Labour Relations Board
Saskatchewan

DEB HARGRAVE, JOAN HAYES, JAN KAPACILA, SANDRA SAWATSKY and HAZEL AMBERSON, Applicants v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 3833, and PRINCE ALBERT HEALTH DISTRICT, Respondents

LRB File No. 223-02; November 21, 2003
Chairperson, James Seibel; Members: Brenda Cuthbert and Maurice Werezak

For the Applicants:	Harold Hargrave
For the Union:	Lois Lamon
For the Employer:	No one appearing.

Duty of fair representation – Arbitrary conduct – Mistakes, errors in judgment and mere negligence not sufficient but rather gross negligence is benchmark for arbitrariness – Where critical job interests involved, union may be held to higher standard – Experience of union representatives and available resources also factors to consider in assessing level of negligence – Where critical job interests not involved and volunteer and inexpert union executive dealt with situation to best of ability, Board does not find breach of duty of fair representation.

Duty of fair representation – Scope of duty – Board's role not to minutely assess reasonableness of every component of union's conduct – Union not generally required to ferret out potential grievors and attempt to convince them to request that grievances be filed – Applicants did not ask for grievances to be filed on their behalf and did not check with union about progress of grievance filed on behalf of other employee – Board dismisses application.

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

REASONS FOR DECISION

Background:

[1] Canadian Union of Public Employees, Local 3833 (the "Union"), is designated as the bargaining agent for a group of employees of the Prince Albert Health District (the "Employer") including laboratory assistants at Victoria Hospital in Prince Albert, Saskatchewan. The Applicants, Deb Hargrave, Joan Hayes, Jan Kapacila, Sandra Sawatsky and Hazel Amberson were, at all material times, laboratory assistants at Victoria Hospital and members of the bargaining unit. The Applicants filed an

application with the Board alleging that the Union had committed an unfair labour practice in violation of s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the *"Act"*), by failing to fairly represent them in grievance or rights arbitration proceedings in relation to a reclassification of the laboratory assistant position and the placement of the laboratory assistants, including the Applicants, in certain pay grades.

[2] Certain basic facts are not in issue. Following the Employer's reclassification of the laboratory assistants in 2001, the individuals affected, including the Applicants, were assigned to certain steps in pay grade three under the collective agreement between the parties. The Union appealed the reclassification to an adjudicator, as allowed under the collective agreement, which resulted in the laboratory assistants being reclassified in pay grade six effective May 1, 2001. However, the adjudicator did not assign the individual affected employees to steps within the pay grade. The Employer made the pay grade step assignments. Shortly afterward, one of the affected laboratory assistants, Nola Lehner, complained to the Union regarding her placement and requested that a grievance be filed. The Union filed a grievance on behalf of Ms. Lehner on May 31, 2001 (the "Lehner grievance"). The Lehner grievance was settled in December, 2001, with Ms. Lehner receiving retroactive pay for a change upwards of one step in the pay grade. Upon learning of the settlement of the Lehner grievance in early 2002, the Applicants, taking that the position that the initial request to the Union by Ms. Lehner was intended to be made on their behalf as well, complained that the Union had not fairly represented them. The Union demurred. The Applicants filed the present application.

Evidence:

[3] Sandra Sawatsky was employed by the Employer as a laboratory assistant at Victoria Hospital from 1984 until she resigned in August, 2001 and moved to Saskatoon. Ms. Sawatsky testified that, at the time the Employer made the pay grade step assignments, she assumed that she would be placed at the same step as Ms. Lehner. She said she assumed that Ms. Lehner's complaint to the Union regarding her step assignment had been made on her behalf as well. In cross-examination, Ms. Sawatsky agreed that she did not personally talk to anyone from the Union regarding her concerns about her pay grade assignment.

[4] Joan Hayes has been employed as a laboratory assistant at Victoria Hospital since 1997. She testified that she knew that Ms. Lehner had requested that the Union file a grievance regarding pay grade assignment and that that had been done. While she did not actually speak to Ms. Lehner about the grievance at the time it was filed, she said she "heard from other people" that Ms. Lehner had agreed to file a grievance on behalf of all the laboratory assistants and she assumed that had been done. Ms. Hayes did not inquire of the Union about the progress of the Lehner grievance because, she said, Ms. Lehner indicated that the Union only wanted one person involved. She said she was angry when she learned that the grievance was settled only on behalf of Ms. Lehner. But, rather than raise the issue with the Union, she complained to the head of her department and Robin Knudsen of the Employer's human resources department, because she "thought the Union had screwed [the laboratory assistants]."

[5] Deb Hargarve has been employed as a laboratory assistant at Victoria Hospital since 1980. She testified that, upon learning of her pay grade step assignment, she raised the issue with the local Union's first vice-president, Theresa Meredith, who told her that each laboratory assistant would have to file a grievance. Ms. Hargrave said she questioned Ms. Meredith about why a single group grievance could not be filed, and was told that Ms. Meredith would check with Brian Brotzel, Union area service representative. Ms. Hargrave testified that, sometime later, Ms. Lehner advised her that a representative grievance had been filed by Ms. Meredith in Ms. Lehner's name. When she learned early in 2002 that the Lehner grievance had been settled on behalf of Ms. Lehner only, Ms. Hargarve approached the then local Union first vice-president, Angie Goulard, and local Union president, Carol McKnight, in March 2002. Ms. McKnight expressed regret and seemed to accept some responsibility for what had happened, but told her that nothing could be done about it.

[6] The written statement of Jan Kapacila was admitted in evidence with the agreement of Ms. Lamon, who represented the Union at the hearing before the Board. The statement reads as follows:

> *There was a conversation that took place with Nola Lehner, Debbie Hargrave and myself. This occurred after the adjudication*

> *and the initial filing of the grievance. It took place in the urinalysis department at the laboratory.*
>
> *Nola Lehner stated that she wanted to be the lab side representative for the group grievance because "I want to do this for Sandra".*
>
> *I don't recall the date but definitely remember the strong statement made by Nola Lehner.*

[7] Carol McKnight was president of the local Union from April, 2001 and through the remainder of time material to this application. She testified that she had been involved in the settlement of the Lehner grievance to some degree, but that the person primarily responsible was Union grievance chairperson, Michelle Hoey. While the Lehner grievance progressed, however, she spoke to Ms. Lehner on the phone a number of times to keep her informed. Ms. Lehner never indicated that she was representing any one else during any of the conversations she had with her.

[8] The local Union membership was advised of the settlement of the Lehner grievance at a meeting in January, 2002. Ms. McKnight said she did not become aware that other employees were upset about the settlement until early April, 2002 when Deb Hargrave called her about it. She indicated to Ms. Hargarve that Ms. Lehner was the only employee who came forward to the Union with a complaint. The issue was not raised again until June, 2002 when she was contacted by the Applicants' representative, Harold Hargarve, who requested that an investigation be conducted by the Union's service representative for the local Union, Lois Lamon. Ms. Lamon conducted an investigation, as a result of which the Union requested that the Employer offer the same compensation to the other laboratory assistants as had been paid to Ms. Lehner. The Employer declined.

[9] Ms. McKnight testified that the Union does not solicit grievances and that while employees may complain about one thing or another, for various reasons, individual employees decline to file grievances. She did admit, however, that as a result of this situation the Union has changed its procedure to require grievance chairpersons to speak to other employees who may be similarly affected by a grievance made by another employee.

[10] In cross-examination, Ms. McKnight admitted that, after a reclassification of a diagnostic imaging clerk position, the Union and the Employer entered into a letter of understanding providing, essentially, that each clerk would be assigned to the same step of the new pay grade as they had each been on in the old. Accordingly, there was no adjudication regarding their reclassification. However, she said that the diagnostic imaging clerk agreement was made after the reclassification of the laboratory assistants and while the Lehner grievance was pending. Under the collective agreement there were fourteen days in which to file a grievance after the laboratory assistant reclassification adjudication and Ms. Lehner was the only employee to come forward with a complaint.

[11] Ms. McKnight said she was aware at the time the Lehner grievance was settled that other laboratory assistants might complain that they were not properly assigned within the pay grade, but the time to file a grievance on their behalf was long expired.

[12] Michelle Hoey has been the local Union first vice-president and sometimes grievance chairperson since October, 2001 after Ms. Meredith resigned from the position in September, 2001. Accordingly, while Ms. Hoey was involved in the settlement of the Lehner grievance, she was not involved at the time it was filed in May, 2001. She referred to the Union's notes of the meeting between the Union and the Employer on June 21, 2001 attended by Ms. Meredith, regarding the Lehner grievance, wherein there is no mention of any other laboratory assistants being involved. Ms. Lehner provided her consent to the terms of the settlement of the grievance without raising any issue about any other laboratory assistant's position. None of the Applicants raised any questions about the Lehner grievance with Ms. Hoey nor at any meeting of the membership throughout the material period of time. Ms. Hoey did not become aware until approximately June, 2002 that any of the Applicants asserted they were to be part of the grievance.

[13] In its reply to the grievance, the Employer took the position that it had the ability to place Ms. Lehner in the pay grade that it did pursuant to certain provisions of the collective agreement. The Union responded on October 18, 2001 that it "[understood] the lack of direction in the collective agreement on [the] issue."

[14] Lois Lamon was a Union local area representative at the relevant time of this matter. The Union agreed that she could be cross-examined by the Applicants' representative.

[15] When Ms. Lamon assumed her position she was made aware of the adjudication decision regarding the reclassification of the laboratory assistants, but was advised by her predecessor that the local Union was handling the matter. She said that the Union entered into a letter of understanding regarding the diagnostic imaging clerks providing for their assignment to the same step of the new pay grade as they had each been on in the old pay grade, because a case was made that they were actually promoted as opposed to simply reclassified.

[16] After the Applicants' representative, Mr. Hargrave, approached Ms. McKnight about the problem, Ms. Lamon conducted an investigation. She said that, in an interview, Ms. Meredith informed her that in fact the Lehner grievance was intended to be on behalf of all the laboratory assistants, but agreed that on its face it did not indicate so. Indeed, in a letter to the Employer's labour relations officer, Robin Knudsen, dated June 24, 2002, Ms. Lamon stated, in part, as follows:

> *Teresa [Meredith] advised me that she made it very clear to the Employer at the first grievance hearing that [the Lehner] grievance was filed on behalf of all affected employees.*

[17] The letter went on to request that the Employer offer compensation similar to that paid in respect of Ms. Lehner to the other laboratory assistants.

[18] In its response, by letter dated July 31, 2002, the Employer did not directly deny the alleged assertion by Ms. Meredith, but rather, stated, in part:

> *The grievance was resolved with Ms. Lehner alone because she filed the grievance. It was also made very clear to the Union that the grievance would be settled with Ms. Lehner only.*

Statutory Provisions:

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

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

Arguments:

[20] Mr. Hargrave, representative for the Applicants, argued that the Applicants had been led to believe by Ms. Lehner that she represented them as well in respect of her grievance of the pay grade assignment. He asserted that it was discriminatory and in bad faith for the Union not to progress the Lehner grievance on behalf of the Applicants as well, although he said the Applicants were not "pointing fingers" at any particular individual or individuals.

[21] Ms. Lamon, representing the Union, stated that it was difficult by the time of the hearing before the Board – some considerable time after the events in question – to determine what transpired at the time Ms. Meredith filed the Lehner grievance in May, 2001 or at the first grievance meeting.

[22] Ms. Lamon asserted that there was no evidence in the Union's original grievance file to indicate that the Lehner grievance was a group grievance on behalf of all the laboratory assistants and that a union is under no obligation to assume that an employee wants a grievance filed on his or her behalf. Nonetheless, expressing regret in the event, Ms. Lamon said that, in the worst case, the local Union made a mistake in not filing a group grievance, but that the mistake, if it was made, did not constitute discrimination, arbitrariness or bad faith within the meaning of s. 25.1 of the *Act*. She pointed out that the members of the local Union executive are volunteers trying their best to carry out their responsibilities and honest errors and laxity do not necessarily constitute a violation of the duty of fair representation, unless they constitute gross negligence.

[23] Some of the many cases referred to by Ms. Lamon in support of her argument included the following: *Canadian Merchant Services Guild v. Gagnon*, [1984] 1 S.C.R. 509 (S.C.C.); *Radke v. Canadian Paperworkers Union, Local 1120,* [1993] 2nd

Quarter Sask. Labour Rep. 57, LRB File No. 262-92; *Gregoire v. United Steelworkers of America, Local 5890 and IPSCO Inc*., [1997] Sask. L.R.B.R. 766, LRB File No. 317-95; *Martalla v. Regina Civic Middle Management Association and The City of Regina*, [1997] Sask. L.R.B.R. 556, LRB File No. 337-96; *Lymer v. Saskatchewan Insurance Office and Professional Employees' Union, Local 397 (O.P.E.I.U.) and Saskatchewan Government Insurance*, [2000] Sask. L.R.B.R. 174, LRB File No. 176-99; *Weber v. Graphic Communications International Union, Local 206C Bindery*, [1998] Sask. L.R.B.R. 23, LRB File No. 307-97; *Wionzek v. International Brotherhood of Electrical Workers, Local 2067 and SaskPower*, [1998] Sask. L.R.B.R. 765, LRB File No. 101-98; *Pino v. Service Employees International Union, Local 299*, [2001] Sask. L.R.B.R. 363, LRB File No. 244-00.

Analysis and Decision:

[24] In this case, the Board must determine whether the Union breached its duty of fair representation to the Applicants by not filing or progressing a grievance on their behalf regarding pay grade assignment following reclassification of the laboratory assistants at Victoria Hospital, while at the same time it filed and progressed a grievance on behalf of a co-worker regarding the same issue, that is, the Lehner grievance.

[25] In many previous decisions, the Board has approved of the following summary by the Supreme Court of Canada in *Gagnon*, *supra*, at 527, 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.*

[26] The Supreme Court of Canada reaffirmed this summary of principles in *Gendron v. Supply & Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298, and *Centre Hospitalier Regina Ltee. v. Quebec (Labour Court)*, [1990] 1 S.C.R. 1330.

[27] As pointed out in many decisions of the Board, a succinct explanation of the distinctive meanings of the concepts of arbitrariness, discrimination and bad faith, as used in s. 25.1 of the *Act*, was made 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 <u>The Trade Union Act</u> 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 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.*

[28] In *Toronto Transit Commission*, [1997] OLRD No. 3148, at paragraph 9, the Ontario Labour Relations Board cited with approval the following succinct explanation of the concepts provided by that Board in a previous unreported decision:[1]

> *. . . a complainant must demonstrate that the union's actions were:*

[1] *Milan Alaica*, [1994] OLRD No. 4036-93-U (Ont. LRB).

> *(1) "Arbitrary" – that is, flagrant, capricious, totally unreasonable, or grossly negligent;*
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> *(2) "Discriminatory – that is, based on invidious distinctions without reasonable justification or labour relations rationale; or*
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> *(3) "in Bad Faith" – that is, motivated by ill-will, malice hostility or dishonesty.*
>
> *The behaviour under review must fit into one of these three categories. …mistakes or misjudgments are not illegal; moreover, the fact that an employee fails to understand his rights under a collective agreement or disagrees with the union's interpretation of those rights does not, in itself, establish that the union was wrong – let alone "arbitrary", "discriminatory" or acting in "bad faith".*
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> *The concept of arbitrariness, which is usually more difficult to identify than discrimination or bad faith, is not equivalent to simple errors in judgment, negligence, laxity or dilatoriness. In* Walter *Prinesdomu v. Canadian Union of Public Employees, [1975] 2 CLRBR 310, the Ontario Labour Relations Board stated, at 315:*
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> > *It could be said that this description of the duty requires the exclusive bargaining agent to "put its mind" to the merits of a grievance and attempt to engage in a process of rational decision making that cannot be branded as implausible or capricious.*
>
> *This approach gives the word arbitrary some independent meaning beyond subjective ill will, but, at the same time, it lacks any precise parameters and thus is extremely difficult to apply. Moreover, attempts at a more precise adumbration have to reconcile the apparent consensus that it is necessary to distinguish arbitrariness (whatever it means) from mere errors in judgment, mistakes, negligence and unbecoming laxness.*[2]

[29] In the present case, the Applicants' complaint is primarily one of perceived arbitrariness relating to the Union's failure to progress the Lehner grievance as a group or representative grievance on behalf of all the Applicants, or to file individual grievances on behalf of each of the Applicants for similar relief.

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[2] This excerpt has been cited with approval by the Board in many previous decisions. See, most recently, *Mercer v. Communications, Energy and Paperworkers Union, Local 922 and PCS Mining Limited* (October 29, 2003, not yet reported) LRB File No. 007-02. The *Prinesdomu* case also has been consistently cited with approval by the Ontario Labour Relations Board in many of its subsequent decisions.

[30] On the evidence presented, we cannot determine that the Lehner grievance was in fact intended by the Union to be a representative grievance for all of the Applicants and that a mistake was made by the Union in not progressing it as such. We cannot, on a balance of probabilities, find that when Union first vice-president, Theresa Meredith, filed the Lehner grievance she intended that it be on behalf of the Applicants as well. Ms. Meredith's hearsay representations to Ms. Lamon a long time after the fact that she intended it as such and that she advised the Employer of that at the first grievance meeting is belied by the facts that that Ms. Meredith herself did not progress the grievance as a representative grievance and failed to leave any information to that effect on the Union's grievance file by which her replacement, Ms. Hoey, would have been alerted to continue to progress the grievance accordingly.

[31] The statement by the Union to the Employer in the letter of June 21, 2002 that in the course of her investigation of the matter Ms. Lamon was told by Ms. Meredith that she advised the Employer at the first grievance meeting that the Lehner grievance was a representative or group grievance, is not an admission by adoption as an exception to the hearsay rule; See, *R. v. Streu*, [1989] 1 S.C.R. 1521 (S.C.C.); *R. v. Schmidt*, [1948] S.C.R. 333 (S.C.C.). Ms. Lamon does not state, nor necessarily imply, that she or the Union adopted the assertion as true, but merely that Ms. Meredith asserted such, exhorting the Employer to make similar payment to the other laboratory assistants as was done for Ms. Lehner.

[32] The Applicants bear the onus of proof in the present application: see, *Chrispen v. International Association of Fire Fighters' Local 510 (Prince Albert Fire Fighters' Association)*, [1992] 4th Quarter Sask. Lab. Rep. 133, LRB File No. 003-92. None of Ms. Meredith, Ms. Lehner or Mr. Knudsen was called to testify in order to clarify the situation concerning the initial filing and handling of the grievance, the respective intent of Ms. Lehner and Ms. Meredith or the understanding of the Employer.

[33] It remains to be determined, however, whether the Union's failure to file a group or representative grievance or individual grievances covering all of the Applicants constitutes a violation of the duty of fair representation.

[34] There have been many pronouncements in the case law with respect to negligent action or omission by a trade union as it relates to the concept of arbitrariness in cases of alleged violation of the duty of fair representation. While most of the cases involve a refusal to accept or to progress a grievance after it is filed, in general, the cases establish that to constitute arbitrariness, mistakes, errors in judgment and "mere negligence" will not suffice, but rather, "gross negligence" is the benchmark. Examples in the jurisprudence of the Board include *Chrispen*, *supra*, where the Board found that the union's efforts "were undertaken with integrity and competence and without serious or major negligence. . . ." In *Radke v. Canadian Paperworkers Union, Local 1120*, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92, at 64 and 65, the Board stated:

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

[35] Most recently, in *Vandervort v. University of Saskatchewan Faculty Association and University of Saskatchewan*, [2003] Sask. L.R.B.R. 147, LRB File Nos. 102-95 & 047-99, the Board stated, at 193:

> *[215] Arbitrariness is generally equated with perfunctory treatment and gross or major negligence. This standard arose from Canadian Merchant Service Guild v. Gagnon . . . .*

And further, at 194-95, as follows:

> *[219] In Rousseau v. International Brotherhood of Locomotive Engineers et al., 95 CLLC 220-064 at 143, 558-9, the Canada Labour Relations Board described the duty not to act in an arbitrary manner as follows:*
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> > *Through various decisions, labour boards, including this one, have defined the term "arbitrary." Arbitrary conduct has been described as a failure to direct one's mind to the merits of the matter; or to inquire into or to act on available evidence; or to conduct any meaningful investigation to obtain the data to justify a decision. It has also been described as acting on the basis of*

> *irrelevant factors or principles; or displaying an indifferent and summary attitude. Superficial, cursory, implausible, flagrant, capricious, non-caring or perfunctory are all terms that have also been used to define arbitrary conduct. It is important to note that intention is not a necessary ingredient for an arbitrary characterization.*
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> *Negligence is distinguishable from arbitrary, discriminatory or bad faith behaviour. The concept of negligence can range from simple negligence to gross negligence. The damage to the complainant in itself is not the test. Simple negligence may result in serious damage. Negligence in any of its variations is characterized by conduct or inaction due to inadvertence, thoughtlessness or inattention. Motivation is not a characteristic of negligence. Negligence does not require a particular subjective stage of mind as does a finding of bad faith. There comes a point, however, when mere/simple negligence becomes gross/serious negligence, and we must assess when this point, in all circumstances, is reached.*
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> *When does negligence become "serious" or "gross"? Gross negligence may be viewed as so arbitrary that it reflects a complete disregard for the consequences. Although negligence is not explicitly defined in section 37 of the Code, this Board has commented on the concept of negligence in its various decisions. Whereas simple/mere negligence is not a violation of the Code, the duty of fair representation under section 37 has been expanded to include gross/serious negligence . . . The Supreme Court of Canada commented on and endorsed the Board's utilization of gross/serious negligence as a criteria in evaluating the union's duty under section 37 in Gagnon et al. [[1984] 1 S.C.R. 509]. The Supreme Court of Canada reconfirmed the utilization of serious negligence as an element to be considered in Centre Hospitalier Régina Ltée v. Labour Court, [1990] 1 S.C.R. 1330.*

[36] In *North York General Hospital*, [1982] OLRB Rep. Aug. 1190, the Ontario Labour Relations Board addressed the relation of negligence to arbitrariness as follows, at 1194:

> *A union is not required to be correct in every step it takes on behalf of an employee. Moreover, mere negligence on the part of a union official does not ordinarily constitute a breach of section 68. See Ford Motor Company of Canada Limited, [1973] OLRB Rep. Oct. 519; Walter Princesdomu and The Canadian Union of*

> *Public Employees, Local 1000, [1975] OLRB Rep. May 444. There comes a point, however, when "mere negligence" becomes "gross negligence" and when gross negligence reflects a complete disregard for critical consequences to an employee then that action may be viewed as arbitrary for the purposes of section 68 of the Act. In Princesdomu, supra, the Board said at pp 464-465:*
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> > *Accordingly at least flagrant errors in processing grievances--errors consistent with a "not caring" attitude--must be inconsistent with the duty of fair representation. An approach to a grievance may be wrong or a provision inadvertently overlooked and section 60 has no application. The duty is not designed to remedy these kinds of errors. But when the importance of the grievance is taken into account and the experience and identity of the decision-maker ascertained the Board may decide that a course of conduct is so, implausible, so summary or so reckless to be unworthy of protection. Such circumstances cannot and should not be distinguished from a blind refusal to consider the complaint.*

[37] In a subsequent decision, *Canada Packers Inc*., [1990] OLRB Rep Aug. 886, the Ontario Board confirmed this position as follows, at 891:

> *A review of the Board's jurisprudence reveals that honest mistakes, innocent misunderstandings, simple negligence, or errors in judgment will not of themselves, constitute arbitrary conduct within the meaning of section 68. Words like "implausible", "so reckless as to be unworthy of protection", "unreasonable", "capricious", "grossly negligent", and "demonstrative of a non-caring attitude" have been used to describe conduct which is arbitrary within the meaning of section 68 (see Consumers Glass Co. Ltd., [1979] OLRB Rep. Sept. 861; ITE Industries, [1980] OLRB Rep. July 1001; North York General Hospital, [1982] OLRB Rep. Aug. 1190; Seagram Corporation Ltd.. [1982] OLRB Rep. Oct. 1571; Cryovac, Division of W.R. Grace and Co. Ltd., [1983] OLRB Rep. June 886; Smith & Stone (1982) Inc., [1984] OLRB Rep. Nov. 1609; Howard J. Howes, [1987] OLRB Rep. Jan. 55; George Xerri, [1987] OLRB Rep. March 444, among others). Such strong words may be applicable to the more obvious cases but may not accurately describe the entire spectrum of conduct which might be arbitrary. As the jurisprudence also illustrates, what will constitute arbitrary conduct will depend on the circumstances.*

[38] The British Columbia Labour Relations Board has taken a similar view with respect to matters of process. In *Haas v. Canadian Union of Public Employees, Local 16*, [1982] BCLB No. L48/82, that Board stated as follows:

> *... similarly, the Board will be reluctant to find a breach of Section 7 by virtue of the manner in which particular grievances are pursued. As stated earlier, a complainant must demonstrate shortcomings in the union's representation beyond the areas of mere negligence, inadvertent errors, poor judgment, etc. The shortcomings must be so blatant as to demonstrate that the grievor's interests were pursued in an indifferent or perfunctory manner.*
>
> *Too often the intended purpose and limits of Section 7 are not well understood. A union is afforded wide latitude in the manner in which it deals with individual grievances; the Board will only find violations of Section 7 where a union's manner of representation of an individual grievor is found to be an obvious disregard for his rights or for the merits of the particular grievance. Broadening the scope of Section 7 beyond the areas described in earlier pages of this decision would not be in keeping with the purpose and objects of the Labour Code; it would encourage the filing of a myriad of unfounded and frivolous Section 7 applications to the Board and it could also force unions to untenable positions in grievance handling because of the weight they would have to give to possible Section 7 complaints hanging over their heads.*
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> . . .
>
> *Each case must be decided on its own merits; suffice to say, however, that the Board may well find shortcomings in the manner in which the union dealt with a particular matter without finding that such shortcomings support a Section 7(1) complaint. The Board may well find that a union could have been more vigourous and thorough in its investigation of the facts in a particular case; it may even question the steps taken in dealing with a grievance and the ultimate decision made with respect to that grievance. However, that does not necessarily mean that a complaint under Section 7(1) will be substantiated. To substantiate a charge of arbitrariness, there must be convincing evidence that there was a blatant disregard for the rights of the union member.*

[39] As noted above, the Canada Labour Relations Board took a similar view in *Rousseau v. International Brotherhood of Locomotive Engineers et al., supra.* In *Johnson v. Amalgamated Transit Union, Local 588 and City of Regina*, [1997] Sask. L.R.B.R. 19, LRB File No. 091-96, the Board referred to the evolution of the treatment of

the issue of arbitrariness by the Canada Board. At 31-32, the Board observed as follows:

> *The Canada Labour Relations Board initially accepted the notion that, in the case of what were termed "critical job interests," the obligation of a trade union to uphold the interest of the individual employee affected would be close to absolute. What might constitute such critical job interests was not entirely clear, but loss of employment through discharge was clearly among them.*
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> *The Board continued to hold the view that the seriousness of the interest of the employee is a relevant factor. In Brenda Haley v. Canadian Airline Employees' Association, [1981] 81 C.L.L.C. 16,096, the Canada Board made this comment, at 609:*
>
> > *This concept (i.e. critical job interests] is a useful instrument to distinguish circumstances where the balance between the individual and union or collective bargaining system interests will tilt in one direction or another. A higher degree of recognition of individual interests will prevail on matters of critical job interest, which may vary from industry to industry or employer to employer. Conversely on matters of minor job interest for the individual the union's conduct will not receive the same scrutiny and the Board's administrative processes will not respond with the same diligence or concern. Many of these matters may not warrant an expensive hearing. Examples of these minor job interests are the occasional use of supervisors to do bargaining unit work, or isolated pay dispute arising out of one or a few incidents and even a minor disciplinary action such as a verbal warning.*
>
> *They concluded in the Brenda Haley case, however, that this factor should be evaluated along with other aspects of the decisions taken by the trade union. The decision contains this comment, at 614:*
>
> > *As frustrating as duty of fair representation discharge cases may be and as traumatic as loss of employment by discharge may be, we are not persuaded mandatory discharge arbitration is the correct response. It is an easy response but its effect on the group and institutional interests is too harsh. With the same view of the integrity of union officials and the merits of the grievance procedure shared by Professor Weiler we say unions must continue to make the difficult decisions on discharge and we must continue to make the difficult decisions complaints about the unions' decisions often require.*

> *They went on to summarize the nature of the duty imposed on the trade union, also at 614:*
>
> > *It is not the Board's task to reshape union priorities, allocate union resources, comment on leadership selection, second guess its decisions, or criticize the results of its bargaining. It is our task to ensure it does not exercise its exclusive majoritarian based authority unfairly or discriminatorily. Union decision makers must not act fraudulently or for improper motives such as those prohibited by human rights legislation or out of personal hostility, revenge or dishonesty. They must not act arbitrarily by making no or only a perfunctory or cursory inquiry into an employee's grievance. The union's duty of fair representation does not guarantee individual or group union decision makers will be mature, wise, sensitive, competent, effectual or suited for their job. It does not guarantee they will not make mistakes. The union election or selection process does not guarantee competence any more than the process does for those selected to act in other democratic institutions such as Parliament or appointees to administrative agencies.*

[40] Thus, there is a line of cases that suggests that where "critical job interests" are involved (e.g., discharge from employment), depending upon the circumstances of the individual case, a union dealing with a grievance may well be held to a higher standard than in cases of lesser importance to the individual in determining whether the union has acted arbitrarily (including whether it has been negligent to a degree that constitutes arbitrariness). The Board has taken a generally favourable view of this position as demonstrated in *Johnson* and *Chrispen*, *supra*.

[41] However, in *Haley, supra,* a case involving the missing of a time limit for referral to arbitration, the Canada Board also recognized that the experience of the union representative and available resources are relevant factors to be considered in assessing whether negligence is assumed to be of a seriousness that constitutes arbitrariness, stating as follows:

> *…The level of expertise of the union representative and the resources the union makes available to perform the function are also relevant factual considerations. These and other relevant facts of the case will form the foundation in each case to decide*

> *whether there was seriously negligent, arbitrary, discriminatory or bad faith, and therefore unfair, representation.*

[42] In *Chrispen*, *supra*, the Board approved of this position also, stating, at 150, as follows:

> *The reason why cases involving allegations of arbitrariness are the most vexing and difficult is because they require the Board to set standards of quality in the context of a statutory scheme which contemplates that employees will frequently be represented in grievance proceedings by part-time union representatives or even other co-workers. Even when the union representatives are full-time employees of the union, they are rarely lawyers and may have few qualifications for the responsibilities which this statutory scheme can place upon them.*
>
> *In order to make this system work, the legislature recognized that union representatives must be permitted considerable latitude. If their decisions are reversed too often, they will be hesitant to settle any grievance short of arbitration. Moreover, the employer will be hesitant to rely upon any settlement achieved with the union if labour boards are going to interfere whenever they take a view different from that of a union. The damage this would do to union credibility and the resulting uncertainty would adversely affect the entire relationship. However, at the same time, by voluntarily applying for exclusive representative status, the union must be prepared to accept a significant degree of responsibility for employees, especially if an employee's employment depends upon the grievance.*

[43] In the present case, the Union filed and progressed a grievance on behalf of Ms. Lehner. It did not approach the Applicants and ask them whether they would like to have grievances filed with respect to their similar treatment by the Employer following the reclassification of the laboratory assistants. However, there was no decision or action by the Union to positively preclude the Applicants, or any of them, from requesting the Union to file a grievance on their behalf; there was the mere practice of the Union that it does not approach and seek to convince individual members of the bargaining unit to file grievances. Rather, the Union's practice was that it is up to an individual member to approach the Union and request that a grievance be filed.

[44] In cases of alleged denial of fair representation it is not the Board's role to minutely assess the reasonableness of every component of a union's conduct. Certainly

a union is not generally required to ferret out potential grievors and attempt to convince them that they ought to request that a grievance be filed. Depending on the circumstances of the individual case, the union's duty may be different in cases of the nature of "critical job interests" as referred to in *Haley*, *supra.* The purported potential grievances in the present case are not of the nature of such critical job interests. Settlement of the Lehner grievance involved the payment of some $800.00.

[45] In the present case there were several changes in the local Union executive at the relevant time, with allegations of wrongdoing made against the executive replaced by, *inter alia*, Ms. Hoey and Ms. McKnight. In the circumstances, communication with the former executive was uncomfortable. In any event, the local Union executive and officers are volunteers with limited expertise and certainly no legal expertise. There is no evidence that the executive did not deal with the reclassification and its results to the best of its ability. In any event, even were we to find that the Union was lax, or even negligent, in its failure to confirm whether the Applicants or any of them wished to have a grievance progressed on their behalf, we could not say that, in the circumstances, it was so serious as to constitute gross negligence or arbitrary conduct. Certainly the Applicants did not assist themselves by relying upon Ms. Lehner and failing to check with the Union on the progress of the grievance at any time.

[46] For these reasons, we do not find that the Union violated the duty of fair representation in s. 25.1 of the *Act*. The application is dismissed.

DATED at Regina, Saskatchewan this **21st** day of **November, 2003.**

LABOUR RELATIONS BOARD

James Seibel,
Chairperson