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BOARD

February 22, 2008

Directed to: McLennan Ross - Thomas Ross, Warren Armstrong, Blair Chahley Seveny - Leanne Chahley, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 146 - Warren Fraleigh

RE: An Unfair Labour Practice Complaint brought by Warren Armstrong affecting the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 146 – Board File GE-05060

501, 10808 - 99 Avenue
Edmonton, Alberta
T5K 0G5

Tel: 780-422-5926
Fax 780-422-0970

308, 1212 - 31 Avenue NE
Calgary, Alberta
T2E 7S8

Tel: 403-297-4334
Fax 403-297-5884

E-mail:
Halrbinfo@gov.ab.ca

Website:
alrb.gov.ab.ca

[1] This is a complaint brought by Warren Armstrong against Local Lodge 146 of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 146 (the "Union"), alleging violations of the *Code*, namely sections 26, 151(f) and 151(i)(ii), concerning imposition of a fine against Mr. Armstrong with the resulting suspension of his membership in the Union for failure to pay the fine. This matter was brought before a panel of the Board (Day, Drisdelle, Flannery) on December 12, 2007.

[2] The facts are largely not in dispute. Warren Armstrong has been a member of the Union since approximately 2000. The Union is the largest local of the International and follows the typical hiring hall process to dispatch construction workers. Mr. Armstrong and his fellow members of the Union, given the Alberta economy, have had significant success in maintaining full employment of a continuous nature. Mr. Armstrong is a well qualified welder. For the past few years prior to the spring of 2006 he had been working as a supervisor for a unionized contractor with the apparent blessing of the Union. Mr. Armstrong had kept his union dues up to date.

[3] In January 2006 Warren Fraleigh, Business Manager and Secretary-Treasurer of the Union wrote to all members re-emphazing the Union's concern about working non-union and reiterated the International Union's constitutional prohibition against working non-union. In particular, the January 2006 letter drew attention to the fact that the Constitution provides "no member shall accept employment with a non-union contractor without prior written approval of the Business Manager".

[4] Mr. Armstrong testified that in the spring of 2006, he was interested in stabilizing his family life as well as making significant money in the boom-time to facilitate an early retirement. Accordingly he accepted a new job working in Fort McMurray as a welding superintendant which paid significantly more than the journeyman rate.

[5] On April 19, 2006, Mr. Armstrong emailed Warren Fraleigh indicating he had taken a job with a non-union contractor as a construction superintendent at CNRL north of Fort McMurray. It would be common ground between the parties and the Board's observation that a construction superintendent job was outside of the collective agreement bargaining unit. The particular company in April 2006 that Mr. Armstrong went to work for was J.V. Driver Projects Inc. J.V. Driver Projects Inc., does not have a contractual relationship with the Union and does not employ any boilermakers engaged in the trade. Typically, J.V. Driver would engage subcontractors to do bargaining unit work.

[6] In perhaps an astute premonition, Mr. Armstrong concluded his April 19, 2006 email to the Union with the statement "the outcome of my membership may be in your hands".

[7] In Mr. Armstrong's email he included his cell number and email address.

[8] Mr. Fraleigh indicates that at least on two occasions from April 19 and prior to June 19, 2006, he endeavoured to contact Mr. Armstrong by telephone to have a discussion with him. Mr. Armstrong candidly admits that given the literally hundreds of phone calls and emails he was receiving daily, that he may have well received the calls from Mr. Fraleigh but did not respond to them.

[9] Having received no communication from Mr. Armstrong, on June 19, 2006, Mr. Fraleigh wrote to Mr. Armstrong concerning his violation of section 17.1.20 of the International Constitution by working for a non-union contractor, namely J.V. Driver Projects Inc. on the CNRL project. It is to be noted that on June 19, 2006, the complaint contained in his letter would appear to be in excess of the time set out in the Constitution, namely charges are to be brought within sixty days after the date the alleged violation occurred. Accordingly any charge should have been filed by June 18, 2006, given the use of the word "within" in the description of time lines set out in the Constitution. No extension was sought and it would appear that the facts that Mr. Fraleigh relied upon were known to him on April 19, 2006 and in fact references were made to that date in his correspondence of June 19th.

[10] The Union appears to have, with the above exception, followed the constitution in all other respects and held a hearing on Wednesday, August 2, 2006, at the Union hall after providing notice in accord with the Constitution to Mr. Armstrong. Up until August 2, 2006, it would appear there was no communication from Mr. Armstrong to his Union.

[11] Mr. Armstrong admits to receiving the documents from the Local, but chose to ignore them for essentially two grounds:

1. He noted upon his review and Constitution and documentation he received that he could not have counsel other than a fellow member and therefore was concerned the trial process would be akin to a kangaroo court.
2. He had passed on the information to his employer who was going to look after it in part because Mr. Armstrong was concerned he may say something politically incorrect to the Union. Further, he expected and anticipated that his employer would protect his interests.

[12] Mr. Armstrong did not attend the hearing nor did he seek counsel other than discussing it with his employer and another work colleague prior to the hearing.

[13] The Trial Board of the Union found him guilty by virtue of decision determined on August 2, 2006 with the decision conveyed to Mr. Armstrong on August 3, 2006. In the letter of August 3, 2006, he was provided with the details of the appeal notice process which would require him to file an appeal within 15 days of the date of the letter. No request for extension to the appeal process nor appeal was filed. Counsel for Mr. Armstrong, having apparently received instructions from Mr. Armstrong's employer wrote to the Union late on August 2nd after the verdict had been determined. In that correspondence he indicated Mr. Armstrong had not violated the Constitution and requested notice if the Union determined to pursue the charges. Towards the end of August, 2006, Mr. Armstrong met with counsel for the first time and on October 30, 2006, counsel filed a complaint against the Union with the Labour Relations Board. The complaint seeks the removal of the fine and the overturning of the Union's decision.

[14] The decision of the Union for the violation of the Constitution was to impose a $5,000.00 fine to be paid within 30 days.

[15] The applicant argues the behaviour of the Union in imposing a fine amounts at least to coercion and intimidation at its best and constitutes illegal activity as a restraint of trade at its worst. The applicant argues the provisions in the Constitution and Union correspondence denying legal counsel at a hearing is clear and the Union assurances of the right to counsel provided verbally at this hearing should be discounted. The complainant argues the trial lacked fairness also because of the quick scheduling.

[16] The applicant further argues in balancing the rights of the member and his Union one must be cognizant of the right of the member to earn a living. Further in this case the Union could not provide Mr. Armstrong with comparable work which is fatal to any discipline taken in light of section 151(i)(ii).

[17] The Union argues it is not for the Board to be intervening in disputes of this nature; Mr. Armstrong had notice of the charges and procedure but chose to ignore them. The Union argues that one ignores at one's peril and the Board should not intervene. As set out in the cases presented, the Union argues there should be a "preference for deference".

[18] The Union notes that section 151(f) references to "any employee" and at the time of these applications he was not an employee. The Union argues alternative work was available and there was no breach of the *Code*.

[19] The Union further argues the fine is not horrific; it represents perhaps four days working under his current employment regime.

Decision

[20] The Applicant alleges a breach of section 26, 151(f), 151(i)(ii). We will address each section in order.

[21] With respect to the section 26 complaint, Mr. Armstrong is currently under suspension for failure to pay a fine. With respect to the criteria of Section 26, it would appear he was served with double registered mail with the specific charges in writing so as to satisfy section 26(a).

[22] Further, he was served a minimum of two weeks prior to the hearing but in any event did not object or request an adjournment with respect to the scheduling of the hearing. We would find this would be a reasonable time to prepare a defense.

[23] He was afforded a hearing although clearly in both the Constitution and in the correspondence inviting him to the hearing it was indicated that counsel was restricted to another member of the Union. During his testimony, Warren Fraleigh indicated the Union acknowledged that if a member requests counsel they are granted the right to counsel. Mr. Armstrong would have had no way of knowing this, but of interest to the Board is the fact that Mr. Armstrong personally did not at any time prior to end of August 2006 actively seek counsel and was satisfied with merely passing on the documentation to his employer. In the circumstances we are not prepared to find the Union's actions to be a breach of section 26(c).

[24] With respect to 26(d), this section contemplates "monetary penalties" and we do not find the amount to be so outrageous as to require our intervention. Further, we are concerned that given his steadfast apparent refusal to participate in the process the Union had very few options with respect to dealing with the matter.

[25] Accordingly we do not find a violation of section 26.

[26] The second basis of the complaint is a breach of section 151(f). The Union argues that this particular provision given the use of word "employee" does not apply to Mr. Armstrong as he was not an employee as defined by the *Code* (section 1(L)) at any material time. With respect to this, we cannot agree with the Union's proposition. The term employee in hiring hall situations must be given wide and liberal interpretation when extending rights to that person. To do otherwise would potentially remove rights of members on layoff.

[27] Here however, we do not believe there is any evidence of coercion; intimidation or threats. Mr. Armstrong simply ignored the attempts of the Union to have a dialogue and ignored the formal process which the Union determined to visit upon him. Mr. Armstrong certainly did not appear to be an individual who would be readily intimidated or coerced.

[28] At paragraph 33 in *Giles Prud'Homme et al* v. *IBEW Local 424* [2006] Alta. L.R.B.R. 289, the Board states:

> . . . we make the following general observations. First, disciplinary proceedings generally serve legitimate trade union purposes in harnessing the collective power of the membership and ensuring that the interests of the collective are not undermined by the actions of individual members. There should be no presumption that union discipline is an instrument of oppression or that it is imposed for ulterior motive. Though oppression and ulterior motive are not unknown in internal trade union affairs, in our experience they are not widespread; and this Board will draw that conclusion only upon evidence of substance.

[29] Accordingly, we do not find a violation of section 151(f).

[30] Lastly, section 151(i)(ii) provides:

> 151 *No trade union and no person acting on behalf of a trade union shall*
>
> (i) *expel or suspend a person from membership in the trade union or take disciplinary action against or impose any form of penalty on any person*
>
> (i) *for engaging in employment in accordance with the terms of a collective agreement between the person's employer and the trade union, or*
>
> (ii) *for engaging in employment with an employer who is not a party to a collective agreement with the trade union if the trade union fails to make reasonable alternate employment available to that person within a reasonable time with an employer who is a party to a collective agreement with the trade union, unless the trade union and that person are participating in a strike that is permitted under this Act.*

[31] As numerous Board cases state, there are four elements in the interpretation of section 151(i)(ii):

(a) imposition of discipline
(b) improper motive for the imposition of discipline
(c) absence of strike
(d) failure by the Union to make alternative union employment available to its members within a reasonable period of time.

[32] Here we have the imposition of discipline – a fine of $5,000.00.

[33] With respect to the improper motive for the imposition of discipline we find none. While banning work for non-union contractors at initial blush appears to be a restraint of trade, the fact is that is precisely what a Union is supposed to do. It wants to ban non-union work and compel its members to fulfill its obligation to supply unionized workers to unionized employers. Here we have a member lending his expertise to achieve success for a non-union contractor or a contractor who purposely does not employ boilermakers to ensure it is not obligated to hire unionized employees.

[34] There is no strike here which renders the "strike" element irrelevant.

[35] That leaves the last issue of whether the Union is able to provide "reasonable alternate employment available to a person within a reasonable time who is a party to a collective agreement with the trade union." Clearly, the Union cannot provide Mr. Armstrong with comparable employment that he was doing in August 2006 or at the time of his application being heard by the Board. Mr. Armstrong indicated at the Board hearing he was receiving $1,200.00 per day with a living out allowance working a 10 on four off schedule. This would compare to a journeyman rate of approximately $4,000.00 per month and is far in excess of a general foreman rate.

[36] The Union led evidence which was not contradicted that considerable work was available for members throughout 2006 and 2007. In fact the Union was unable to fill all callouts in 2007 for journeyman welders with similar skills to Mr. Armstrong.

[37] In fairness we do not believe the obligation imposed by section 151(i) goes so far as to require comparability to his current position but rather alternate work under the collective agreement.

[38] The statute protects workers pursuant to section 151(i)(i) for work under the collective agreement. It would seem inconsistent that pursuant to section 151(i)(ii) that the obligation would expand beyond “collective agreement work”.

[39] Accordingly, we would find no violation of section 151(i)(ii).

[40] In the circumstances, Mr. Armstrong’s application is dismissed.

D. Sean Day, Vice-Chair