The Labour Relations Board
Saskatchewan

DOUGLAS WEES, BARON HACK, NICHOLAS KAPELL, OLIVE KAVANAGH, ALLAN LANDRY, ALAN LINDQUIST, RONALD MACK and ORIE ROGOZA, Applicants v. SASKATCHEWAN INSURANCE, OFFICE AND PROFESSIONAL EMPLOYEES' UNION, LOCAL 397 and SASKATCHEWAN GOVERNMENT INSURANCE, Respondents

LRB File Nos. 182-04 & 195-04 to 201-04; May 3, 2005
Vice-Chairperson, Wally Matkowski; Members: Gloria Cymbalisty and Leo Lancaster

For the Applicants:	Nicholas Kapell
For the Respondent Union:	Rick Engel
For the Respondent Employer:	Shelley Joyce

Duty of fair representation – Scope of duty – Applicants allege that union's decision not to file grievance relating to employer's unilateral change to pension plan incorrect – Board does not have jurisdiction to overturn decision made by union simply because applicant believes decision to be incorrect in absence of arbitrary, discriminatory or bad faith conduct by union – Where no evidence that union acted in arbitrary, discriminatory or bad faith manner, Board dismisses duty of fair representation applications.

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

REASONS FOR DECISION

Background:

[1] Douglas Wees, Baron Hack, Nicholas Kapell, Olive Kavanagh, Allan Landry, Alan Lindquist, Ronald Mack and Orie Rogoza (the "Applicants") each filed an unfair labour practice application alleging that Saskatchewan Insurance, Office and Professional Employees' Union, Local 397 (the "Union") violated s. 25.1 of *The Trade Union Act,* R.S.S.1978, c. T-17 (the "*Act*") and failed to represent the Applicants fairly and reasonably by failing to grieve a unilateral amendment of the collective agreement proposed by Saskatchewan Government Insurance (the "Employer"). What the Employer did in fact change was the SGI Contributory Superannuation Plan, which change would require the Applicants to resign on or before June 30, 2004 in order to prevent a loss of pension benefits.

[2] The Applicants also filed an unfair labour practice application alleging that the Employer violated s. 11 of the *Act* by failing to bargain with the Union prior to implementing the unilateral amendment.

[3] The Board heard this matter in Regina on October 5, 2004. At the start of the hearing, counsel for the Employer raised the preliminary objection that the unfair labour practice application against the Employer should be dismissed because the Applicants did not have standing to directly bring the application against the Employer. Counsel argued that the Board's recent decision in *Metz v. Saskatchewan Government and General Employees' Union and Government of Saskatchewan*, [2003] Sask. L.R.B.R. 28, LRB File No. 164-00 was directly on point. In *Metz, supra*, the Board held that the applicant lacked standing to bring a s. 11(1)(c) complaint against her employer because the employer owed the duty to bargain in good faith to the union, as the exclusive representative of the employees. Counsel for the Union agreed that the Board was bound by the *Metz, supra,* decision.

[4] Mr. Kapell, spokesperson for the Applicants, candidly admitted that the Applicants' claim against the Employer was made pursuant to s. 11(1)(c) of the *Act*. As such, the Board upheld the Employer's preliminary objection and dismissed the application against the Employer, on the basis that the Applicants did not have standing to bring the application against the Employer, relying on the Board's decision in *Metz*, *supra.*

[5] The hearing was marked by a tremendous amount of cooperation between the Applicants and the Union. Mr. Kapell advised the Board that he had been active in the Union for approximately thirty years and had been president of the local. Given his past involvement with the Union, he reluctantly brought his application. He agreed to a number of facts contained in the Union's brief of law and counsel for the Union agreed to a number of facts put forward by Mr. Kapell. Based on these agreements, neither party called any witnesses to testify before the Board.

[6] Mr. Kapell advised the Board that the Applicants' legal position was that the Union should have filed grievances on behalf of the Applicants in relation to the proposed changes to the SGI Contributory Superannuation Plan (the "old pension plan"),

even though he conceded that the Union had not acted in an arbitrary, discriminatory or bad faith manner, pursuant to s. 25.1 of the *Act*.

Facts:

[7] The Applicants are members of the old pension plan, which is administered by the Employer according to a plan text that is registered with the Superintendent of Pensions. The day-to-day operations of the old pension plan are run by a pension committee consisting of a chairperson, a members' representative and a CIC representative. The old pension plan is maintained for employees of the Employer, both in-scope and out-of-scope, who were hired prior to January 1, 1980 and who did not elect to transfer to the SGI Capital Pension Plan (the "defined contribution plan"). At present, there are less than forty current employees still in the old pension plan, inactive members of the old pension plan (people who quit their employment at SGI but are not yet eligible to draw a pension benefit) and retirees.

[8] In 1993, the old pension plan text was amended to allow members at the date of retirement to take a monthly pension benefit or to terminate their employment in the old pension plan and withdraw their funds. In 2003, the Employer decided that it would return to a pre-1993 calculation of the termination formula. It sought and received permission to do so from the Superintendent of Pensions. In April 2004, the Employer gave current employees until June 30, 2004 to opt for the 1993 formula. To obtain this option, employees had to terminate membership in the old pension plan as well as their employment with the Employer.

[9] The Applicants want to be "grandfathered," so that the 1993 formula will apply to them on their respective normal retirement dates. While the Union is sympathetic to the plight of the Applicants, the Union has refused to file a grievance on behalf of the Applicants. The Union has not made pensions a bargaining issue with the Employer and states that it does not have a mandate to do so from its membership. In addition, the Union does not believe that it can successfully pursue a grievance on behalf of the Applicants because it is the Union's position that the old pension plan text is not negotiated between the Employer and the Union and that the old pension plan does not arise out of, nor is it incorporated into, the collective agreement.

[10] The applicable provisions of the collective agreement between the Employer and the Union are as follows:

> *ARTICLE 2 – RECOGNITION*
>
> *2.1 The Employer agrees to recognize the Union as the sole collective bargaining agent for the Employees covered by this Agreement and hereby consents and agrees to negotiate with the Union or its designated representatives in any and all matters affecting the relationship between the said Employer and its Employees.*
>
> *. . .*
>
> *ARTICLE 20 – GRIEVANCES*
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> *20.1 Grievance means any complaint or dispute brought by the Employer or by the Union on its own behalf or on behalf of any Employee(s) concerning matters relating to the interpretation, application, or alleged violation of this agreement.*
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> *. . .*
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> *ARTICLE 24 – BENEFIT PLANS*
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> *24.1. Pension Plans*
>
> *24.1.1 The Employer shall provide contributions, as required by the plan text, on behalf of Employees registered in the following pension plans:*
>
> - *Contributory Superannuation Plan for the Employees of SGI.*
> - *Capital Pension Plan.*
> - *Public Service Superannuation Plan.*
> - *Public Employees Superannuation Plan.*
>
> *24.1.2 Employees registered in the SGI Contributory Superannuation Plan will be provided with a statement indicating pension equity as soon as possible after the first quarter of each year. Employees registered in the remaining pension plans will receive statements as required by the applicable plan text.*

Relevant statutory provision:

[11] 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.*

Applicant's Arguments:

[12] The Applicants argued that the Employer implemented unilateral changes to the old pension plan and that the Union should have challenged the actions of the Employer and filed a grievance on behalf of the Applicants. The Applicants pointed to a recent arbitration decision, *Grain Services Union v. Saskatchewan Wheat Pool*, July 30, 2002, (Campbell) quashed in *Saskatchewan Wheat Pool v. Grain Services Union*, [2004] 2 W.W.R. 496 (Sask. Q.B.) to support their argument that the Union could have filed a grievance with the Employer as a result of the Employer's unilateral amendments to the old pension plan.

Union's Arguments:

[13] Counsel for the Union argued that there was absolutely no evidence of improper conduct by the Union falling within the parameters of s. 25.1 of the *Act*. Counsel argued that the Union has not made pensions a bargaining issue and does not have the mandate from its members to do so. Counsel also argued that the Board did not have jurisdiction to hear these applications because the old pension plan text is not negotiated between the Union and the Employer.

Analysis:

[14] In the recent decision *Judd v. Communications, Energy and Paperworkers Union of Canada, Local 2000 et al.* (2003), 91 C.L.R.B.R. (2d) 33, the British Columbia Labour Relations Board stated at 42:

> *. . . although the Board has explained that it has no jurisdiction to overturn a union's decision simply because an employee thinks it was wrong, the Board receives a large number of Section 12*

> *complaints which essentially ask the Board to do just that. While these complaints may use the phrases "arbitrary, discriminatory and bad faith", the essence of the complaint is often that the Union was wrong. However, it is not the Board's role to decide if a union was right or wrong as long as the union has not acted in an arbitrary, discriminatory, or bad faith manner.*

[15] Likewise, in Saskatchewan, a large number of duty of fair representation cases present no evidence of union wrongdoing pursuant to the *Act*, but rather applicants complain that their union made the wrong decision. In the case at hand, Mr. Kapell conceded that there was no evidence that the Union had acted in an arbitrary, discriminatory or bad faith manner. Mr. Kapell and the Applicants do believe that the Union made an incorrect decision not to file a grievance and proceed to arbitration in relation to the changes made to the old pension plan. However, as set out in *Judd, supra*, the Board does not have jurisdiction to overturn a decision made by a union simply because an applicant believes it to be wrong in the absence of any arbitrary, discriminatory or bad faith conduct. Given that there was no evidence that the Union acted in an arbitrary, discriminatory or bad faith manner, the applications against the Union are dismissed.

DATED at Regina, Saskatchewan this **3rd** day of **May, 2005.**

LABOUR RELATIONS BOARD

Wally Matkowski,
Vice-Chairperson