

**Labour Relations Board
Saskatchewan**

CHARLES HAWKINS, Applicant v. UNITED TRANSPORTATION UNION, LOCAL 1110 and CARLTON TRAIL RAILWAY COMPANY, Respondents

LRB File No. 193-01; March 19, 2003

Vice-Chairperson, James Seibel; Members: Clare Gitzel and Bruce McDonald

For the Applicant: Ron Parchomchuk
For the Union: Michael Church
For the Employer: No one appearing

Duty of fair representation – Arbitrary conduct – Union investigated circumstances of grievance, considered relevant factors and weighed competing interests of applicant, union members and union – Board finds union did not act arbitrarily and dismisses application.

Duty of fair representation – Scope of duty – Board reviews scope of duty relating to grievance and arbitration proceedings – Union investigated circumstances of grievance, considered relevant factors and weighed competing interests of applicant, union members and union – Board finds union did not act arbitrarily, discriminatorily or in bad faith and dismisses application.

The Trade Union Act, ss. 5(d) and 25.1

REASONS FOR DECISION

Background:

[1] In late 1997, Carlton Trail Railway Company (“CTR”) acquired Canadian National Railway’s (“CN”) Prince Albert terminal and associated lines between Saskatoon, North Battleford and Meadow Lake. Prior to the transfer, Charles Hawkins (the “Applicant”) was employed by CN at Prince Albert as a conductor. He was a member of the United Transportation Union, Local 1110 (“UTU” or the “Union”). UTU is the bargaining agent for a unit comprising conductors, assistant conductors and brakemen employed by CN, and for another unit of such employees employed by CTR.

[2] Prior to the sale, affected UTU members employed at CN were given the option to transfer to other CN operations, to transfer to CTR retaining their accumulated CN seniority, or to sever their employment from CN and receive a severance payment. The Applicant opted to transfer to a management position with CTR out of the scope of the Union pursuant to an

arrangement between CTR and the Union that would have allowed him to retain his accumulated CN seniority. A few weeks before the transfer of the CN operations to CTR and unbeknownst to the Union, he commenced employment with CTR and resigned his employment with CN.

[3] In 1999, members of the UTU bargaining unit at CTR learned that the Applicant had resigned his employment with CN prior to the transfer of operations to CTR. They disputed his being placed on the seniority list based on retention of his CN seniority. The Union conducted an investigation and adjusted his seniority downwards. In the summer of 2001 CTR terminated the Applicant's employment in his management position, but gave him the option, which he accepted, of reverting to a conductor's position within the scope of the UTU bargaining unit at CTR. Upon reverting to the bargaining unit, the Applicant requested that the Union grieve his seniority placement. The Union refused. The Applicant brought the present application alleging that the Union breached its duty of fair representation in violation of s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "Act").

[4] 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.

[5] At the hearing, the parties agreed that CTR was the successor to CN pursuant to s. 37.2 of the Act.

Evidence:

[6] Brian McGinty worked in the railway industry for almost 30 years. He was appointed president of CTR by its parent company, OmniTrax, a few months before the transfer from CN in late 1997. He left the company in February 1999. By consent of the parties he testified by telephone from Winnipeg.

[7] Members of UTU, along with members of the Brotherhood of Locomotive Engineers ("BLE"), are represented in bargaining by the Canadian Council of Railway Operating Unions ("CCROU"). In September 1997, CN provided notice to CCROU of its

intention to sell the material rail lines to OmniTrax, which lines would be operated by CTR. CN and CCROU entered into an agreement dated October 23, 1997 (the “material change agreement”) to provide for the terms, conditions and benefits that would apply to affected unionized employees. By that date, CTR and the railway unions, including those represented by CCROU, had essentially concluded a collective agreement that would apply to CTR’s unionized employees when the sale transaction closed and CTR commenced operations. Article 2 of the material change agreement sets out the options available to affected CN employees, as follows:

2. *Eligible employees...will be required to elect option A, B or C as outlined below. Eligible employees must make their election in writing in accordance with the provisions set out in Appendix B. Such election shall be irrevocable.*
- a) *elect to transfer to Carlton Trail Railway, this option is conditional upon successfully being awarded a position at CTR (see appendix B);*
or
 - b) *elect to remain with CN and exercise seniority in accordance with [certain conditions];*
or
 - c) *elect to sever their employment relationship with CN.*

[8] The exact date when CTR would commence operations and require the services of transferring CN employees was not then known. Appendix B to the material change agreement addressed this point as follows:

This letter will confirm that the date of commencement of operations by Carlton Trail Railway Company (Transfer Date) has not yet been determined.

Employee meetings will be conducted and eligible employees will have no less than ten days to make their election as per item two of the memorandum of agreement dated October 23, 1997.

When a transfer date has been determined it will be communicated to CN in writing at least 14 days in advance.

[9] Mr. McGinty wanted one of the affected employees, Roland Hackl, a CN conductor and then local chairperson of UTU, Local 1110 at Prince Albert, to transfer to

the position of CTR's superintendent of transportation, a management position out of the scope of the UTU bargaining unit. He discussed the matter with Mr. Hackl in October 1997 but Mr. Hackl declined the offer. Mr. McGinty asked Mr. Hackl's opinion of the suitability of some other CN employees, including the Applicant, for the position

[10] Representatives of OmniTrax, CN, UTU and the other railway unions met in Saskatoon on November 17, 1997 and attended to several matters. First, CTR signed a comprehensive collective agreement with CCROU representing UTU and BLE, and also with the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 100, and the Brotherhood of Maintenance of Way Employees Western System Federation, for a term of three years "effective on the commencement of operations by CTR in 1997," then anticipated to be December 1, 1997. In fact, the commencement date was a little later, on December 8, 1997.

[11] The collective agreement with CTR provided that employees moving from CN to positions with CTR would retain their accumulated CN seniority for the purposes of placement on the CTR seniority list (i.e., they would retain their relative seniority positions). Anyone moving to an out-of-scope position would be placed on an "excepted list" where their accumulated CN seniority would be preserved in the event they moved to an in-scope position with CTR in the future. According to Mr. McGinty, to be eligible to bring their CN seniority to CTR, transferring employees had to transfer on the date CTR commenced operations. On these points, the collective agreement provides in part as follows:

ARTICLE 6 – SENIORITY

6.1 ...CTR agrees to recognize the length of continuous service with...CN of any employee who resigns from CN and who transfers to CTR on the date of commencement of operations on the subdivisions purchased by CTR from CN for the purposes of placement on the seniority roster, entitlement to benefits and for calculation of entitlement to vacation. Such an employee shall be placed on the roster according to his seniority from CN. ...

[12] According to Mr. McGinty, if employees resigned from CN prior to the date that CTR commenced operations, they would not bring any CN seniority with them

if they became employed by CTR, because they would not be considered to be “transferring” employees.

[13] The other main business at the November 17, 1997 meeting was to consider the transfer elections that affected CN employees had made thus far. Both the Applicant and Mr. Hackl attended the meeting. According to Mr. McGinty, the Applicant was assured that if he elected to transfer to the superintendent’s position with CTR in accordance with the material change agreement, he could retain his CN seniority on an “excepted list.” He was specifically told that it was not necessary for him to submit a separate employment application to CTR – he just had to elect to transfer.

[14] Mel Eldridge has been employed by CN as an engineer since 1973. He is a member of both UTU and BLE. He has held several executive positions in UTU including vice-general chair for Western Canada from 1989 to 1999. Mr. Eldridge was involved in the negotiations between the Union and CN and the Union and OmniTrax in 1997. He was the signing officer for UTU on the collective agreement made with CTR of November 17, 1997.

[15] Mr. Eldridge also testified about the November 17, 1997 meeting. His recollection was similar to Mr. McGinty’s: that is, the two main items of business were signing the collective agreement and assigning positions to CN employees electing to transfer to CTR or other CN operations based on their seniority. According to Mr. Eldridge, the Union had prior experience with this kind of situation, the material change agreement in the present case being nearly identical to one negotiated a few months before respecting the transfer of CN’s Hudson Bay – The Pas lines to Hudson’s Bay Railway.

[16] Mr. Eldridge explained the method and consequence of resigning from CN. Employees resign by submitting a “Resignation Notice” form, which provides as follows:

[Name of employee, position and department] voluntarily resigns from the service of Canadian National Railways effective [date]. I fully understand that in so resigning I give up my rights and privileges as an employee, and that if I re-enter the service, I shall commence as a new employee. [Signed dated and witnessed].

[17] On the effective date of the resignation, employees cease to be CN employees and forfeit their seniority. According to Mr. Eldridge, employees transferring to CTR were not to resign from CN, but would automatically be transferred with their CN seniority on the date that CTR commenced operations and then be deemed to have resigned as per Art. 3 of the material change agreement and Art. 6.1 of the collective agreement with CTR. It would only be beneficial for employees to elect to sever their employment with CN under the material change agreement and go to work for CTR if the employees could begin collecting their CN pension while working for CTR. Indeed, that is what one of the affected employees, Don Dugan, elected to do.

[18] Mr. Eldridge said that he and Mr. Hackl had a discussion at the November 17, 1997 meeting about the Applicant's position with the Applicant present. Mr. Hackl asked him whether the Applicant's CN seniority would be preserved if the out-of-scope position with CTR did not work out. Mr. Eldridge replied that the Applicant's relative seniority could be protected on an "excepted list" in the same manner as the seniority of engineers and conductors who went out-of-scope at CN was then protected. He said he advised Mr. Hackl that the Applicant need not complete an application for employment with CTR if he was going into an out-of-scope position, but that he would simply transfer on the commencement date.

[19] At the November 17, 1997 meeting, after going through the election forms of the affected employees, representatives of CCROU (including Mr. Eldridge), CTR and CN signed a list summarizing the elections and awarded positions to each employee based on seniority. In essence, the employees, whether transferring to CTR or to other CN operations, bid on available positions by seniority. The Applicant is listed as being awarded "CTR ep" (i.e., "excepted position"), which did not require him to bid by seniority as the CTR superintendent's position was out-of-scope.

[20] However, unbeknownst to the Union, the Applicant submitted a CN Resignation Notice form (see, *supra*) on November 19, 1997 with an effective date of November 17, 1997. Mr. Eldridge testified that he had no inkling at the November 17, 1997 meeting that the Applicant was going to resign from CN, and he was unaware that he had done so until some years afterward when he learned of it from the Applicant's legal counsel. A memorandum Mr. Eldridge sent to then UTU general chairperson J.W.

Armstrong on November 21, 1997 showed where the affected members were assigned under the material change agreement and identified Mr. Dugan as the only member electing to resign from CN. An explanatory note in the memorandum with respect to the Applicant states, "Chuck Hawkins ... will be placed on the Seniority List as he is qualified as Conductor. Nobody opposes this."

[21] The Applicant was employed as a conductor by CN from April 1991 to November 1997, when he moved to the superintendent of transportation position at CTR. In approximately August 2001, he moved to an in-scope conductor position with CTR.

[22] The Applicant testified that Mr. McGinty offered him the superintendent's position with CTR in the fall of 1997. The Applicant discussed the offer numerous times with his friend and union officer, Mr. Hackl, who told him that he himself had turned down the offer. Mr. Hackl advised him that if he took the position he could probably have his seniority protected, in the same manner as if he went out-of-scope at CN.

[23] The Applicant completed a CTR Application for Employment dated November 4, 1997 identifying that he was available for work starting that date. Indeed, he said that he was already working for CTR by that time while continuing to be employed at CN on "booked off" status. He said that his supervisor at CN was aware of this. He made his last trip as a CN employee on approximately November 1, 1997. He testified that he accepted the position with CTR before he had confirmation from the Union that his seniority would be protected on an "excepted list" if he elected to transfer to the CTR superintendent position.

[24] The Applicant attended the meeting of CN, CTR and officials of the various railway unions on November 17, 1997. He testified that he was present when Mr. Hackl asked Mr. Eldridge whether protecting the Applicant's seniority would be a problem if he went out-of-scope with CTR. Mr. Eldridge left to make a phone call, returned, and advised that it would not be a problem. Mr. Hackl asked the other parties present at the meeting if there would be any problem protecting the Applicant's seniority and they indicated that there would not. The Applicant said that there was no mention at the time of his resigning from CN.

[25] After this, the employees' bids were opened. The Applicant said he requested a "bid form" (i.e., used by employees electing transfer to CTR or other CN operations to bid on in-scope positions on the basis of seniority) because he had not completed one. He was told that he should not complete a bid form because it would result in his "holding" an in-scope position, effectively blocking another affected employee with less seniority desiring to transfer in-scope to CTR.

[26] The Applicant said he submitted a resignation notice to CN effective November 17, 1997 because the CTR managers had preparatory work to complete before operations commenced. He submitted the notice to CN superintendent Randy Clearwater. He said that he did not discuss doing so with Mr. Hackl or anyone from the Union. He received a severance payment from CN in accordance with the UTU-CN collective agreement.

[27] In early 1999, the first seniority list was posted at CTR. The Applicant was first on the UTU conductor list and fifth on the combined CCROU list. The Union did not "sign off" the list. In the fall of 1999, the Applicant received a copy of a letter from Mr. Hackl, Local Chairperson of UTU, Local 1110, to UTU general chairperson B.J. Henry dated August 31, 1999. It referred to requests made by UTU members at CTR to remove the Applicant from the seniority list. The letter said that UTU, Local 1110 made a motion to "support the Local members of the CTR in their endeavour to remove C.W. Hawkins from the seniority list of the CTR" because the Applicant was improperly listed, having resigned from CN prior to CTR commencing operations, and asked Mr. Henry to review the appeal of the Applicant's seniority.

[28] Mr. Hackl attached a letter from UTU's CTR representative and vice local chairperson, John Pruden, to Mr. Hackl, dated July 3, 1999, which set out the position of UTU members at CTR, as follows:

The UTU members at Carlton Trail Railway have unanimously asked me to forward the following to you in order to appeal the seniority of C.W. Hawkins, based on the following:

1) *Mr. Hawkins elected to sever his employment with Canadian National Railways effective November 17, 1997 under*

the conditions outlined in Article 2, Option C of the Memorandum of Agreement dated October 23, 1997.

2) *Mr. Hawkins accepted a management position with Carlton Trail Railway effective November 17, 1997, prior to the CTR takeover.*

3) *Mr. Hawkins did not transfer to CTR as provided for in the October 23, 1997 Memorandum, Article 2, Option A and CTR Agreement Article 6.1, and as such should have no seniority on the CTR UTU list relative to his CN UTU seniority.*

4) *Mr. Hawkins hired on to CTR directly into management and never made a trip from UTU ranks, and, in accordance with Article 6.2 of the CTR Agreement should not hold a turn on the UTU list.*

5) *The Vice General Chairperson at the time, Brother Eldridge, and you, then Local Chairperson for Prince Albert, placed the Applicant on the UTU seniority list with no right to do so. The Applicant was not working as a conductor with CN any longer and was in fact working as Superintendent of Operations for CTR. Whatever sense of allegiance you had for a former member you represented was misplaced. There is no provision in the CTR Agreement or the October 23, 1997 Memorandum of Agreement to allow someone that hired on as management a place on the seniority list.*

[29] The Applicant's counsel, Mr. Parchomchuk, wrote to Mr. Hackl on September 7, 1999 advising that he represented the Applicant and requesting copies of documents and correspondence regarding the seniority issue. Mr. Hackl spoke with, and wrote back to, Mr. Parchomchuk on September 8, 1999, advising that UTU general chairperson Henry was reviewing the matter and that the Applicant would be notified of the ruling, any change to his seniority, and his options.

[30] Mr. Henry wrote to the Applicant on March 22, 2000 advising that the seniority appeal had been allowed in part, in that the Applicant would be placed on the seniority list after those employees that transferred from CN to CTR on the commencement date of December 8, 1997, but ahead of any new employees hired since that date by CTR. The letter provides, in part, as follows:

In order to conduct this review, this office requested information from Canadian National Railway regarding your employment

status at the time of CTR takeover, as well as information from CTR regarding your application for employment and employment date at that railway. In addition, Local Chairperson Hackl and UTU vice President John Armstrong were interviewed regarding the awarding of positions at CTR. The results are as follows:

- 1. Documentation from CN shows that you resigned from CN effective November 17, 1997.*
- 2. Your application for employment with Carlton Trail Railway indicates that you applied for, and commenced employment with CTR on November 4, 1997.*
- 3. Article 6.1 of the Memorandum of Agreement between CTR and CCROU states, in part:
[See Art. 6.1, supra]*
- 4. You approached Local Chairperson Hackl prior to the awarding of the positions at CTR and asked him if you would be protected on the seniority list. No mention was made that you had already resigned from CN. At this time, it was common knowledge that you had accepted a management position with CTR.*
- 5. Local Chairperson Hackl forwarded your request to Vice General Chairperson Eldridge, who was representing this office. Without the information that you had already resigned from CN, the assumption was made that you were transferring to CTR at the commencement date, as provided for in Article 6.1 of the Memorandum of Agreement. You were awarded a position on the seniority position based on this assumption.*

Based on the foregoing, it is apparent that an error has been made regarding your placement on the seniority list. Our decision is as follows:

- 1. As your resignation from CN and employment at CTR occurred prior to CTR commencing operations, you were not eligible to transfer to CTR pursuant to the Collective Agreement.*
- 2. You commenced employment with CTR on November 4, 1997 and must be considered the senior person hired by CTR.*
- 3. As senior new hire at CTR, your seniority position should be properly be placed subsequent to those employees that transferred from CN at the takeover, but prior to those employees hired by CTR other than those who transferred.*

[31] In a letter to Mr. Pruden dated March 29, 2000, the Applicant grieved the Union's decision on his seniority status. The Applicant asserted, *inter alia*, as follows:

3) Prior to commencing employment at Carlton Trail Railway I was advised by Roland Hack, who was local Chairperson at that time, that the Union would protect my seniority. Relying on his representation I resigned from Canadian National Railway prior to the commencement date. As a result of the representation of Mr. Hackl the Union is prevented from now reducing my seniority.

4) At a meeting that occurred in Saskatoon in November 1997, ...the issue of my seniority was discussed. It was agreed by representatives of the UTU, the BLE and CTR that I would maintain my CN seniority. As such the union and CTR is now prevented from reducing my seniority.

[32] Mr. Henry wrote to the Applicant on June 27, 2000, advising that his grievance was denied and providing instructions for an appeal of the decision under the terms of the Union's constitution, including notice that there was a 90-day time limit for appeal. The Applicant did not appeal.

[33] While the Applicant was granted nearly four years' seniority under Mr. Henry's decision of March 22, 2000, he was lower on the seniority list than he would have been had he been on the "excepted list." This meant that he would lose first call-in for overtime and earlier eligibility for engineer's training. The Applicant testified that he did nothing about Mr. Henry's decision at that time because, if he was staying in management at CTR and not returning to the bargaining unit, it was not worth the cost. He said this changed, however, when he was laid off from his superintendent's position and reverted to a conductor's position in the bargaining unit in the summer of 2001, after bidding and being awarded the position in accordance with the seniority granted by Mr. Henry's decision. The present application was filed with the Board on September 20, 2001.

[34] The Applicant said that the Union responded reasonably promptly to his telephone calls, letters and requests for information, and performed a thorough investigation into his complaint even if he did not agree with the result.

[35] Roland Hackl has been employed by CN for some 14 years as a conductor. He is also qualified as an engineer and is a member of BLE. He has been a

local chairperson for UTU, Local 1110 since 1992. He is also a vice general chairperson for the UTU “committee of adjustment” which has jurisdiction over UTU members at CN and the short-line railways that acquired operations from CN, including CTR, from Vancouver to Thunder Bay.

[36] Mr. Hackl testified that he has known the Applicant for his entire career with CN and CTR, having initially trained the Applicant as a brakeman and yard helper. They were also friends outside of work.

[37] Mr. Hackl said that as local chairperson, his role with respect to the CN transfer to CTR was to provide the Union’s lead negotiator, Mr. Armstrong, with information regarding local conditions in order to help him address the adverse effects of the divestiture. He was privy to all negotiations regarding the material change agreement and the collective agreement between CTR and the railway unions. The Union had previous experience with this kind of situation, having been involved in the divestiture of other CN lines to Hudson’s Bay Railway about six months previously. That material change agreement was used as a template for the negotiations regarding CTR.

[38] Mr. Hackl explained that for good reason, the material change agreement rests on the premise that affected employees will remain CN employees until the moment that the transferee short-line railroad commences operations. If an employee severed employment from CN before the deal was completed, the Union would be helpless to do anything for the employee if the deal fell through. For example, the transfer to Hudson’s Bay Railroad was delayed about six months from the date initially planned. In another case, dealing with the transfer of lines at Grande Prairie, Alberta, the deal with the first purchaser fell through and the lines were not transferred for another year. In the case of CTR, the original date for commencement of operations was December 1, 1997 but was pushed back to December 8, 1997.

[39] Mr. Hackl testified that he was offered the job as CTR transportation superintendent, but he declined it. He said that he advised the Applicant not to take the position, as he felt that CTR would “dump” him after it got up and running. He advised the Applicant to go over to CTR as a conductor. He said that he also told him that he had to transfer pursuant to the material change agreement to retain his seniority.

[40] Between October 23, 1997, when the collective agreement with CTR was made in principle, and November 13, 1997, by which date affected employees had to make their elections, UTU held a “town hall meeting” with its members, including the Applicant, to inform them of their options under the material change agreement and their status under the CTR collective agreement upon transfer. Each employee received a copy of the material change agreement, the proposed collective agreement and an election form in a personally addressed package. For most of that period, Mr. Hackl did not “work the trains” so that he could be available to assist affected employees, field their questions and respond to their concerns.

[41] Mr. Hackl explained that because the Applicant opted to transfer to the out-of-scope management position with CTR, he was not required to complete a bid form for an in-scope conductor position. The Applicant would go directly into the management position, thus freeing up the opportunity for another affected employee to go in-scope with CTR upon transfer. No one who transferred was required to resign from CN, and indeed, resignation would result in a loss of their CN seniority. According to Mr. Hackl, the CTR collective agreement contemplated that seniority would be transferred unbroken if the affected employee “made the trip to CTR” as a UTU member. Mr. Hackl testified that he was not aware that the Applicant had resigned from CN until he received the complaint from the UTU local at CTR in 1999. He said that had he known that the Applicant was planning to resign, he would have advised against it. The Applicant was designated as an “excepted position” on the initial CTR seniority list as a result of the agreement of CTR and the railway unions at the meeting in November 17, 1997, but the agreement did not contemplate his resignation from CN before CTR commenced operations.

Arguments:

[42] Mr. Parchomchuk first addressed the issue of delay. Citing the decision of the Board in *Neskar v. Civic Employees Union, Local 21 (C.U.P.E.)*, [1995] 4th Quarter Sask. Labour Rep. 70, LRB File No. 122-95, he argued that notwithstanding the delay in making the present application, it was not unreasonable, there is no evidence of prejudice to the Union and justice can be done.

[43] In arguing the merits of the Applicant's position, counsel referred to the Board's decisions in *Banga v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep. 88, LRB File No. 173-93 and *Jungwirth v. International Brotherhood of Electrical Workers, Local 529*, [1998] Sask. L.R.B.R. 490, LRB File No. 018-98, as setting out the principles to consider on an application under s. 25.1 of the *Act*. In addition, counsel argued that the *Banga* case, in which the Board granted the application, is analogous on its facts.

[44] In *Banga, supra*, a group of employees filed a grievance claiming that the seniority allotted Ms. Banga was too great. The union and the employer reached an agreement to reduce Ms. Banga's seniority. Sometime later, the employer recalculated the seniority of several employees, including Ms. Banga, as a result of which her seniority was further reduced, making her subject to layoff. The union complained to the employer and it reversed its decision regarding Ms. Banga. However, a group of employees filed another grievance disputing her placement on the seniority roster. In a letter of understanding, the union agreed with the employer to a recalculation of the seniority of all employees according to a new formula. Ms. Banga disagreed with the result of the recalculation and filed an appeal, which under the terms of the letter of understanding, was to proceed to arbitration. However, the union decided to take the employees' second grievance to arbitration.

[45] Ms. Banga sought independent legal advice, and rejected a union offer to represent her at the arbitration because the union was unwilling to advance the argument that an arbitrator had no jurisdiction to determine the second grievance because it covered the same ground, settled by agreement, as the first grievance. The arbitrator accepted the preliminary argument and confirmed the calculation of Ms. Banga's seniority based on the resolution of the first grievance. The union refused to commit to accept this figure. It advised that her appeal under the letter of understanding would proceed to arbitration. Before that could occur, Ms. Banga filed an application pursuant to s. 25.1 of the *Act*, alleging that the union had failed to fairly represent her by refusing to calculate her seniority according to the resolution of the first grievance, by accepting and pursuing a second grievance on the same issue, and by rejecting the arbitrator's finding in the second grievance. The Board found that the union had violated s. 25.1 primarily because it refused to accept the determination of Ms. Banga's seniority

in accordance with the settlement of the first grievance and because it pursued the second grievance.

[46] Mr. Parchomchuk submitted that the Applicant's formal resignation from CN on November 19, 1997 has no bearing on what the parties at the November 17, 1997 meeting decided regarding the treatment of his CN seniority. That is, he said, the Union cannot strictly construe the material change agreement and CTR collective agreement to assert that the Applicant's subsequent resignation superseded the special deal regarding him. Counsel argued that the Applicant had merely relied on the representations of Mr. Hackl and the CTR and UTU representatives at the November 17, 1997 meeting.

[47] Mr. Parchomchuk submitted that the Union failed to fairly represent the Applicant by taking the position that it would not grieve his seniority placement. He requested that the Board order the Union to file and arbitrate a grievance. In addition, citing the decision of the Board in *Woodside v. Regina Police Association Inc.*, [2001] Sask. L.R.B.R. 599, LRB File Nos. 167-99, 168-99 & 169-99, counsel asked the Board to order the Union to pay for independent legal counsel to represent the Applicant at arbitration.

[48] Mr. Church, counsel for the Union, first submitted that the application ought to be dismissed on the basis that it is not timely. The Applicant missed the time limit for appealing Mr. Henry's decision under the Union's constitution. In support of this position, Mr. Church referred to the decision of the Board in *Kinaschuk v. Saskatchewan Insurance Office and Professional Employees' Union, Local 397*, [1998] Sask. L.R.B.R. 528, LRB File No. 366-97.

[49] With respect to the merits of the application, Mr. Church took the approach that the Union's refusal to accept and advance the Applicant's complaint was consistent with its interpretation of the material change agreement and the collective agreement with CTR from the start. That is, to be credited one's CN seniority in employment with CTR, one had to transfer seamlessly from CN to CTR on the date CTR commenced operations. This position was not arbitrary, he said, but designed to protect affected employees in the event the transfer to CTR fell through: their employment with

CN would remain intact and their seniority continue to accrue under the collective agreement with CN. He said that this was made clear at the informational meeting with affected employees and in the information package containing the election forms. While the Applicant's situation was somewhat anomalous compared to employees transferring to in-scope CTR positions in that he was not required to bid on an in-scope position, it was nonetheless important for his CN job security and seniority retention to transfer in the same manner and at the same time as the other employees.

[50] Mr. Church argued that the facts in *Banga, supra*, are not analogous to the present case, in that the Union has not failed to abide by a prior resolution of a grievance of the same issue. He said that the Union was unable to understand what prompted the Applicant to resign from CN in advance of the transfer of operations to CTR. In abiding by the agreement made at the November 17, 1997 meeting with respect to retention of his CN seniority as an excepted position, the Union had laboured under a misapprehension of the fact, which was not brought to its attention until 1999, that he had transferred to CTR along with the other affected employees. Upon being apprised of an issue regarding the retention of seniority, the Union investigated and confirmed that the Applicant had indeed resigned from CN some weeks before the transfer of operations to CTR. Mr. Church asserted that the Applicant was in the same position as if he had been dismissed for cause by CN before the transfer date. Nonetheless, the Union made a decision that resulted in the Applicant being allocated seniority ahead of UTU members at CTR hired since the transfer from CN.

[51] In support of his contention that the Union did not violate s. 25.1 in failing to carry forward a grievance to the Employer, Mr. Church cited the decisions of the Board in *Jungwirth, supra*; *Basaraba v. Saskatchewan Government Employees' Union*, [1994] 3rd Quarter Sask. Labour Rep. 216, LRB File No. 086-94; *Staniec v. United Steelworkers of America, Local 5917*, [2001] Sask. L.R.B.R. 405, LRB File No. 205-00; and the decision of the Canada Labour Relations Board in *Rhodes v. United Transportation Union* (1995), CLR 97 di 103.

[52] Mr. Church argued that the present case is distinguishable from *Banga, supra*. In that case, the union ignored or refused to recognize a prior grievance settlement that it had negotiated with the employer in relation to Ms. Banga's seniority.

In this case, the Union takes the position that it did not file a grievance because there was no violation of the collective agreement. The Union does not agree with the Applicant's assertion that he is entitled to retain his CN seniority when he had clearly resigned.

Analysis and Decision:

[53] On the first seniority roster posted after it commenced operations, CTR recognized the Applicant's seniority based on his presence on an "excepted list" as an in-scope CN employee who had transferred to an out-of-scope position with CTR under the terms of the material change agreement and the collective agreement, as it had agreed with the Union on November 17, 1997. Members of the local UTU unit at CTR appealed his seniority placement pursuant to the Union's constitution, alleging that the Applicant had not transferred to CTR in the manner contemplated by the material change agreement and the collective agreement, but had resigned from CN before the transfer occurred, thus losing his CN seniority.

[54] The Union's general chairperson, Mr. Henry, investigated. The Applicant agreed that he had resigned before the transfer, but took the position that the Union was nonetheless bound by the agreement it made with the Employer on November 17, 1997 that he would retain his seniority on an "excepted list." Although Mr. Henry found that the Applicant lost his eligibility for excepted seniority status by resigning from CN, he nonetheless awarded the Applicant greater seniority than any CTR new hires. The Employer has apparently accepted the Union's decision and the Union has lived by the decision despite subsequent complaints by members of the bargaining unit. The Union has refused to file a grievance about the Applicant's present seniority status with the Employer or to consider further appeals from dissatisfied members.

[55] The Board has frequently reviewed the principles pertaining to applications alleging breach by a trade union of the duty to fairly represent an employee. In outlining the general elements of the duty, the Board often refers to the following description made by the Supreme Court of Canada in *Canadian Merchant Services Guild v. Gagnon*, [1984] 84 CLLC 12, 181:

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.*

[56] In describing the distinct attributes of the terms “arbitrary,” “discriminatory” and “in bad faith” as used in similar legislation, the Supreme Court referred to the following comments of the British Columbia Labour Relations Board in *Rayonier Canada (B.C.) Ltd.* (1975), 2 CLRBR 196, at 201:

Under this language, which has been directly imported into our legislation, it is apparent that a union is prohibited from engaging in any one of the three distinct forms of misconduct in the representation of the employees. 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 such factors as race and 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.

[57] In *Ward v. Saskatchewan Union of Nurses*, [1988] Winter Sask. Labour Rep. 44, LRB File No. 031-88, at 47, this Board commented similarly on the distinctive meanings of these three concepts, as follows:

Section 25.1 of The Trade Union Act obligated 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 favouritism. 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.

[58] This application rests primarily on the thesis that the Union acted arbitrarily in refusing to grieve the Applicant's current placement on the seniority roster, thus failing to implement the agreement it made with CTR on November 17, 1997 with respect to his seniority status. There is no evidence of any discriminatory treatment of the Applicant by the Union, nor is there any evidence that the Union acted in bad faith or with any personal antipathy towards the Applicant in arriving at its decision.

[59] In further considering the nature of the term "arbitrary," in *Basaraba, supra*, at 229, the Board stated that the provision requires that the union take account of all relevant considerations in determining whether to grieve and prosecute a complaint to arbitration:

If decision making is not to be arbitrary ... the process must address all factors which are relevant. It seems to us to follow that the content of this test of arbitrariness will vary significantly with the circumstances of each case, as what is relevant and important will depend on the factual context in which the decision is made. It will clearly be required of the trade union in every case to pay attention ... to the interests which are at stake for the employee, as well as those which the union itself has invested in the situation.

[60] The Union was involved throughout the process leading to the transfer of operations from CN to CTR, first negotiating the material change agreement with CN and a collective agreement with CTR, and then, at the meeting on November 17, 1997, assigning seniority and positions to be effective upon the actual transfer of operations to CTR. The Union, which had prior experience with the process of rail line divestiture by

CN, held informational meetings with affected employees to describe the options open to them, and ensured that its officers were readily available to answer questions and assist with completing option elections. The Applicant attended the informational meeting and spoke with his friend and Union official, Mr. Hackl, on several occasions about his desire to pursue the offer to go into an out-of-scope position with CTR. Concerned about a loss of seniority if he did so, he had Mr. Hackl confirm with the Union that if CTR and the other rail unions agreed, the Applicant would be granted excepted status, allowing him to retain his CN seniority. The parties so agreed at the meeting of November 17, 1997.

[61] The Union explained that the transfer of any in-scope CN employee to either an in-scope or out-of-scope position with CTR was always predicated on the condition that the transfer would occur when CTR took control of the rail lines and commenced operations. The primary reason for such a transfer process makes sense: in the event that the deal is delayed or falls through (as had happened before), the affected employees would not have severed their employment from CN and would remain in their positions able to continue to enjoy the benefits of the collective agreement with CN.

[62] However, unbeknownst to the Union, and without any advice on its part to do so, the Applicant resigned from CN before the transfer to CTR took place. The Applicant seemed to have been eager to start working in his new position at CTR, but he already had been doing this for several weeks while on “booked off” status prior to resigning from CN. Rather than wait for the deemed resignation of affected employees to become effective under the material change agreement and the collective agreement on the commencement of CTR operations, he inexplicably resigned from CN. He may have misunderstood the intent and import of the process of the transfer of operations and employees to CTR and the basis of the November 17, 1997 agreement by the parties, but the Union had no reason to anticipate or suspect that he might resign from CN other than according to the transfer protocol.

[63] In any event, the Union arrived at a decision on the Applicant’s seniority placement with CTR on the basis that by his resignation he had lost his CN seniority and eligibility for excepted seniority status. CTR apparently accepted the Union’s position and revised the Applicant’s seniority placement accordingly. The Union, having sought

and agreed to the placement, logically concluded that CTR did not breach the collective agreement, and refused to grieve the placement.

[64] We do not view the present case as analogous to the situation in *Banga, supra*. In that case, the union refused to recognize or implement the settlement of a grievance made with the employer and accepted and prosecuted a second grievance of the same issue that was inimical to Ms. Banga's interests; that is, it took action to attempt to remove something from Ms. Banga that it had agreed she had. In the present case, the Union's view is that the Applicant's seniority status, ostensibly based on the agreement of November 17, 1997, was not taken away from him because he never actually had it. Under the Union's interpretation, the Applicant's retention of accumulated CN seniority was predicated on a seamless transfer to CTR pursuant to the material change agreement and the collective agreement on the date CTR commenced operations.

[65] It is not for us to determine whether the Union is correct in its interpretation of the effect of the Applicant's resignation under the collective agreement and material change agreement. We must assess whether, in arriving at its decision not to grieve the Applicant's seniority placement, the Union acted in a manner that was discriminatory, in bad faith or arbitrary. As we have said, we find no evidence that the Union acted with discrimination or in bad faith. Nor do we find that the Union acted arbitrarily. In coming to a decision to assign the Applicant a compromise seniority placement accepted by CTR, we conclude that Mr. Henry conducted an adequate investigation, considered the relevant factors and weighed the competing interests of the Applicant, the other members of the bargaining unit and the Union as a whole.

[66] For the reasons stated above, the application is dismissed.

DATED at Regina, Saskatchewan, this **19th** day of **March, 2003**.

LABOUR RELATIONS BOARD

James Seibel,
Vice-Chairperson