Labour Relations Board
Saskatchewan

FRANK PETTY, Applicant v. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 529 and BILL'S ELECTRIC CITY LTD., Respondents

LRB File No. 009-03 & 010-03; June 2, 2005
Chairperson, James Seibel; Members: Joan White and Duane Siemens

For the Applicant:	Larry Dimen
For the Respondent Union:	Rod Gillies
For the Respondent Employer:	Barry Wilcox

Duty of fair representation – Scope of duty – Where union fairly and adequately investigated circumstances of grievance, arrived at informed and rational decision to put grievance before joint committee and followed joint committee's decision not to advance grievance to arbitration, Board finds no violation of union's duty of fair representation.

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

REASONS FOR DECISION

Background:

[1] International Brotherhood of Electrical Workers, Local 529 (the "Union") is the certified bargaining agent for a standard "Newbery" unit of employees of Bill's Electric City Ltd. (the "Employer") working in the electrical trade division. At all material times the Applicant, Frank Petty, was an employee of the Employer and a member of the bargaining unit represented by the Union. The Applicant filed an application (LRB File No. 009-03) alleging that the Union had committed a violation of s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") in failing to prosecute a grievance relating to his dismissal from employment.

[2] 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.*

[3] The Applicant also filed an application (LRB File No. 010-03) alleging that the Employer committed an unfair labour practice in dismissing him from employment contrary to s. 5 of the *Act*. At the hearing by the Board, Mr. Dimen, on the Applicant's behalf, advised that the particular sections of the *Act* alleged to have been breached were ss. 11(1)(a) and (c).

Evidence:

The Applicant

[4] The Applicant is a journeyman electrician and has been a member of the Union for some 25 years. He testified that, on October 3, 2002, he was dispatched by the Union to work for the Employer, an electrical contractor, on a five-day job in relation to the shutdown of a plant operated by Weyerhauser Limited ("Weyerhauser") in Hudson Bay, Saskatchewan, commencing on October 10, 2002.

[5] The Applicant arrived in Hudson Bay on the evening of October 9, 2002 and secured accommodation in a downtown hotel. Apparently his room was very noisy and he had difficulty sleeping. Although very tired, he arrived at the worksite in time for the 6:00 a.m. start on October 10, 2002. He attended the Weyerhauser orientation, which was completed by 8:00 a.m. After a short break, during which he said he got 15 minutes sleep, he attended the Employer's orientation, during which he said the workers were advised that the Employer followed a progressive discipline procedure. They were also advised to take orders from Weyerhauser personnel.

[6] The Applicant said he and his fellow workers got a second rest break at about 10 a.m., during which he set up an appointment for 3 p.m. to meet with the owners of alternate accommodation a short distance out of Hudson Bay. The Applicant took another smoke break at 11 a.m. because he said he needed some fresh air to wake up. While the Applicant was on this break, Dave Sokulski, one of the Employer's managers, chastised him for being outside.

[7] After the lunch break, the Applicant said he told the shop steward, Jim Brinkman, that he might not make it through the entire workday because he was so tired. The Applicant testified that, at 2:30 p.m., he mentioned to Mr. Brinkman that he was

leaving for the day. The Applicant went to meet with the owners of the alternate accommodation and to pick up some provisions.

[8] When the Applicant arrived at work the following morning at 6 a.m., Mr. Brinkman told him he was to call the Union's business agent, Garnet Greer, at 7 a.m. During the conversation between the Applicant and Mr. Greer, Mr. Greer advised the Applicant that Mr. Sokulski had telephoned Mr. Greer the previous evening to say that the Employer was terminating the Applicant's employment. The Applicant drove to Saskatoon, arriving at the Union's office at about 11:30 a.m. After a heated conversation between the Applicant and Mr. Greer, Mr. Greer completed a grievance form on the Applicant's behalf grieving the termination, which the Applicant signed.

[9] The Applicant said he attended a meeting of the Union's executive committee, the date of which he could not recall, at which he was allowed to make a presentation. Instead of referring the grievance to arbitration, the executive committee decided to refer the grievance to the Joint Conference Committee, a joint committee of representatives of employers and union locals in the electrical trade division in Saskatchewan, which attempts to settle grievances before they are referred to arbitration and which provides recommendations.

[10] Mr. Greer presented the case on behalf of the Applicant to the Joint Conference Committee on November 29, 2002. The Joint Conference Committee recommended that the grievance be denied, that the Applicant be paid for all hours worked on October 10, 2002 and that the Applicant receive 4 hours' "show up pay" for October 11, 2002.

[11] In cross-examination by counsel for the Union, the Applicant admitted that he had decided several hours before to leave work at 3 p.m. on October 10, 2002. He acknowledged that he did not attempt to find the foreman on the project nor did he ask anyone for permission to leave. He also acknowledged that, when he spoke to Mr. Greer on the phone on October 11, 2002, he had lied when he said he had told someone in a grey hard hat that he was leaving the site the day before. Admitting that Mr. Brinkman in fact wore a yellow hard hat, the Applicant said he was protecting Mr. Brinkman because he might be fired for sticking up for him.

[12] The Applicant also agreed that he had perhaps as many as ten conversations with Mr. Greer regarding the grievance between October 11, 2002 and mid-January, 2003.

Garnet Greer

[13] Mr. Greer has been a member of the Union for some 23 years. At the time of the events in question, he had been the Union's business agent for one year.

[14] Mr. Greer testified Mr. Sokulski telephoned Mr. Greer at home on the evening of October 10, 2002 and advised Mr. Greer that the Employer was terminating the Applicant's employment. Mr. Greer then called Mr. Brinkman, the Union's shop steward on the job, that same evening. Mr. Sokulski apparently had spoken already with Mr. Brinkman. Mr. Greer told Mr. Brinkman to have the Applicant call Mr. Greer in the morning. During his telephone conversation with the Applicant on the morning of October 11, 2002, Mr. Greer asked the Applicant if he had told anyone he was leaving; the Applicant replied, "a guy in a grey hard hat." Mr. Greer said that it was only at the hearing at the Board that he heard for the first time that the Applicant maintained that he did not tell the truth in this regard because he was protecting Mr. Brinkman.

[15] After completing the grievance on the Applicant's behalf, Mr. Greer submitted it to the Employer verbally and discussed the matter with Mr. Sokulski within three days as per the first step of the grievance process pursuant to the provincial collective agreement for the electrical trade division (the "collective agreement"). They were unable to settle the grievance. Following the meeting of the Union's executive committee (the meetings of which Mr. Greer attends but has no vote) on or about October 15, 2002, Mr. Greer once again attempted to settle the matter on terms recommended by the executive committee with the concurrence of the Applicant. However, he was not successful.

[16] The written grievance was submitted to the Employer and, as per the instructions of the Union's executive committee, the grievance was referred by the Union to the Joint Conference Committee pursuant to the collective agreement, in an attempt to resolve the matter without arbitration. It is the Joint Conference Committee's practice to receive statements from persons involved and to hear presentations on behalf of the

Union and the Employer. It does not receive evidence under oath. A statement by the Applicant was presented by Mr. Greer. Mr. Greer also presented the case on behalf of the Applicant to the Joint Conference Committee.

[17] Upon considering the recommendations of the Joint Conference Committee, the Union's executive committee resolved to accept the recommendations and not to refer the grievance to arbitration. The Applicant disagreed.

Dave Sokulski

[18] Mr. Sokulski was the Employer's representative responsible for the job in question. He testified that he terminated the Applicant's employment for abandoning the site without advising authorized personnel. He said that the Employer's foreman, Robert Plasko, was on the site at all times.

Arguments:

[19] The Applicant's representative, Mr. Dimen, argued that the Union had failed in its duty to fairly represent the Applicant. A main point of his argument in this regard appeared to be that the Union have should held Mr. Brinkman responsible for not relaying the Applicant's advice to Mr. Brinkman that the Applicant was leaving early to secure accommodation to the Employer's foreman at the site. Mr. Dimen also asserted that it was unusual that it was the Union rather than the Employer that advised the Applicant that he had been terminated. Mr. Dimen submitted that in all the circumstances the grievance ought to have been referred to arbitration.

[20] Mr. Dimen argued that the Employer was guilty of an unfair labour practice because it had failed to gather and consider all the facts before terminating the Applicant. Asserting that "the punishment did not fit the crime," Mr. Dimen said the Board ought to find that the Employer fired the Applicant without just cause.

[21] Mr. Gillies, counsel on behalf of the Union, argued that the evidence disclosed that Mr. Greer and the Union had fulfilled the duty of fair representation honestly and conscientiously. Counsel referred to the decision of the Board in *Kozak v. United Food and Commercial Workers*, [1994] 4th Quarter Sask. Labour Rep. 213, LRB

File No. 170-94, as demonstrating the principles followed by the Board in assessing applications alleging failure to fulfill the duty of fair representation.

[22] Mr. Gillies submitted that it was necessary to consider the short (five day) duration of the job, during which the plant would be shut down and during which it was necessary for the Employer to have a full complement of workers to do all necessary work for as long as would be required on those days in order to complete the job on time. As a unionized employer, the Employer's preservation of its reputation with Weyerhauser is also of benefit to the Union in that the Employer may secure other jobs requiring the dispatch of the Union's members to do the work. In such circumstances, it is not expedient to conduct an in-depth on-site investigation at the time of an employment incident in the nature of absence and the like – if a worker cannot be relied upon to show up for and remain at work, he is replaced.

[23] Counsel asserted that Mr. Greer made a fair inquiry, assessment, and decision based on what occurred and the degree of seriousness warranted. On the night of October 10, 2002 Mr. Greer spoke with Mr. Sokulski and Mr. Brinkman. The next day he spoke with the Applicant, with whom he spoke another 8 to 10 times as the matter progressed. The grievance was considered by the Union's executive board; discussions were held with the Employer; the matter was referred to the Joint Conference Committee.

[24] Mr. Wilcox, counsel on behalf of the Employer, argued that there was no evidence, and certainly no *prima facie* case, to support the application against the Employer alleging violation of ss. 11(1)(a) and (c) of the *Act*.

Analysis and Decision:

[25] The issues to be decided in this case are (1) whether the Union, in compliance with s. 25.1 of the *Act*, fairly represented the Applicant with respect to grievance and rights arbitration proceedings in relation to the termination of his employment in a manner that was not arbitrary, discriminatory or in bad faith, and (2) whether the Employer committed an unfair labour practice in violation of ss. 11(1)(a) and (c) of the *Act*.

[26] The Board's approach to applications alleging a violation of the duty of fair representation pursuant to s. 25.1 of the *Act* was summarized in *Berry v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep. 65, LRB File No. 134-93, as follows at 71-72:

> *This Board has discussed on a number of occasions the obligation which rests on a trade union to represent fairly those employees for whom it enjoys exclusive status as a bargaining representative. As a general description of the elements of the duty, the Board has indicated that it can do no better than to quote the principles outlined by the Supreme Court of Canada in the case of Canadian Merchant Services Guild v. Gagnon, [1984] 84 CLLC 12,181:*
>
> > *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.*
>
> *The terms "arbitrary," "discriminatory," and "in bad faith," which are used in the legislative description of the kind of conduct on the part of a trade union which is to be prevented, have been held to address slightly different aspects of the duty. The Supreme Court in Gagnon used the following comments from the decision of the British Columbia Labour Relations Board in Rayonier Canada (B.C.) Ltd. (1975), 2 CLRBR 196, at 201, to convey the distinct attributes of the duty of fair representation:*

> *... 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 favoritism. 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.*

This Board has also commented on the distinctive meanings of these three concepts. In Glynna Ward v. Saskatchewan Union of Nurses, LRB File No. 031-88, they were described in these terms:

> *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 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.*

[27] The Board has followed and applied these principles in numerous cases over the past many years. In the present case, it is our opinion that the Union fulfilled its duty pursuant to s. 25.1 of the *Act* with respect to the Applicant's grievance. The Union fairly and adequately investigated the circumstances and arrived at an informed and rational decision to put the matter before the Joint Conference Committee. Following the Joint Conference Committee's decision, the Union decided not to advance the grievance to arbitration.

[28] Because of the time limits for filing grievances contained in most collective agreements, grievances are routinely filed in order to preserve rights and allow sufficient time for adequate investigation and discussion with the employer. However, the filing of a grievance is not a guarantee or representation to an employee that a complaint will certainly be advanced to arbitration. That decision is dependent upon a number of considerations, including the results of the investigation of the circumstances of the event.

[29] It is also important to recognize the special circumstances regarding grievances in the context of employment in the construction industry, particularly in the case of short-term projects, and hiring hall procedures. The Union cannot be faulted for taking into consideration the circumstances of the project in the present case. The project was for five days only, during which the plant would be shut down. The Employer had the right to expect that the full complement of workers from the Union's hiring hall would show up and remain for as long as was required to get the job done on time. Mr. Greer quite properly viewed the Employer's interests in maintaining its reputation as dove-tailing with the Union's interests in securing work for its members.

[30] Accordingly, the application against the Union is dismissed.

[31] Furthermore, notwithstanding that the Applicant likely does not have standing to file the unfair labour practice application against the Employer, we find in any event that there is insufficient evidence to support that application and it is also dismissed.

DATED at Regina, Saskatchewan, this **2nd** day of **June**, 2005.

LABOUR RELATIONS BOARD

James Seibel,
Chairperson