applicant fails to provide this information, he or she may not be allowed to present evidence or make representations regarding those matters which were not included.

However, it should be emphasized that a proper application of this type is ordinarily concise and deals only with relevant matters. The Board may refuse to process or take further action respecting an application that fails to concisely set out the facts and/or includes irrelevant documentation.

Is there a time limit for filing a duty of fair representation complaint?

The Board may refuse to accept a complaint where the applicant has “unduly delayed” in filing with the Board. The Board has stated that “undue delay” is, in most circumstances, more than six months after the conduct allegedly giving rise to the complaint. If the application is filed more than six months after the bargaining agent's alleged violation came to the applicant's attention, the reasons for the delay must be specifically detailed.

What happens after a complaint is filed?

Once a complaint is filed, a copy is sent to the bargaining agent and the Employer so that they may reply in writing. Following receipt of the reply or replies, the matter is placed before the Chairperson or a Vice-Chairperson of the Board who review the material submitted in order to determine whether the allegations and supporting evidence contained in the Application, if proven true, could constitute a violation of the duty of fair representation. If the Board is not satisfied that is the case, then the Application may be dismissed without holding a hearing [Rule 5(5) of the *Manitoba Labour Board Rules of Procedure, Regulation 184/87 R*, of the *Act*]. The Board, following its review of the material submitted may appoint a Board Officer to attempt to settle the dispute. If a Board Officer cannot help the parties reach a settlement, the Board may hold a hearing to deal with the allegations made by the employee [Sections 30(3) and 31(1) of the *Act*]. Alternatively, the Board may determine that the Application ought to proceed to a preliminary hearing or a full hearing before the Board.

What can the Board do if it finds that a bargaining agent has not fairly represented the employee?

The Board may issue various orders including a direction to cease and desist, an award of compensation and interest, a referral of a grievance to arbitration [Section 31(4) of the *Act*] and a requirement that a union sign and distribute notices stating that it was found in violation of the *Act* and undertakes to comply with the *Act* in the future.

Relevant Sections of *The Labour Relations Act* Pertaining to a Bargaining Agent's 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,

- (a) in the case of the dismissal of the employee,
 - (i) acts in a manner which is arbitrary, discriminatory or in bad faith, or
 - (ii) fails to take reasonable care to represent the interests of the employee; or
- (b) in any other case, acts in a manner which is arbitrary, discriminatory or in bad faith; commits an unfair labour practice.

Complaint alleging unfair labour practice

30(1) Any employer, employee or other person, or any union or employers' organization, who or which alleges the commission of an unfair labour practice may file a written complaint in respect thereof with the board.

Undue delay

30(2) The board may refuse to accept a complaint filed under subsection (1) where, in the opinion of the board, the complainant unduly delayed in filing the complaint after the occurrence, or the last occurrence, of the alleged unfair labour practice.

Disposition of complaint

30(3) Where the board accepts a complaint filed under subsection (1), the board may

- (a) refer the complaint to a representative of the board for purposes of subsection (4); or
- (b) proceed directly to hold a hearing into the alleged unfair labour practice; or
- (c) at any time decline to take further action on the complaint.

Remedies for unfair labour practice

31(4) Where the board finds that a party to a hearing under this section has committed an unfair labour practice it may, as it deems reasonable and appropriate and notwithstanding the provisions of any collective agreement,

- (a) order a party which is an employer to reinstate in employment any employee whose employment has been terminated by reason of the unfair labour practice; or
- (b) order any party which is an employer to employ any person who has been refused employment by reason of the unfair labour practice; or
- (c) order any party which is a union to reinstate as a member of the union any person whose membership in the union has been terminated by reason of the unfair labour practice; or
- (d) order the party to pay to any person referred to in clause (3)(b) an amount in compensation for the diminution of income or other employment benefits or other loss suffered by the person; or
- (e) where the unfair labour practice interfered with the rights of any person under this Act but the person has not suffered any diminution of income or other employment benefits or other loss by reason of the unfair labour practice, order the party to pay to the person an amount not exceeding \$2,000; or
- (f) where the unfair labour practice interfered with the rights of a union, employer or employers' organization under this Act, whether or not the union, employer or employers' organization has suffered any loss by reason of the unfair labour practice, order the party to pay to the union, employer or employers' organization an amount not exceeding \$2,000.; or
- (g) order the party to cease and desist any activity or operation which constitutes the unfair labour practice; or
- (h) order the party to rectify any situation resulting from the unfair labour practice; or
- (i) order the party to do, or refrain from doing, anything that is equitable to be done or refrained from in order to remedy any consequence of the unfair labour practice; or
- (j) do two or more of the things set out in clauses (a) to (i).

A copy of the Board's **FORM XX: Application Alleging an Unfair Labour Practice Contrary to Section 20** and **FORM A: Memorandum of General Information Required on all Proceedings** are attached.

What happens to the information I include in a Section 20 Application?

All information included in your application is provided to the party or parties named as respondents or interested parties. Further, such information may be referred to in the order or reasons issued by the Board at the conclusion of the case, on the Board's website and in print and online reporting services that may publish the Board's decision.