The Labour Relations Board
Saskatchewan

JOSEPH NISTOR, Applicant v. UNITED STEELWORKERS OF AMERICA, Respondent

LRB File No. 112-02; January 14, 2003
Chairperson, Gwen Gray, Q.C.; Members: Bruce McDonald and Marshall Hamilton

The Applicant: Joseph Nistor
For the Respondent: Neil McLeod, Q.C.

Duty of fair representation – Arbitrary conduct – Board finds that union did not act arbitrarily in its prosecution of applicant's grievance – Board dismisses complaint.

Duty of fair representation – Practice and procedure – Delay – Whether applicant's delay in bringing complaint prejudicial to union's ability to prosecute grievance – Subsequent to events giving rise to complaint, applicant's employment terminated and termination upheld by arbitrator – Union has no ability to prosecute original grievance – Board would dismiss complaint on basis of delay alone.

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

REASONS FOR DECISION

Background:

[1] Mr. Joseph Nistor (the "Applicant") filed an application under Section 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") alleging that the United Steelworkers of America (the "Union") failed to fairly represent him in a grievance proceeding. The Union denied that it failed in its duty owed to the Applicant. A hearing was held in Regina on November 12, 2002 and November 18, 2002.

Facts:

[2] The Applicant was employed at International Mill Service, Inc. (the "Employer" or "IMS") in Regina for 21 years. During his employment, the Applicant was active in the Union at all levels and was president of its composite Local 5917 for 15 years. Local 5917 comprises 18 separate bargaining units. In his own bargaining unit, the Applicant was the chief negotiator for the Union and its chief shop steward.

[3] In October 2000, the Applicant was asked to resign from his positions in the Union for reasons that are not related to, and have no bearing on, this application.

[4] On December 23, 2000, the Employer suspended the Applicant for four days as a result of an incident in which the Applicant backed his hot loader into a pot full of slag in the steel plant at IPSCO. The accident resulted in damage to the loader. The Employer determined that the Applicant had been careless in operating the loader and it imposed the four-day suspension.

[5] The Union filed a grievance with the Employer protesting the discipline. By that time, Mr. Keith Donald had replaced the Applicant as the Union's chief shop steward at IMS. Mr. Donald received a copy of the notice of discipline sent to the Applicant by IMS. He drafted a grievance with the Applicant and submitted it to the Employer. In its grievance, the Union disputed both the imposition of the discipline and the length of the penalty.

[6] IMS and the Union held a second stage meeting, in accordance with the terms of the collective agreement. Mr. Donald attended on behalf of the Union along with the Applicant and Pat Carrigan, shop steward and unit president. The Union took the position that the discipline imposed on the Applicant was too harsh and the Applicant informed the Employer's representatives that if the penalty was reduced to a two-day suspension he would not proceed with the grievance. IMS, however, relied on the Applicant's work record and took the position that the suspension was justified. There was no resolution of this matter at Step 2.

[7] The parties held a third stage meeting on January 23, 2001 at the Union's Regina office. Mr. Jeff Kallichuk, staff representative, conducted the negotiations on behalf of the Union while Mr. Michael Rochester, manager of human resources for IMS, conducted the negotiations for the Employer by telephone from the Employer's Pennsylvania headquarters. The Applicant and Mr. Donald also attended the meeting for the Union. Mr. Faron Comaniuk, IMS site superintendent, and one other member of IMS's management attended at the meeting on behalf of IMS. During this meeting, Mr. Kallichuk pressed the Employer to reduce the penalty as in the Union's opinion, it was too harsh. Mr. Rochester agreed to discuss the matter further with Mr. Kallichuk after

the meeting and, as a result of these further discussions, IMS agreed to reduce the penalty from a four-day suspension to a three-day suspension.

[8] Mr. Kallichuk testified that he communicated the offer to the Applicant directly and through Mr. Donald. Mr. Donald recalled that Mr. Kallichuk asked him to have the Applicant contact Mr. Kallichuk at the Union's office to discuss the matter. Mr. Donald reminded the Applicant to do so on several occasions. Mr. Kallichuk recalled discussing IMS's offer with the Applicant over coffee at the Union's office and asking the Applicant to "think about it" and get back to him with his decision. According to Mr. Kallichuk and Mr. Donald, the Applicant did not respond to the requests. As a result, after some time, they discussed the grievance and concluded that the Union would not likely succeed if the grievance were referred to arbitration. Mr. Kallichuk took into account a number of factors, including his own knowledge of the Applicant's work habits, his work record, and general arbitral law. Mr. Kallichuk and Mr. Donald did not communicate their decision not to refer the grievance to arbitration to the Applicant.

[9] The Applicant has a different recollection of these events. He does not recall being informed of the offer or of being told by Mr. Donald to contact Mr. Kallichuk to discuss the matter. As far as he recalls, after the second stage meeting, he asked Mr. Donald and Mr. Kallichuk what was going on with the grievance and did not get a satisfactory answer. The Applicant believes that the Union dropped the ball on this grievance and let the time lapse for referring the grievance to arbitration. The Applicant believed that he had a good chance of winning the grievance based on the theory that his discipline was out of line with discipline imposed on other employees for similar incidents of unsafe work.

[10] However, this is not the end of the story. The Applicant had another accident at work on July 1, 2001. On this occasion, he suffered personal injury and was on Workers' Compensation benefits for ten days. When he returned to work, he was given notice of discipline and was eventually terminated from his employment. IMS relied on the Applicant's past work record, including the discipline imposed related to the December 23, 2000 incident, to justify the Applicant's termination. The Union grieved the termination and referred the grievance to arbitration where it was upheld by arbitrator Robert Pelton in an award issued on October 26, 2001.

[11] In the course of the arbitration hearing, IMS offered the Applicant a "last chance agreement" whereby he would return to work on conditions designed to encourage him to work in a safe manner. The Applicant refused to accept the agreement and took his chances on winning the arbitration. Unfortunately for him, it was the wrong decision.

[12] The Applicant now complains to the Board in an application filed June 24, 2002 that the Union failed to fairly represent him in relation to the grievance filed regarding the December 23, 2000 incident. His theory is that if the Union had referred the four-day suspension to arbitration and won, he would not have lost his job as a result of the culminating incident that occurred on July 1, 2001. The duty of fair representation complaint comes 16 months after the imposition of the discipline and almost eight months after the arbitration award was issued by Mr. Pelton. As a remedy, the Applicant is seeking damages against the Union.

[13] The Applicant claims that he raised the issue of the suspension grievance with Mr. Neumann, Union representative, in March 2002. Mr. Kallichuk stated that the Applicant did not raise the issue with him after the July 1, 2001 incident and during the period of time he was working with the Applicant on his termination grievance.

Arguments of the Parties:

[14] The Applicant argued that the Union was derelict in its duty by not processing the suspension grievance to arbitration. He noted the absence of written accounts of the Employer's offer to reduce the penalty from four days to three days; the absence of written communication to him concerning the offer; the lack of notice from the Union regarding the abandonment of the grievance; and the lack of proper procedures within the Local Union of reporting on and recommending action on the grievance.

[15] The Union argued that it was not derelict in its duty. It noted that the Applicant only came forward with his complaint about the suspension grievance after the discharge grievance was lost. The Union argues that although Mr. Kallichuk and Mr. Donald did not formally communicate with the Applicant, they did follow normal

procedures and did consider all of the relevant factors in determining that the Union would not proceed to arbitrate the suspension grievance. The Union argued that its conduct did not fall within that category of negligence that would result in a finding that it had breached its duty of fair representation. Counsel referred the Board to *Chrispen v. International Association of Firefighters', Local 510,* [1992] 4th Quarter Sask. Labour Rep. 133; LRB File No. 003-92; *Radke v. Canadian Paperworkers Union, Local 1120,* [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92; *Yearly v. Service Employees' International Union, Local 299,* [1993] 4th Quarter Sask. Labour Rep. 57, LRB File Nos. 055-92, 080-92 and 081-92; and *Gregoire v. United Steelworkers of America Local 5890,* [1997] Sask. L.R.B.R. 766, LRB File No. 317-95.

Analysis:

[16] There are two issues that we will address in these reasons. First, was the application under s. 25.1 filed in a timely manner or should it be dismissed as a result of the delay in filing? Second, on the merits of the application, did the Union breach s. 25.1 by not referring the suspension grievance to arbitration?

Delay:

[17] The Board has considered the issue of delay in filing duty of fair representation applications in *Kinaschuk v. Saskatchewan Insurance Office and Professional Employees' Union, Local 397,* [1998] Sask. L.R.B.R. 528, LRB File No. 366-97. In that instance, the applicant filed an application under s. 25.1 some three years after the alleged failure of the union to represent him in a discharge grievance. The Board noted that the fundamental question is whether justice can still be done despite the delay and noted the various factors that will be considered in arriving at the decision. In particular, the Board will consider if the respondent union is prejudiced in its prosecution of the grievance as a result of the delay.

[18] In the present case, given the timing of the application under s. 25.1, the Union would not be able to prosecute the grievance even if it were found to have been in breach of the duty of fair representation in relation to the suspension grievance. The intervening event, that is, the termination of the Applicant's employment and the resulting arbitration award upholding the termination, render it impossible for the Union

to prosecute the Applicant's suspension grievance. The Applicant has no employment status with IMS at this time as s. 25(1.2) of the *Act* renders the arbitration award "final and conclusive." The only remedy available for a breach of s. 25.1 in these circumstances is an order for damages against the Union.

[19] In some circumstances where an employee has been unfairly represented by a union in an arbitration hearing, damages may be the appropriate remedy: see, for instance, *Rousseau v. International Brotherhood of Locomotive Engineers,* 95 CLLC 220-064 (CLRB).

[20] However, in this case, the Applicant was aware that the Union had not referred the suspension grievance to arbitration prior to the termination of his employment and the subsequent arbitration of his termination grievance. He did not explain to the Board why he did not pursue an application under s. 25.1 at some point between the Step 3 meeting on January 23, 2001 and July 1, 2001, the date of the culminating incident. The Applicant is an experienced union member and had the knowledge and ability to bring an application to the Board in a timely fashion.

[21] We find that the Applicant unreasonably delayed bringing his application under s. 25.1 and that this delay has prejudiced the Union's ability to prosecute the grievance if it was found to be in violation of s. 25.1.

[22] On this ground alone, we would dismiss the application.

Merits of the Application:

[23] Section 25.1 of the *Act* requires a union to represent employees in grievances and arbitration in a manner that is not arbitrary, discriminatory or in bad faith. The Applicant's complaint in this case alleges that the Union was arbitrary in its approach to his suspension grievance by failing to refer the grievance to arbitration in a timely fashion. In our recent decision in *Johnston v. Service Employees' International Union,* [2003] Sask. L.R.B.R., LRB File No. 157-02 (unreported as of the date of these Reasons), the Board summarized the requirements for non-arbitrary treatment as follows:

> *The duty of fair representation requires the Union to act in a manner that does not demonstrate bad faith, arbitrary treatment or discrimination. The general requirements were set out by the Supreme Court of Canada in Canadian Merchant Services Guild v. Gagnon, [1984] 1 S.C.R. 509. In particular, the Court held that "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."*

[24] In *Radke, supra,* the Board expanded on the requirement to avoid "arbitrary" treatment as follows:

> *What is expected of trade union officials in their representation of employees is that they will act honestly, conscientiously and without prejudgment or favourtism. Within the scope of these criteria, they may be guilty of honest errors or even some laxity in the pursuit of the interests 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.*

[25] Mr. Kallichuk and Mr. Donald described the steps they took to prosecute the Applicant's suspension grievance. They vigorously pursued the grievance through Steps 2 and 3. At the Step 3 meeting, Mr. Kallichuk continued to press Mr. Rochester for a reduction in the penalty and Mr. Rochester eventually offered a reduction.

[26] The Applicant disputes that this offer was communicated to him. There is no documentation that the offer was communicated to the Applicant and we cannot say, based on the evidence, that Mr. Kallichuk or Mr. Donald did actually convey the offer to the Applicant. Mr. Kallichuk and Mr. Donald testified that they did convey the information, while the Applicant denied that he was informed of the offer. The lack of documentation tends to support the Applicant's view of the matter and we are of the view that it would be unlikely that the Applicant would not recollect such information. His evidence was given in a straightforward manner. This is not to suggest, either, that Mr.

Kallichuk or Mr. Donald were not telling the truth. However, they may have faulty memories in relation to this aspect of the evidence.

[27] If the offer was not conveyed to the Applicant, Mr. Kallichuk and Mr. Donald certainly were lax in this aspect of their representation of the Applicant. However, such laxness does not necessarily mean that they were grossly negligent. They did consider the overall issues arising from the grievance, including the likelihood of succeeding at arbitration, their knowledge of the Employer's case against the Applicant, and general arbitral law. In our view, their assessment of the likelihood of succeeding on the grievance was not superficial or careless. It must be recalled that the Applicant did not deny responsibility for the accident on July 1, 2000 that resulted in the imposition of discipline, although he did complain that the severity of the penalty was out of proportion to the penalties imposed on other workers for similar accidents. Some discipline would be imposed on the Applicant resulting from the accident and, as such, it would continue to form part of the disciplinary record that could be considered by the Employer in relation to the culminating incident.

[28] In our view, the Union did not act in an arbitrary manner in relation to its obligation to represent the Applicant. Mr. Kallichuk and Mr. Donald considered the relevant factors and came to a conclusion that was based on the information before them.

[29] For these reasons, the application is dismissed.

DATED at Regina, Saskatchewan this **14th** day of **January, 2003.**

LABOUR RELATIONS BOARD

Gwen Gray, Q.C.
Chairperson