The Labour Relations Board
Saskatchewan

JOHN KIENDEL, RICHARD IRVINE AND RALPH BANDA, Applicants v. UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 248-P and MITCHELL'S GOURMET FOODS INC., Respondents

LRB File No. 111-02; September 10, 2003
Vice-Chairperson, Wally Matkowski; Members: Bruce McDonald and Brenda Cuthbert

The Applicants:	John Kiendel, Richard Irvine and Ralph Banda
For the Respondent Union:	Gary Bainbridge
For the Respondent Employer:	Kevin Wilson

Duty of fair representation – Scope of duty – Union went to great lengths to meet applicants' concerns including involving mediator – Applicants themselves concede that grievance against employer has absolutely no chance of success – Board dismisses application.

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

REASONS FOR DECISION

Background:

[1] John Kiendel, Richard Irvine and Ralph Banda (the "Applicants") filed an unfair labour practice application dated June 20, 2002 alleging that United Food and Commercial Workers International Union, Local 248-P (the "Union") violated s. 25.1 of *The Trade Union Act,* R.S.S.1978, c.T-17 (the "*Act*") and failed to represent the Applicants fairly and reasonably by refusing to advance a grievance against Mitchell's Gourmet Foods Inc. (the "Employer") relating to the Applicants not receiving double time for statutory holidays worked in December, 1999.

[2] At the hearing, the Applicants asked that the Union be made to pay them the difference between the wages which they received for the days in question and the wages which they assert that they should have received. The Applicants conceded that no grievance could be successfully advanced against the Employer. This matter was heard by the Board in Saskatoon on May 6 and 7, 2003.

Facts:

[3] The relevant facts in this case are not in dispute. In 1999, Christmas Day and Boxing Day fell on a Saturday and Sunday. Pursuant to the provisions of the collective agreement entered into between the Union and the Employer, these holidays had been moved to Friday, December 24, 1999 and Monday, December 27, 1999. As such, employees would obtain the statutory holidays off, namely December 24 and 27, 1999, and have to work December 25 and 26, 1999.

[4] In the fall of 1999, some employees noticed this anomaly and asked the Union to attempt to switch the statutory holidays to December 25 and 26, 1999. Plant employees unanimously agreed with this change. The Union then approached the Employer, who agreed to switch the statutory holidays "so long as it did not cost any extra money." This movement of statutory holidays is permitted pursuant to the provisions of the collective agreement.

[5] The maintenance department, a division of the plant which employs trades people such as electricians, millwrights and boiler operators, wanted the same deal the plant employees received.

[6] Jim Boyko, a shop steward in the maintenance department, canvassed employees in the department and advised Union authorities that there was no opposition to the change. As such, the Union and the Employer also agreed to switch the statutory holidays to December 25 and 26, 1999 for the maintenance department.

[7] The Applicants worked Friday, December 24 and Monday, December 27, 1999 and were paid their regular wages for those days. In January, 2000, the Applicants asked the Union to filed a grievance on their behalf, asking the Employer to pay the Applicants for December 24 and 27, 1999 as if those days were statutory holidays.

[8] The Union filed a grievance on behalf of the Applicants. After the Union conducted an investigation, it withdrew the grievance, concluding that to proceed with the grievance would be fundamentally improper and in bad faith, given that the Union had agreed with the Employer to change the statutory holiday dates. In addition, the Union concluded that to proceed with the grievance would jeopardize the future bargaining relationship between the Employer and the Union, as the Employer would not be able to take the Union at its word.

[9] The Union advised the Applicants of its decision to withdraw the grievance and agreed to utilize a mediator to attempt to address the Applicants' concerns. The joint mediation meeting did not take place as the Applicants cancelled two proposed meetings.

[10] The Applicants filed this application on June 21, 2002. The Applicants concede that a grievance against the Employer in this matter will not be successful. Their complaint is that the Union should not have entered into the agreement with the Employer which changed the December, 1999 statutory holiday dates without first having the negotiating committee involved and a general membership vote. Secondly, the Applicants claim that the Union has made mistakes before and, to correct its mistakes, the Union has paid members money. The Applicants attempted to introduce evidence relating to the closure of the Employer's beef kill line and the Union paying approximately $93,000 to its members. The Union would not waive its claim of privilege on the legal opinion it received in regard to the beef kill line incident. The Applicants claimed that this payment by the Union was precedential and meant that the Union could pay them for the difference in their wages, arising from the change to the December, 1999 statutory holiday dates.

[11] Following the evidence of the Applicants, the Union brought forward a non-suit motion. Counsel for the Union argued that there was absolutely no evidence that the Union had acted in a manner which contravened s. 25.1 of the *Act*. Counsel noted that the Applicants themselves acknowledged that the Union cannot win a grievance against the Employer relating to the statutory holiday change, given the Union's agreement to the change. Counsel for the Union argued that, after a delay of approximately two and one half years, the Applicants simply wanted the Union to give them some money.

Relevant statutory provision:

[12] Section 25.1 of the *Act* 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.*

Analysis:

[13] The non-suit motion is granted and the application is dismissed. It is completely devoid of merit. The Applicants themselves concede that a grievance has absolutely no chance of success, so they look to the Union for some money. There has been no breach of s. 25.1 of the *Act*.

[14] The Union has gone to great lengths to attempt to meet the concerns of the Applicants, including getting a mediator involved. Unfortunately, this did not bring an end to the matter.

[15] During the hearing, counsel for the Employer attempted to elicit evidence from a witness to the effect that it would be beneficial for Union members to have two consecutive days off with their families, namely Christmas Day and Boxing Day, rather than having off December 24 and 27, 1999. The obvious purpose of counsel for both the Union and the Employer asking these questions was that they were attempting to demonstrate that an agreement had been entered into between the Union and the Employer and that this agreement was a logical one.

[16] In regard to the logic issue, the Board made the comment to the effect that it "depends on the family." By making this comment, the Board was questioning the blanket proposition that everyone would want to spend two days off work with their immediate family. The Board was not questioning the Applicants' motive for not wanting two consecutive days off. Unfortunately, the Applicants took offence to both the line of questioning and the Board's comment. In their materials they claim that the Union alleged that the Applicants did not want to spend time with their family. However, that is not what happened, as outlined above. The Board recognizes that appearing before a tribunal can at times be a difficult process for non-lawyers, especially when facing lawyers on the opposite side. Now that the Applicants are removed from this stressful situation, hopefully they will realize that none of the parties intended to offend them with either the line of questioning or any comments that followed.

[17] Finally, the Applicants complained that they were not given access to certain documents which they attempted to obtain by subpoena. Even if the Union had waived its claim of privilege on the opinion letter relating to the beef kill line incident, this information could not have assisted the Applicants on this s. 25.1 application. This application deals with a grievance under a collective agreement, and the Union's conduct in that regard, not the terms of a special payment made by the Union to its members.

DATED at Regina, Saskatchewan this **10th** day of **September, 2003.**

LABOUR RELATIONS BOARD

Wally Matkowski,
Vice-Chairperson