Labour Relations Board
Saskatchewan

MURRAY HIDLEBAUGH, Applicant v. SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION and SASKATCHEWAN INSTITUTE OF APPLIED SCIENCE AND TECHNOLOGY, Respondents

LRB File No. 097-02; May 20, 2003
Vice-Chairperson, James Seibel; Members: Marshall Hamilton and Maurice Werezak

The Applicant, Murray Hidlebaugh
For the Respondent Union: Rick Engel
For the Respondent SIAST: Gary Crawford

Duty of fair representation – Scope of duty – Union owes duty of diligent and competent representation to bargaining unit as whole and to individuals in grievance and arbitration proceedings – Two arms of duty often in conflict and union must balance collective and individual interests – Union may decline to grieve or arbitrate legitimate complaint where interests of collective membership reasonably deemed more important than interests of individual.

Duty of fair representation – Contract negotiation – Union did not get everything that it wanted in bargaining succession planning incentive plan – Union negotiated diligently with respect to terms of plan and considered result to be significant improvement over former process – Terms of plan ratified by union membership – Board finds no breach of duty of fair representation.

Duty of fair representation – Contract administration – Union investigated facts and circumstances of complaint, communicated with applicant in timely and honest fashion and arrived at decision not to pursue grievance – No evidence of animosity toward applicant by union – Board finds no breach of duty of fair representation.

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

REASONS FOR DECISION

Background:

[1] Saskatchewan Government and General Employees' Union (the "Union"), is designated as the bargaining agent for two units of employees of Saskatchewan Institute of Applied Science and Technology ("SIAST" or the "Employer") – an academic bargaining unit and an administrative support bargaining unit.

[2] At all material times, Murray Hidlebaugh was a member of the academic bargaining unit. Mr. Hidlebaugh 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*"), in failing to fairly represent him in grievance or rights arbitration proceedings, by reason of the Union's refusal to file a grievance of the Employer's denial of Mr. Hidlebaugh's application to participate in its Succession Planning Incentive Plan ("SPI Plan") that would have allowed him to retire early and receive a lump sum incentive payment.

[3] The applicable collective bargaining agreement between the Union and SIAST, for the term July 1, 2000 to June 30, 2003, covers both bargaining units and the SPI Plan is open to employees in both units. The text of the SPI Plan is contained in Appendix D to the collective agreement as follows:

> *1. Eligibility*
>
> *1.1 In order to facilitate succession planning in a managed fashion, SIAST may offer incentives to any employee from either Bargaining Unit, based on funding in #2 that meets the following criteria:*
>
> *(a) age 55 or over with a minimum of 10 years of SIAST pensionable service; or*
>
> *(b) has a minimum of 25 years of pensionable service with at least 10 of those years at SIAST.*
>
> *2. Funding*
>
> *2.1 SIAST shall commit at least $350,000.00 per year to fund this incentive plan.*
>
> *2.1.1 This is a single incentive plan for employees from both Bargaining Units.*
>
> *2.2 Monies allotted to but not utilized by this fund will be allowed to accumulate and be utilized in the next fiscal year.*
>
> *2.3 At no time will the allotment and the accumulation from the previous fiscal/academic year be allowed to exceed $700,000.00.*

3. Criteria to Ensure Program Viability

3.1 If more than employee from a program/department applies for and is eligible for this plan, SIAST will not be required to approve multiple applicants if more than one employee leaving the program/department in a fiscal/academic year threatens the viability of the program/department. Those not approved due to viability will be considered first the next fiscal/academic year should they reapply.

4. Process

4.1 Employees wishing to be considered for this plan will indicate, in writing, to the Manager of Human Resources between September 1 and October 31 of the year in which they wish to be eligible for this plan. The employee must meet the age requirements on or before December 31 of the year in which they apply.

4.2 An employee who has been offered an incentive by SIAST has the right to accept or to decline the offer within thirty (30) calendar days of the offer being made.

4.3 All employees who apply for this plan will be notified of acceptance or rejection by December 31 of the year in which they applied.

4.4 In the event of acceptance of an offer of this plan, the employee's date of resignation shall be effective on a date mutually agreed upon between SIAST and the employee, but not later than June 30 of year following the year on which the employee was accepted for this plan.

5. Incentive Amounts

5.1 The incentive will be paid in one lump sum on the effective date of resignation, or for optimum tax advantage, on an agreed-upon deferred date or in predetermined installments/stipends/increments, etc., in the following amounts:

Age at Incentive Plan Application	*Payout:*
63	*10% of annual salary to a maximum of $5,000.00*
62	*20% of annual salary to a maximum of $10,000.00*
61	*30% of annual salary to a maximum of $15,000.00*
60	*40% of annual salary to a maximum of $20,000.00*

55-59 50% of annual salary to a maximum of $25,000.00
or
Under 55 with 25 years of pensionable service

Evidence:

[4] Mr. Hidlebaugh was employed at SIAST for some thirty-two years. His last position was head of the recreation and leisure services program in the recreation and tourism department. He retired on July 1, 2002, at the age of 57.

[5] Mr. Hidlebaugh had originally intended to work until 2003 because he could take advantage of a wage increase due to be implemented on July 1, 2002 and a doubling of his supervisory stipend, which would serve to increase his pension income when he retired. However, in the spring of 2001, each of Mr. Hidlebaugh's parents suffered a health crisis, which necessitated that he become involved with their care. He found it onerous to return to full-time work in the fall of 2001. The SPI Plan option looked attractive to him.

[6] On September 7, 2001, Mr. Hidlebaugh applied to participate in the SPI Plan for the 2001-02 academic year. He was the only employee to apply from his program area. He testified that, although he met each of the alternative eligibility requirements in clause 1.1 of the SPI Plan, he received notice from Marie Alexander, the Employer's chief human resources officer, by letter dated November 27, 2001, that his application was rejected. The letter provided, in part, as follows:

> *We have now had an opportunity to carefully consider all the applications to the 2001-02 Succession Planning Incentive Plan. At this time, I must advise you that your request was not approved for the 2001-02 academic year.*
>
> *Thirty-nine applicants requested access to the $350,000.00, which was available under the Collective Agreement – Appendix D. Please note that if an application that has been approved is subsequently withdrawn or declined within 30 calendar days of the offer being made, then all other applications will be reconsidered.*

[7] While Mr. Hidlebaugh admitted that the text of the SPI Plan makes no reference to preference based on seniority, persons with less seniority than he were accepted to participate in the SPI Plan, and he felt that it was a factor that should have

been considered. He did not understand what criteria were applied by the Employer to determine which applications were accepted and which were rejected.

[8] Mr. Hidlebaugh asserted that the Employer did not follow the process outlined in clause 4.1, in that certain employees were urged to apply outside of the application "window" and that the Employer did not provide notice of acceptance or rejection to certain employees by the deadline set in clause 4.3.

[9] Mr. Hidlebaugh met with local Union representatives Jim Steele and Reg Hammer shortly before Christmas, 2001 to inquire as to what criteria were considered by the Employer in making the decisions on participation in the SPI Plan. Mr. Steele agreed that the criteria were vague, but were loosely based on the viability of the SPI Plan and the recommendation of departmental deans. He advised Mr. Hidlebaugh to speak to the dean of his department, Brian Mertz.

[10] Mr. Hidlebaugh contacted Mr. Mertz in early January, 2002. Mr. Mertz told him that, while he had concerns about having the senior personnel to cover a planned expansion of the SIAST tourism program, he personally had supported the Mr. Hidlebaugh's application. However, according to Mr. Mertz, the Employer's management had routinely rejected the application of any employee who was expected to retire during the year in any event without the incentive of the SPI Plan.

[11] Mr. Hidlebaugh sent a letter by facsimile to Union officer, Barry Barber, on January 29, 2002, outlining the discussions he had had with Mr. Steele and Mr. Mertz, reiterating his concerns that persons who were not eligible had been accepted for participation in the SPI Plan, and requesting that the Union file a grievance of his application rejection.

[12] David MacNeil, Union vice-chair of the academic bargaining unit negotiating committee responded to Mr. Hidlebaugh in a letter dated January 30, 2002, which provided, in part, as follows:

> *When Appendix D was agreed to at the bargaining table it was with the understanding that the Deans would provide input, and Senior Management Council (SMC) would make the final selection*

> *of the succession plan applicants. Appendix D clearly states that SIAST may offer the incentive to employees who meet the agreed to criteria. There were many other employees including yourself who were not offered the succession plan incentive, but that in itself is not grounds for a grievance.*
>
> *Although it is unfortunate SIAST could not offer this option to more employees, we must accept the fact that there has been no breach of the Collective Bargaining Agreement and, therefore, no ability to file a grievance.*

[13] A few weeks later, in mid-February, 2002, Mr. Hidlebaugh again met with Mr. Steele. He learned that some successful applicants had declined the offer to participate in the SPI Plan and that the Employer was urging some other employees to apply. Mr. Hidlebaugh wrote to Mr. MacNeil on March 5, 2002. His letter provided, in part, as follows:

> *I was stating that it is my contention that I was treated unfairly because there is at least one person I know of in the Industrial Division who was granted the succession and I wasn't. While there are at least three people that I know of who are on sick leave who were granted the succession incentive and there is no where in the agreement that that was even considered in the definition of criteria.*
>
> *After doing some further checking, I am fairly certain that the Union owes me a duty of fair representation. This is based on two aspects. First, the agreement is so open to interpretation that it is open to abuse. And second the person that was accepted is so close to the same situation that I have (121 days difference) that there is definitely the possibility that there was some personal agendas involved. Therefore, as a start, I feel that the Union has a duty to the members to require that there be a full disclosure to all the involved individuals as to who was selected and who was rejected and the criteria used. And if it is found that money was used to finance the movement of staff from sick leave to retirement or if seniority was not a consideration then this would be grieved a s not meeting the conditions of the agreement.*

[14] Having received no reply to his letter during the next few weeks, Mr. Hidlebaugh spoke to Mr. Steele once again near the end of March, 2002. Mr. Steele indicated to him that the Union was not going to pursue his complaint.

[15] Mr. Hidlebaugh felt that if he was going to retire he had to do so by the end of April, 2002 so that new staff could be put into place in sufficient time to prepare for the next academic term. He gave his notice of resignation on April 7, 2002 effective July 1, 2002.

[16] Mr. Hidlebaugh filed the present application with the Board on May 23, 2002.

[17] Mr. Hidlebaugh received a letter from Ms. Alexander, on behalf of the Employer, dated July 15, 2002, purporting to explain the criteria and process used by the Employer in its selection of successful applicants. The letter provided, in part, as follows:

> *At the request of David MacNeil, Academic Bargaining Unit chair, I am providing you the following information related to the process for selecting and approving succession plan applicants.*
>
> *First, employees were reminded should they wish to be considered for the incentive that they would need to apply in accordance with the collective agreement.*
>
> *Next during the period between the notification and the receipt of applications senior management met to discuss the process for approval. During that meeting it was determined that in addition to the information in the collective agreement the following would be considered:*
>
> 1. *That divisions/departments identified as high risk (based on an analysis of data would be given priority;*
> 2. *Quality of service for students and SIAST;*
> 3. *That the mix of approved applications would represent the mix of our in-scope employee groups as appropriate;*
> 4. *Age; and*
> 5. *Years of service.*
>
> *Following the receipt of applications all appropriate managers were informed and asked for input. Subsequent to receipt of this information senior management met again. At that time each applicant's request was considered and reviewed against the established criteria. In your case, it was felt that there was not as pressing a need as there was in other areas. In addition, you were younger than other applicants where the overwhelming majority of the program members in another area were of an age that should we not manage the exit of employees in that program we would find ourselves unable to recruit.*

[18] In cross-examination, Mr. Hidlebaugh took issue with several assertions in the letter. He pointed out that, although it stated that his comparatively young age was a considered factor, approximately forty per cent of the successful applicants were younger than he. He stated that while his program area was relatively new, it was functioning well and that he could have left the program under the SPI Plan without jeopardizing the program's viability. While he agreed that the "viability" of the SPI Plan could include consideration of the age of the staff and the number of applicants in each program or department, he was concerned that the criteria were not explained to the employees ahead of application, and that there was no "scoring system" to determine who would be accepted or rejected.

[19] Mr. Hidlebaugh also agreed that when he applied for the SPI Plan he was seriously considering that he might have to retire anyway and he advised Mr. Mertz of this.

[20] Mr. Hidlebaugh also agreed with the assertion that article 7.2.1.1 of the collective agreement purportedly allows the Employer and the Union to use the SPI Plan as one tool to minimize lay-offs should a reduction in the workforce be necessary. Article 7.2.1.1 provides as follows:

> *7.2.1.1 If a workplace reduction is necessary, the Union (and where appropriate the employees) will be consulted in order to determine solutions that provide as many viable options as possible in order to minimize potential lay-off. Viable options may be available to all employees in the affected program/department that may include, but are not limited to Succession Planning Incentive Plan, voluntary lay-off, job share, leave of absences, retraining, secondments, and/or retirement.*

[21] Mr. Hammer was called to testify on behalf of Mr. Hidlebaugh. He was formerly the head of the plumbing and pipefitting program in the industrial training division at the SIAST Kelsey Campus.

[22] Mr. Hammer successfully applied for the SPI Plan in September, 2001. He was surprised when he learned that Mr. Hidlebaugh was not successful given that they had approximately the same amount of seniority.

[23] Mr. Hammer confirmed that at least two employees were urged to apply for the SPI Plan in May and June, 2002.

[24] Mr. MacNeil testified on behalf of the Union. He is the acting chair of the SIAST academic bargaining unit. He has been on the Union's bargaining committee for four years and has been a shop steward since 1993. He has been employed at SIAST since 1989.

[25] Mr. MacNeil, who was on the bargaining committee for the present collective agreement, testified that the SPI Plan was introduced with the agreement. In previous contracts there were loopholes that allowed for some senior full-time employees to take part-time jobs and then be offered a severance package, but this scheme was not available for everyone and was viewed by the Union and the membership as inequitable. The Employer estimated the cost of the old scheme to be $350,000 and each side developed a form of plan as a proposal for bargaining. The main difference between the Union's proposal and the Employer's proposal was that the former included seniority as the distinguishing criterion between eligible applicants for access to the plan. However, the Employer insisted that a number of factors had to be considered, including the concept of "program viability" within departments, which in turn included such considerations as the number of students in the program, program scale-downs, changes or budget cuts, the age and experience of the employees delivering the program and quality of service concerns. The discussion at the bargaining table centered on the program viability parameter. It was understood that the Employer need not accept all eligible applicants or spend more than the base amount stated in clause 2.1 of the SPI Plan (see, Appendix D, *supra*), and that the Union could not dictate who was accepted or rejected for participation. The Union capitulated on the seniority issue after looking at the overall benefits of the plan to the bargaining unit membership as a whole. The bargaining committee considered it to be a significant improvement over the then existing process, particularly in that it was open to all employees to be considered for participation. The collective agreement, including the SPI Plan, was ratified by the Union's membership.

[26] In December, 2001, the Employer provided the Union with confidential lists of all applicants and of successful applicants to the SPI Plan. According to Mr. MacNeil, the Union had no reason to believe that the Employer had used criteria other than those discussed in bargaining over the plan, or had otherwise not acted in good faith, in making the selection of successful applicants.

[27] When Mr. Barber, chair of the Union's bargaining committee, received the January 29, 2002 letter from Mr. Hidlebaugh, he discussed its contents with Mr. MacNeil. They both agreed that there was no basis to file a grievance. It was decided that Mr. MacNeil would respond, which he did by his letter of January 30, 2002. When he received Mr. Hidlebaugh's March 5, 2002 letter, he arranged for the campus Union representative, Mr. Steele to meet with Mr. Hidlebaugh and reiterate the Union's position.

[28] Mr. Hidlebaugh attended at the Union's Saskatoon office on July 9, 2002, in connection with this application. Mr. MacNeil listened to his concerns about the lack of knowledge of the general membership of the criteria and rationale used by the Employer to make its decisions regarding participation in the SPI Plan. Mr. MacNeil contacted Ms. Alexander in the SIAST human resources office right then and there for the appropriate information, and also contacted Mr. Mertz to have him again clarify his involvement as dean in the process. However, Mr. Hidlebaugh was not satisfied. Mr. MacNeil contacted Mr. Mertz a short time later to request that he put his explanation in writing. Mr. Mertz responded by letter dated August 2, 2002, which provided as follows:

> *Further to our telephone conversation yesterday, I can advise that in reviewing my Division's submissions for succession planning that I gave Murray Hidlebaugh's request thorough consideration.*
>
> *Priorities for succession planning are based on a number of factors but primarily around such considerations as ease with which a faculty member could be replaced, the age of other faculty members in the program area, and other pending retirements in the program area.*
>
> *It was my judgment that Murray was an asset to SIAST and not someone that we would want to give an incentive to leave. Compared to the other requests that I received, and considering that the program overall has quite a young faculty, Murray did not receive a high priority ranking by me in my recommendations to*

> *senior management, who made the final decisions on who would receive incentives and who would not.*

[29] In addressing the allegation that some persons had been urged to apply for the SPI Plan outside of the time frame set out in the SPI Plan text, Mr. MacNeil explained that, while the decisions as to access to the SPI Plan by eligible applicants were made in late 2001, there were two subsequent events which could have affected employees' decisions about whether to apply for the SPI Plan had they been known at that time. The first was the release of the Employer's business plan in March 2002, and the second was the provincial budget in May 2002, which together instigated an attempt to minimize lay-offs. It was decided to use SPI Plan money for this purpose as allowed by article 7.2.1.1 of the collective agreement, *supra*. The Union and the Employer looked at which employees might have wanted to access the SPI Plan had the necessity for "rationalization" been known at that time, and based on whether it could prevent a lay-off, certain employees were told that they could apply. The number of lay-offs was ultimately reduced from 34 to 11, at least partly by using this mechanism.

[30] With respect to the allegation that Mr. Hammer was in much the same position as Mr. Hidlebaugh and was allowed to participate in the SPI Plan, Mr. MacNeil said that he investigated, spoke to their respective departmental deans and found that their circumstances were somewhat different in that there was more rationalization in the industrial programs area where Mr. Hammer was employed than in the non-industrial programs area where Mr. Hidlebaugh was employed.

[31] Mr. Steele is the Union chair at the Employer's Kelsey Campus. He testified that he met with Mr. Hidlebaugh on five occasions regarding the present matter: December 19, 2001; and January 25, February 11, June 26 and July 10, 2002. Before he met with Mr. Hidlebaugh for the first time, Mr. Steele had already received an inquiry from another long-service employee, Brian Grovestine, about his rejection for participation in the SPI Plan, and Mr. Steele met with the dean of the industrial division, David Walls, on December 4, 2001 to discuss the matter. Mr. Steele learned that the criteria used by the deans in making their recommendations regarding applicants from their departments included the following: years of service; age; how many employees were likely to leave at about the same time; the impact on the program; the availability of qualified replacement personnel; impact on the quality of the training of students; the

identification of “high risk” programs (i.e., those with perennial recruitment problems) the balance between academic and administrative and support employees.

[32] Mr. Steele met with Mr. Hidlebaugh on December 19, 2001, and provided him with the details of the criteria used by the deans. He also outlined the discussions in bargaining regarding the SPI Plan. He advised Mr. Hidlebaugh to discuss the matter with his dean and Ms. Alexander in human resources.

[33] In cross-examination, Mr. Steele admitted that he could not assess whether the criteria were applied consistently by the Employer as between the applicants

Statutory Provisions:

[34] Relevant provisions of the *Act* include the following:

> *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:

[35] Mr. Hidlebaugh argued the Union had failed in its duty of fair representation with respect to his complaint about the application of the SPI Plan. While he did not dispute the legitimacy of the criteria purportedly used in making the decisions on participation in the SPI Plan, he argued that the lack of transparency in their application led to questions about the consistency of application. Mr. Hidlebaugh asserted that the Union ought to have taken the position that the primary criterion for participation in the SPI Plan was seniority, and should not have simply taken the Employer’s word for it that the criteria it applied were applied consistently.

[36] Mr. Hidlebaugh said that Mr. Barber ought to have met with him personally rather than having Mr. MacNeil send the response dated January 30, 2002. He pointed out that the impact of the Employer’s business plan and the provincial budget

in the spring of 2002 were irrelevant to the decisions made by the Employer's management regarding the SPI Plan in the fall of 2001.

[37] Mr. Engel, counsel for the Union, stated that the case raised three issues: first, the relationship of the duty of the Union in bargaining to represent the bargaining unit as a whole to that of its duty of representation to an individual employee under s. 25.1 of the *Act*; second, the standard of union representation under that section; and, third, the role of the Board in a situation like that of the present application.

[38] With respect to the first issue, Mr. Engel referred to the decision of the Supreme Court of Canada in *Tremblay v. Office and Professional Employees International Union, Local 57* (2002), 212 D.L.R. (4th) 212, which dealt with a complaint against a union by an employee who had resigned her employment after bargaining commenced with the employer, but before an ensuing strike and the settlement of a new collective agreement that did not provide for retroactivity of salary increases for employees no longer employed when the agreement became effective. Counsel argued that the case confirms that a union's duty in bargaining of representation of the bargaining unit as a whole may conflict with the more diverse interests of individual employees, and that although it may be obligated to take those interests into account when considering the application of a collective agreement in the future, because of the complexity of the bargaining process and the creation and shifts of balances of power, a union may have to accept a questionable clause or agreement rather than engage in an industrial dispute.

[39] Counsel argued that, in the present case, there was no reason for the Union to doubt that the Employer had exercised its discretion in determining employee participation in the SPI Plan in a reasonable manner for justifiable business reasons.

[40] Mr. Engel asserted that the standard applicable to the Union in arriving at its decision not to file a grievance of the matter is as enunciated by the Board in *Brian Lymer v. Saskatchewan Insurance Office and Professional Employees' Union, Local 397 (O.P.E.I.U.),* [2000] Sask. L.R.B.R. 174, LRB File No. 176-99 and *Allan Wionzek v. International Brotherhood of Electrical Workers, Local 2067*, [1998] Sask. L.R.B.R. 765, LRB File No. 101-98. Briefly stated, the standard accepted by the Board is 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.*

[41] Counsel argued that the Union had fulfilled its obligation in the present case. The Employer had certain authority and obligation under the terms of the collective agreement with respect to the administration of the SPI Plan and the Union was of the opinion that it could not interfere with the negotiated process in the absence of clear evidence of unfairness by the Employer. Counsel argued that the basis for taking the position that such evidence must clearly be apparent is because for the Union to force changes to the Employer's selection results in the bumping of one member from participation in the SPI Plan in favour of another. In other words, the Union cannot embark on a fishing expedition based on raw data when the selection process is not purely empirical but involves judgment and discretion on the part of the Employer.

[42] With respect to the role of the Board in assessing the degree to which a trade union has fulfilled the duty to represent members fairly, Mr. Engel referred to the decision of the Board in *Vladimir Mravcak v. Communications, Energy and Paperworkers Union, Local 594*, [1995] 1st Quarter Sask. Labour Rep. 103, LRB File No. 221-94, where it was confirmed that the Board should "examine whether the union has conscientiously and reasonably represented the interests of a member who has no alternate recourse for the protection of those interests."

[43] Finally, Mr. Engel asserted that the evidence demonstrated that the persons who appeared to apply late for participation in the SPI Plan actually received

money pursuant to article 7.2.1.1 of the collective agreement as part of the effort to minimize layoffs caused by events unrelated to succession planning.

[44] Counsel argued that in the circumstances the Union had not violated s. 25.1 of the *Act*.

[45] In reply, Mr. Hidlebaugh took issue with the lack of transparency in the application of the criteria by the Employer and the failure of the Union to press for detailed disclosure of how the Employer arrived at its decisions on participation in the SPI Plan. Further, he argued that the Union ought not to have agreed to a process that did not have seniority as the paramount consideration, and that allowed the Employer to exercise its sole discretion in the selection of successful applicants.

Analysis and Decision:

[46] In numerous 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.*

[47] The Board commented on 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.*

[48] In the present case, the Applicant's complaint is primarily one of perceived arbitrariness in relation to the decision not to file and process a grievance of his complaint and, to a lesser degree, discriminatory action in relation to the late application to the SPI Plan by certain employees.

[49] The Union's duty of fair representation is a dual responsibility. It owes a duty of diligent and competent representation to the bargaining unit as a whole, as in collective agreement negotiation, and a duty to fairly represent individual members in grievance and arbitration proceedings. The cases are legion that recognize that the two arms of the duty are often in conflict and that it is necessary for a union to engage in a balancing of collective and individual interests. However, it is clear that a bargaining agent need not grieve or arbitrate every individual complaint even if it is legitimate. It may decline to do so where the interests of the collective membership are reasonably deemed to be more important than those of the individual. A common example is the decision by a union to represent one of its members in a selection grievance based on its interpretation of the collective agreement and the interests of the wider membership

where the successful outcome of the grievance will mean that another member will not be successful in obtaining the position.

[50] We are not in a position to minutely assess the reasonableness of the Union's actions in its negotiation of the SPI Plan during collective bargaining. Mr. Hidlebaugh was upset that the Union did not require that access to the SPI Plan be fundamentally based on seniority. But we accept the evidence of Mr. MacNeil that the Union negotiated diligently with respect to the terms of the SPI Plan and considered the result that was ratified by the membership to be a significant improvement over the former process.

[51] Collective bargaining is a complex and dynamic process that involves conflict, compromise, confrontation, horse-trading, puffery, mutual education, psychological pressure, nimble maneuvering and totally frank discussion, in varying proportions. The agreement that results from the alchemy that takes place in the crucible of such negotiations is one that has evolved from its predecessor, and which will evolve again after the next round of negotiations. Seldom, if ever, does either party get everything that it wants. In the present case, the Union did not get everything that it wanted in a succession planning incentive plan, but that does not mean that it did not fulfill its duty of representation in bargaining. As the Supreme Court of Canada observed in *Tremblay*, *supra*, at paras. 21-23, in collective bargaining a union:

> *. . . often has to deal with the consequences of the history and problems of the group it represents. Interests may have been created, legal situations may have crystallized, commitments may have been made. In such a situation, even though the duty of representation is carried out in the present, but from the perspective of the foreseeable future of the agreement to be negotiated, the union will sometimes have to take those interests or rights into account when deciding on the approaches to which the agreement will give form and effect for the future.*

But, that being said, the Court went on to observe that:

> *The employer, which must negotiate in good faith for the purposes of entering into a collective agreement…has no legal obligation to accept the union's proposals. …It would be difficult for a union to guarantee the outcome of collective bargaining. Sometimes it*

> *may have to accept a questionable agreement rather than start or prolong a labour dispute.*

[52] For these reasons, in the absence of any specific evidence of deficiency in collective bargaining representations by the Union, or evidence that it did not fairly assess the interests of its collective membership and the interests of individual members likely to be affected, we are not prepared to find any culpable failure on its part to fulfill this arm of the duty of representation.

[53] With respect to the fulfillment of its duty to Mr. Hidlebaugh as an individual member pursuant to s. 25.1 of the *Act*, it is our opinion that the Union did not violate the provision. Its representatives investigated the facts and circumstances of his complaint. They analysed their findings. They communicated with Mr. Hidlebaugh in a timely fashion and in an honest manner with respect to the results of that investigation. They then sought further detail from representatives of the Employer. They considered the interests of the collective membership with respect to the issue as well as the individual interest of Mr. Hidlebaugh. They arrived at a decision regarding the merits of a grievance. They communicated that decision to Mr. Hidlebaugh in a timely manner. There was no evidence of any animosity towards Mr. Hidlebaugh by Union representatives. The perceived late application for SPI Plan participation by other members was reasonably explained as employment of the lay-off amelioration mechanism in article 7.2 of the collective agreement, rather than the SPI Plan itself.

[54] For the foregoing reasons the application is dismissed. We thank Mr. Hidlebaugh and Mr. Engel for their skill and courtesy in the presentation of the case.

DATED at Regina, Saskatchewan this **20th** day of **May, 2003.**

LABOUR RELATIONS BOARD

James Seibel,
Vice-Chairperson