**Labour Relations Board**
**Saskatchewan**

**SHELDON MERCER, Applicant v. COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION, LOCAL 922 and PCS MINING LTD., Respondents**

LRB File No. 007-02; October 29, 2003
Vice-Chairperson, James Seibel; Members: Clare Gitzel and Maurice Werezak

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| For the Applicant: | Drew Belobaba and William Slater |
| For the Respondent Union: | Neil McLeod, Q.C. |
| For the Respondent Employer: | Melissa Brunsdon |

**Duty of fair representation – Scope of duty – Board's role not to minutely assess reasonableness of every component of union's conduct but to generally examine reasonableness of union's conduct within context of each case – Despite some lapses in timeliness of communication and updating of events, union sufficiently conscientious, reasonable and fair in pursuit of applicant's interests and in communications with applicant – Board dismisses application.**

***The Trade Union Act*, s. 25.1.**

## REASONS FOR DECISION

**Background:**

**[1]** Communications, Energy and Paperworkers Union, Local 922 (the "Union"), is designated as the bargaining agent for employees of PCS Mining Ltd. (the "Employer") The Applicant, Sheldon Mercer, was, at all material times, a member of the bargaining unit. Mr. Mercer filed an application with the Board alleging that the Union had committed an unfair labour practice in violation of s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the *"Act"*), by failing to fairly represent him in grievance or rights arbitration proceedings. Mr. Mercer's application alleges that the Union violated s. 25.1 of the *Act* by refusing or failing to pursue a grievance with respect to an alleged duty of the Employer to accommodate Mr. Mercer's disability and to ensure that Mr. Mercer received appropriate disability benefit entitlements.

**Evidence:**

**[2]** Mr. Mercer was employed by the Employer from 1980 to October 5, 2000, initially as a labourer, then as an equipment operator and finally as a first class operator responsible for his own crew. At one time he was a Union shop steward. He presently resides in Nova Scotia where he is employed in the computer systems industry.

**[3]** Mr. Mercer first injured his back on the job in 1985. From then until his employment with PCS Mining Ltd. was terminated in October, 2000, he was off the job due to back injury eight or nine times for three to six months at a time, during which periods he collected workers' compensation benefits. Each time he returned to work he would work some shifts of light duties before returning to his regular operator job. He last re-injured his back on September 30, 1998 after which he never returned to work. He collected workers' compensation benefits until they were terminated in March, 1999. He then went on a sick leave of absence and collected long term disability benefits. Apparently, Mr. Mercer's back will never heal to the point where he would be able to resume his equipment operator job with the Employer.

**[4]** Mr. Mercer testified that, at the last meeting he attended with the Employer and the Union in May 1999, when he inquired about a position with lighter duties, the Employer advised that there was no such position available then, nor would there be any such position available in the future. Following the meeting, the Union filed a grievance on May 26, 1999 (Grievance No. 9010), requesting that full benefits be maintained for Mr. Mercer. For reasons of financial economy, Mr. Mercer returned to live in his former home province of Nova Scotia in August, 1999.

**[5]** The Union filed another grievance on November 30, 1999 (Grievance No. 9024) alleging that the Employer had breached its duty to accommodate Mr. Mercer in violation of the collective agreement between the parties and requesting that he be awarded a switchboard operator position that was soon to be vacant. The Employer responded to the grievance that the position was being eliminated upon the retirement of the incumbent. The Union accepted the Employer's response.

**[6]** Mr. Mercer and the local Union president, Bryan Barnes, communicated periodically through to the spring of 2000, as Grievance No. 9010 worked its way through the grievance procedure. According to Mr. Mercer, Mr. Barnes advised him early in 2001 that Grievance No. 9010 was to be heard at arbitration later that year.

**[7]** In August, 2000, Mr. Mercer called Gary Mighton, the Employer's mine construction general foreman, and left a message indicating that he wanted to return to work. By letter dated August 30, 2000, the Employer's human resources superintendent, Lee Knafelc, noted that Mr. Mercer's physician recommended to the Saskatchewan Workers' Compensation Board that Mr. Mercer change his job, and advised that,

> *…given your lengthy history of unsuccessful return to work efforts, the Company's position is that we have fulfilled our duty to accommodate your disability, and we will not consider any further modification or alteration of duties in order to reintroduce you to your previous job… .*

**[8]** Mr. Knafelc noted that Mr. Mercer could appeal the cessation of long term disability benefits to the plan carrier. On September 21, 2000, Mr. Barnes contacted the Employer to request that it extend Mr. Mercer's 24-month sick leave in order that he could seek re-training. By letter dated September 25, 2000, the Employer declined to do so and confirmed that Mr. Mercer would be terminated on the expiry of the leave on October 5, 2000. Mr. Mercer did file an appeal with the long term disability plan carrier. The Union filed a further grievance on October 4, 2000 (Grievance No. 0027) also alleging that the Employer had breached its duty to accommodate Mr. Mercer and requesting that Mr. Mercer be awarded a vacant underground electrician position. The Employer replied that it could not do so, specifically, *inter alia*, because:

> *Prior to the expiry of his 24-month leave of absence, Mr. Mercer did not present any medical evidence to indicate that another return-to-work attempt would be appropriate, nor did he express any interest in the possibility of pursuing vacancies arising for other positions during that period.*

**[9]** By letter dated December 19, 2000 the Union advised the Employer that the Union accepted the Employer's response to Grievance No. 0027.

**[10]** According to Mr. Mercer, he tried to contact Mr. Barnes several times between the summer of 2000 and October, 2001, leaving messages but never receiving a call back. Mr. Mercer also maintained that he wrote Mr. Barnes letters, dated March 6 and October 18, 2001, requesting information on the Union's actions with respect to his proceedings (i.e., his grievance against the Employer and his claim against the plan carrier), but received no reply. Failing to hear from the Union, he filed the present application on January 14, 2002.

**[11]** The last communication Mr. Mercer received from the Union was a letter from Mr. Barnes received November 14, 2002. Mr. Barnes advised Mr. Mercer that, in light of a legal opinion the Union had received to the effect that a lawsuit against the long term disability plan carrier would likely not be successful, the Union had decided not to proceed further with such action. With respect to Grievance No. 9010, Mr. Barnes advised that it was still active, but had been pending the outcome of the opinion on the lawsuit against the long term disability plan carrier. He indicated that, if Mr. Mercer was interested in proceeding further with Grievance No. 9010, Mr. Mercer should contact the Union and provide reasons why this should be done.

**[12]** In its reply to the present application, the Union averred that Mr. Mercer had been offered two lighter duty jobs and that he was advised by the Union to accept one of them, a job in the "dry" area (essentially, the laundry), but he declined. Mr. Mercer denied that that happened. He said rather that the issue of that position came up at the meeting with the Employer in May, 1999, but the Employer refused to allow him to have it. Instead, another disabled employee with less seniority, Corey Hamilton, was awarded the position. In cross-examination, Mr. Mercer denied that he advised Mr. Barnes that he was not interested in the job because it was for substantially lower pay. He also stated that he had no recollection as to whether Mr. Barnes called him at some point after he had moved to Nova Scotia to ask him whether he was interested in the "dry" job.

**[13]** Under cross-examination, Mr. Mercer acknowledged that he understood that the Union could not proceed with a grievance against the Employer for a refusal by the long term disability plan carrier to continue benefits. He stated that his complaint

against the Union in the present proceedings is that it did not fairly represent him in that it failed to secure some kind of job for him that he was capable of performing.

**[14]** Mr. Mercer took a program in computer studies at Cape Breton College between approximately April, 2000 and May, 2001. He funded his tuition from employment insurance program benefits and personal RRSP's. His present employment in the computer industry, which he started in May, 2002, pays approximately one-half of what he earned as an equipment operator at the mine. And, while the dry job would have entailed an hourly wage decrease from $23.00 to $20.00, he would have earned considerably more than he does at present.

**[15]** Under cross-examination, Mr. Mercer admitted that he was now not interested in any job with the Employer and "just wanted to be treated fairly by the Union." He stated that his primary motivation for proceeding with the present application was "to prove that the [Union] lied" about his being offered a job by the Employer.

**[16]** By agreement of the parties, Bryan Barnes was cross-examined by each of them. He has been the president of the local Union for the past eight years and, some time prior to that, had been president for another three-year period.

**[17]** In his testimony, Mr. Barnes related a much different sequence of events than had Mr. Mercer. According to Mr. Barnes, Mr. Mercer turned down both the job in the dry area and an underground electrician position before he moved to Nova Scotia. Prior to his termination, Mr. Mercer had expressed interest in work relating to computers – he had taken some training in the area while off work – but Mr. Barnes told him there was nothing like that available. Indeed, Mr. Barnes said that the Employer offered to customize seating for Mr. Mercer on the equipment in his former position, but Mr. Mercer told him that he did not want to work underground any longer. At the meeting with the Employer in May, 1999, Mr. Barnes said there were two positions "on offer": the job in the dry area and a helper's position. However, the latter position, which involved waxing floors, was probably not suitable for Mr. Mercer's condition; it was eventually filled by Mr. Hamilton.

**[18]** The Union knew as early as March, 1999 that the dry area job was going to come open sometime later in the year. But, Mr. Barnes said, Mr. Mercer told him he was moving to Nova Scotia and was "not interested in doing laundry for the rest of his life." Mr. Barnes said he recommended to Mr. Mercer that he accept the dry area job for the time being and then look for something that he was more satisfied with. He said he later called Mr. Mercer in Nova Scotia in November, 1999, to tell Mr. Mercer that the dry job was still on offer and to ask whether he was then interested, but Mr. Mercer declined. It was eventually filled on a temporary basis by a less senior employee, Nick Sokolski. Mr. Barnes said that he also advised Mr. Mercer that there was an accounting clerk position open, but that Mr. Mercer indicated he was not interested.

**[19]** Mr. Barnes tried to have the Employer extend Mr. Mercer's sick leave but, he indicated that, it was the Union's opinion that the collective agreement allowed the Employer to terminate an employee who could not work after 24 months. Accordingly, the Union did not grieve Mr. Mercer's termination itself.

**[20]** According to Mr. Barnes, Grievance No. 9010 was referred to arbitration in June, 1999, but the Union decided to hold it in abeyance pending an opinion from the Union's solicitors on the merits of a lawsuit against the long term disability plan carrier. The last time Mr. Barnes spoke with Mr. Mercer on the telephone was sometime after Mr. Mercer was terminated in October, 2000. Mr. Barnes said he advised Mr. Mercer that the issue of filing a claim against the long term disability plan carrier was still in the hands of the Union's solicitors and that the status of Grievance No. 9010 was pending the outcome of such a claim. He said that, for reasons beyond the Union's control, its solicitors took some considerable time to assess the merits of a lawsuit against the long term disability plan carrier. When the solicitors finally provided a negative opinion, the Union decided that Grievance No. 9010 was probably not worth pursuing because it was based on a claim for denial of benefits against the Employer. Hence, Mr. Barnes said he wrote to Mr. Mercer in November, 2002 to see if Mr. Mercer had any opinion on the grounds upon which to pursue the grievance.

**[21]** With respect to contacting and attempting to contact Mr. Mercer, Mr. Barnes referred to SaskTel records for calls made from the Union's telephones to Mr. Mercer's Nova Scotia telephone number. The records disclose that 15 calls were made

between October 29, 1999 and May 13, 2001. Although some of the notes of the attendances were destroyed in a building fire, Mr. Barnes related that five calls made in October and November, 1999 were most likely to discuss the availability of the job in the dry area; a particularly lengthy call in May, 2000 was likely to provide an update on the grievance situation and the Union's strategy; and five calls in September and October, 2000, including a particularly lengthy one on September 25, 2000, were likely to discuss Mr. Mercer's impending termination and the options that might be pursued, including application for extension of benefits and for an education leave. Mr. Barnes did relate, however, the special difficulties entailed in contacting Mr. Mercer in Nova Scotia because of the significant time difference.

**[22]** Mr. Knafelc, the Employer's human resources superintendent, testified that, when the Employer learned that Mr. Mercer's workers' compensation benefits were to cease in March, 1999, he requested a meeting with Mr. Mercer. Mr. Mercer declined to have a Union representative present at the meeting in February, 1999. Mr. Mercer indicated to Mr. Knafelc that Mr. Mercer was not medically fit to return to his regular job. However, when Mr. Knafelc mentioned the possibility of jobs in the dry area and as an accounting clerk, Mr. Mercer indicated that he was not interested. Mr. Knafelc agreed that he did not actually offer the positions to Mr. Mercer.

**[23]** Mr. Knafelc requested another meeting with Mr. Mercer for April 26, 1999, which was also attended by the mine general superintendent and Mr. Barnes. He said the Employer wanted to know whether Mr. Mercer was then interested in the dry area job, which was being temporarily performed by another employee with back problems. Mr. Mercer indicated that his interests lay with computers or carpentry and he was not interested in the dry job. Mr. Knafelc said he contacted Mr. Mercer once more on May 21, 1999 to see whether he had changed his mind about the dry job, but Mr. Mercer still indicated that he was not interested, both because of the nature of the job and the decrease in pay that it would entail.

**[24]** Mr. Knafelc testified that the availability of the dry area job was raised once more with the Union and Mr. Mercer at a second step grievance meeting regarding Grievance No. 9010 on June 22, 1999. Mr. Mercer indicated then that he had not been cleared by his physician to work at any job. The dry job was posted as a permanent

position in October, 1999, but Mr. Mercer did not apply. Mr. Knafelc admitted that, while Mr. Mercer's placement in the job would have been subject to medical clearance, Mr. Mercer would have had the best opportunity to secure the job as the most senior applicant.

**Statutory Provisions:**

**[25]** Relevant provisions of the *Act* include s. 25.1, which provides as follows:

> *25.1 Every employee has the right to be fairly represented in grievance or rights arbitration proceedings under a collective bargaining agreement by the trade union certified to represent his bargaining unit in a manner that is not arbitrary, discriminatory or in bad faith.*

**Arguments:**

**[26]** In argument, Mr. Belobaba, counsel for Mr. Mercer, referring to the decision of the Supreme Court of Canada in *Canadian Merchant Services Guild v. Gagnon*, [1984] 84 C.L.L.C. 14,043 argued that the Union had failed to fairly represent Mr. Mercer as evidenced by its lack of communication with him and its failure to secure an appropriate job for him. Both points, he said, were significantly contingent on the credibility assigned to the opposed testimony of each of Mr. Mercer and Mr. Barnes.

**[27]** While Mr. Mercer admitted that he had no recollection that Mr. Barnes advised him to apply for the dry area job, it was clear from the evidence of Mr. Knafelc that the job was never actually "on offer" to Mr. Mercer. Mr. Belobaba insisted that Mr. Mercer would have taken the dry job had it been specifically offered to him.

**[28]** Counsel referred to the fact that the Union did not contact Mr. Mercer between November, 2000 and May, 2001 even though Mr. Mercer sent a letter to Mr. Barnes requesting information in March, 2001 and some telephone calls were not returned.

**[29]** As a remedy, counsel requested that the Board order mediation or arbitration to determine what Mr. Mercer has lost as a result of the Union's failure to fairly represent him, that is, damages.

**[30]** Mr. McLeod, counsel for the Union, argued that the evidence did not establish that there was a violation of s. 25.1 of the *Act*. He asserted that the present application was based on an allegation that the Union had acted arbitrarily and not on any allegation that the Union had acted discriminatorily or in bad faith, specifically in withdrawing the accommodation grievance, Grievance No. 0027.

**[31]** In addressing generally the Union's handling of all of the grievances that were filed on Mr. Mercer's behalf, Mr. McLeod asserted that the Union had not acted in a cursory, perfunctory or negligent manner, but had conducted appropriate investigations and made reasonable assessments and decisions in the circumstances.

**[32]** In speaking to the matter of the Union's handling of Grievance No. 9010, referring to the decision of the British Columbia Labour Relations Board in *Semancik and Canadian Union of Public Employees, Local 4165*, [1999] BCLRBD, Mr. McLeod argued that the concept of duty of fair representation does not extend to continued payment of legal fees by a union to institute or continue a civil court action on behalf of a member against a long term disability plan carrier, but only to grievance and arbitration proceedings under a collective agreement.

**[33]** With respect to the suggestion of the laxity of communication by the Union with Mr. Mercer, counsel asserted that the evidence of Mr. Barnes, as corroborated by Mr. Knafelc, ought to be preferred to that of Mr. Mercer and that it demonstrates that there was no failure or neglect that would constitute a violation of the duty of fair representation. Referring to the decision of the Board in *Radke v. Canadian Paperworkers Union, Local 1120*, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92, Mr. McLeod argued that, given the nature of the issues raised in the grievances, the circumstances regarding the availability of certain jobs referred to in the evidence, and the distance over which the communication had to take place, any apparent lapses in communication could not be said to be of a nature or degree that demonstrates arbitrary or bad faith treatment. In this regard, counsel also referred to the decision of

the Board in *Gregoire v. United Steelworkers of America, Local 5890 and IPSCO Inc*., [1997] Sask. L.R.B.R. 766, LRB File No. 317-95.

**[34]** The main frustration for the Union was the lack of interest shown by Mr. Mercer in the positions proposed by the Union that might be suitable for him. Mr. Barnes raised the issue of the dry area job on several occasions, as well as seeking to have the Employer extend Mr. Mercer's sick leave of absence or grant an educational leave, but Mr. Mercer rejected any potential accommodation options presented to him. Counsel pointed out that the assertion by Mr. Mercer's counsel that Mr. Mercer would have accepted the dry area job had it actually been offered to him is belied by Mr. Mercer's statements to Mr. Barnes and Mr. Knafelc that he was not interested in the position in any event.

**[35]** With respect to the remedy sought by Mr. Mercer, which ultimately comes down to an assessment of damages by arbitration, counsel for the Union argued that it is predicated on the assumption that the accommodation grievance (Grievance No. 0027) would have been successful and is not within the scope of what the Board has customarily ordered in such cases.

**Analysis and Decision:**

**[36]** In prior decisions, the Board has approved of the following summary by the Supreme Court of Canada in *Gagnon*, supra, at 12,181, of the general principles applicable to duty of fair representation cases:

> *The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*
>
> *1. The exclusive power conferred on a union to act as a spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
>
> *2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*

> *3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*
>
> *4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*
>
> *5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employees.*

**[37]** The Board succinctly explained the distinctive meanings of the concepts of arbitrariness, discrimination and bad faith, as used in s. 25.1 of the *Act*, in *Glynna Ward v. Saskatchewan Union of Nurses*, [1988] Winter Sask. Labour Rep. 44, LRB File No. 031-88, at 47, as follows:

> *Section 25.1 of The Trade Union Act obligates the union to act "in a manner that is not arbitrary, discriminatory, or in bad faith". The union's obligation to refrain from acting in bad faith means that it must act honestly and free from personal animosity towards the employee it represents. The requirement that it refrain from acting in a manner that is discriminatory means that it must not discriminate for or against particular employees based on factors such as race, sex or personal favoritism. The requirement that it avoid acting arbitrarily means that it must not act in a capricious or cursory manner or without reasonable care. In other words, the union must take a reasonable view of the problem and make a thoughtful decision about what to do.*

**[38]** However, the concept of arbitrariness, which is often more difficult to identify than discrimination or bad faith, is not equivalent to simple errors in judgment, negligence, laxity or dilatoriness. In *Walter Prinesdomu v. Canadian Union of Public Employees*, [1975] 2 Canadian LRBR 310, the Ontario Labour Relations Board stated, at 315:

> *It could be said that this description of the duty requires the exclusive bargaining agent to "put its mind" to the merits of a grievance and attempt to engage in a process of rational decision making that cannot be branded as implausible or capricious.*
>
> *This approach gives the word arbitrary some independent meaning beyond subjective ill will, but, at the same time, it lacks any precise*

> *parameters and thus is extremely difficult to apply. Moreover, attempts at a more precise adumbration have to reconcile the apparent consensus that it is necessary to distinguish arbitrariness (whatever it means) from mere errors in judgment, mistakes, negligence and unbecoming laxness.*

**[39]** In the present case, Mr. Mercer's complaint is primarily one of perceived arbitrariness as related to the Union's decision not to progress a grievance of his accommodation complaint and, more generally, the perception that the Union did not communicate with Mr. Mercer in a timely manner and made decisions regarding prosecution of the various grievances in a perfunctory manner.

**[40]** The nature of the Board's role in reviewing the actions of a union, with respect to complaints of the nature raised in the present case, is defined by the standard accepted by the Board as set out in the decision of the British Columbia Labour Relations Board in *Rayonier Canada (B.C.) Ltd*. [1975], 2 Canadian LRBR 196, at 201-02, as cited with approval by the Supreme Court of Canada in *Canadian Merchant Services Guild v. Gagnon*, [1984] 84 C.L.L.C. 14,043, at 12, 185:

> *. . . The union must not be actuated by bad faith, in the sense of personal hostility, political revenge, or dishonesty. There can be no discrimination, treatment of particular employees unequally whether on account of factors such as race or sex (which are illegal under the Human Rights Code) or simple, personal favouritism. Finally, a union cannot act arbitrarily, disregarding the interests of one of the employees in a perfunctory manner. Instead, it must take a reasonable view of the problem before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations.*
>
> (Emphasis added).

**[41]** However, it is clear that the Board's role is not to minutely assess the reasonableness of every component of a union's conduct in such cases.[1] This is because the Board does not decide the merits of the purported grievance itself, but merely hears evidence of the nature of the grievance and the alleged acts or omissions of the union in its handling in order to have some context in which to assess the reasonableness of the union's conduct. As the Board stated in *Banga v. Saskatchewan*

[1] See, *Hidlebaugh v. Saskatchewan Government and General Employees' Union and Saskatchewan Institute of Applied Science and Technology*, [2003] Sask. L.R.B.R. 272, LRB File No. 097-02.

*Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep. 88, LRB File No. 173-93, at 98:

> *It is clear from the jurisprudence which has accumulated concerning the duty of fair representation that it is not the task of a labour relations board to second guess a trade union in the performance of its responsibilities, or to view the dealing of that union with a single employee without considering a context in which numerous other employees and the union itself may have distinct or competing interests at stake.*

**[42]** In *Radke*, *supra*, at 69 and 70, the Board expressed the notion that, when reviewing the conduct of a trade union in progressing grievances, it is appropriate to make a more general examination, particularly where the relationship between the union and the complaining employee has been lengthy:

> *We do not overlook the fact that there were occasions when tensions and misunderstanding occurred in the relationship between Mr. Radke and his Union representatives . . . Neither do we rule out the possibility that the Union made some mistakes in dealing with Mr. Radke. There were lapses in clear communication with him, occasions when Union officials lost their tempers, and a failure to supply him with information about the outcome of the second Kloppenburg arbitration. Over the considerable period during which the Union was pursuing the interests of Mr. Radke, however, we are convinced that their general approach to him was conscientious, reasonable and fair.*
>
> *. . .*
>
> *In coming to this conclusion, we do not wish to convey the impression that we have also concluded that Mr. Radke has no cause for his sense of frustration and bewilderment. He has seen his claims disappear into a thicket of delays, complexities and confusing signals. He was persuaded to give up his employment under pressure and in despair at ever achieving a fair assessment of his claim. There are signs that he may not have been well-served at some points in terms of medical advice, that he may have been treated with undue impatience by his Employer, and that he may have had reason to become skeptical of the vehicles for the determination of his grievances. What has happened to Mr. Radke is tragic, and we do not wish to be taken as trivializing the consequences for him of this lengthy saga.*
>
> *On the other hand, responsibility for this sad situation cannot be imputed to the Union, absent a finding that its conduct was*

> *arbitrary, discriminatory or animated by bad faith. We cannot find in this case that the Union failed to live up to its duty to represent him fairly, or that they neglected to support him at critical points in his attempts to obtain redress. We therefore conclude that this application must be dismissed.*

**[43]** In *Gregoire*, *supra*, the Board approved of an earlier statement made in its decision in *Radke*, *supra*, at 64 and 65, as to what may reasonably be expected by an employee of his or her union:

> *What is expected of trade union officials in their representation of employees is that they will act honestly, conscientiously and without prejudgment or favouritism. Within the scope of these criteria, they may be guilty of honest errors or even some laxity in the pursuit of the interest of those they represent. In making decisions about how or whether to pursue certain issues on behalf of employees, they should certainly be alert to the significance for those employees of the interests which may be at stake. Given the importance of the employee interests the union has the responsibility to pursue, they should also carry out their duties seriously and carefully. The ultimate decision made or strategy adopted, however, may take into account other factors than the personal preferences or views of an individual employee.*

**[44]** In the present case, we prefer the evidence of Mr. Barnes to that of Mr. Mercer as to the sequence of events and nature of communications between them, in large part, because the evidence of Mr. Knafelc corroborates that of Mr. Barnes on several points. This is not to say that we consider that Mr. Mercer was in any way untruthful, but merely that Mr. Barnes appeared have a more detailed recollection of events.

**[45]** That being said, while there may well have been some lapses in the timeliness of communication and updating of events from Mr. Barnes to Mr. Mercer, that fact does not, in and of itself, constitute arbitrary treatment on the part of the Union. On viewing the evidence as a whole, we are of the opinion that Mr. Barnes was sufficiently conscientious, reasonable and fair in his pursuit of Mr. Mercer's interests and in his communications with Mr. Mercer in the circumstances. Mr. Mercer's intransigence to the idea of considering alternate job duties in the dry area or as accounting clerk, should they come available, was frustrating for Mr. Barnes, but he continued communication with the Employer and Mr. Mercer on the point for some considerable time in the hope

that Mr. Mercer would change his mind. The several time zones over which communication with Mr. Mercer had to take place were somewhat problematic, but the Union's telephone records bear out Mr. Barnes version of events that he continued to press Mr. Mercer over the dry area job as the only practical alternative at the time. By his own admission, Mr. Mercer has no present interest in returning to employment with the Employer in any capacity.

**[46]** Undoubtedly, there was also frustration on the part of Mr. Mercer in that the various grievances and the potential lawsuit against the long term disability plan carrier were no doubt perceived as a confusing welter of inadequate avenues to obtain the redress to which he felt entitled.

**[47]** However, in all the circumstances, we do not find any convincing evidence that the Union acted in an arbitrary or discriminatory manner or in bad faith in its treatment of Mr. Mercer. It acted with sufficient conscientiousness and fairness in a difficult situation.

**[48]** The application is dismissed.

**DATED** at Regina, Saskatchewan this **29th** day of **October, 2003.**

**LABOUR RELATIONS BOARD**

James Seibel,
Chairperson