Labour Relations Board
Saskatchewan

D.C.B., Applicant v. SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION and RAIDER INDUSTRIES INC., Respondents

LRB File No. 045-04; August 30, 2006
Chairperson, James Seibel; Members: Clare Gitzel and Gerry Caudle

The Applicant: D.C.B.
For the Union: Brian Haughey
For the Employer: Al Bromley

Duty of fair representation – Scope of duty – Applicant failed to contact union until one year after termination, advised union that he was not willing to return to work for employer and agreed with union that best course of action was to pursue appeal of denial of workers compensation claim – Union assisted applicant with workers compensation appeal – Applicant did not contact union further until filing duty of fair representation application – Board concludes that union did not act in arbitrary or bad faith manner and dismisses application.

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

REASONS FOR DECISION

Background:

[1] Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union") is certified to represent a bargaining unit of employees of Raider Industries Inc. (the "Employer"). At all material times, the Applicant, D.C.B., was an employee in the bargaining unit and a member of the Union until his employment was terminated by the Employer on March 22, 2002. On March 9, 2004 the Applicant filed an application pursuant to s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), alleging that the Union had failed to fairly represent him with respect to grievance or rights arbitration. Section 25.1 provides as follows:

> *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.*

[2] In his application, the Applicant alleged that the Union violated s. 25.1 of the *Act* by reason that the Union refused to file a grievance of his termination.

[3] In its reply to the application, filed with the Board on March 19, 2004, the Union denied the allegation and said that the Applicant had been the subject of progressive discipline by the Employer. Furthermore, the Union stated that it met with the Applicant, who had been injured at work on June 29, 2001 and could not return to work in his former position with the Employer due to medical problems, with respect to determining an appropriate course of action and it was determined that the Union would represent the Applicant with respect to an appeal to the Workers' Compensation Board, which it did. Finally, the Union stated that the Applicant had not contacted a representative of the Union for over a year before he filed the present application.

[4] The Applicant represented himself at the hearing of the application by the Board.

Evidence:

[5] The Applicant testified on his own behalf. The Applicant commenced employment at the Employer's plant on May 17, 2000, after being terminated from his two previous jobs. After approximately one year, the Applicant developed a bronchial problem, which appears to have been exacerbated by the glues used in his work with the Employer. He also had some problems with his job performance.

[6] The Applicant was injured at work on June 29, 2001. He spent approximately four months on workers' compensation benefits between November 14, 2001 and March 8, 2002, following a course of physiotherapy. He commenced work again on March 11, 2002 working about three hours a day doing a variety of tasks as assigned.

[7] The Employer terminated the Applicant on March 22, 2002, ostensibly for cause. Some considerable time after being terminated, the Applicant sought the assistance of the Union. The Applicant was unclear as to when this was. He discussed the matter with a representative of the Union, Brian Haughey, and advised Mr. Haughey that he was too ill to return to work with the Employer.

[8] At some point the Applicant filed a complaint against the Employer with the Saskatchewan Human Rights Commission in connection with his termination -- again, he was unclear as to when this was, but said that the Union was not involved in that proceeding. The Applicant also attempted to again obtain workers' compensation benefits but his claim was eventually denied in March 2004.

[9] The Applicant stated that the Union refused to assist him.

[10] In cross-examination by Mr. Haughey, the Applicant admitted that, shortly after he contacted the Union, Mr. Haughey and a shop steward from the Employer's Moose Jaw plant met with the Applicant in Saskatoon, where he was then living in March 2003. After discussing the situation with the Applicant, who told them that he was still suffering from his injuries and taking medications for depression, the Applicant agreed that it was decided that the Union would assist him in an appeal of the denial of his workers' compensation claim. The claim was denied after an assessment by the Workers' Compensation Appeals Board, which took the position that the Applicant was fit to return to work in his pre-injury position and duties. The Applicant did not contact the Union after that.

[11] When asked whether the Union had ever refused to meet with him, the Applicant stated that he had no telephone and no money. He agreed that the Union had not discriminated against him, but maintained that the Union had treated him unfairly.

[12] The Applicant stated that he was not fit to return to work and, in any event, he was not ready to return to work with the Employer, which has plants in Moose Jaw and Drinkwater, because he did not want to move but rather wanted a job in Saskatoon.

[13] The Union did not call any *viva voce* evidence.

Arguments:

[14] In a somewhat disjointed argument, the Applicant stated that he wanted the Board

to solve his problem and that he had been on medication for some three years. Somewhat surprisingly, he asserted that he was ready to do any kind of work and wanted to return to his former job. In somewhat contradictory fashion, he also said that he wanted the Board to reserve decision in his case until he was back on his feet.

[15] Mr. Haughey, on behalf of the Union, stated that, while the Union sympathised with the Applicant, it had not failed in its duty to fairly represent the Applicant. Having determined that the Applicant's complaint was without merit and that it was long out of time to file a grievance, the Union nonetheless agreed to assist the Applicant in an appeal of the denial of his workers' compensation claim, which it did. In any event, because the Applicant was unwilling to return to work with the Employer at either of its plants, there was no use to filing a grievance or proceeding to arbitration.

Analysis and Decision:

[16] The Board's general approach to applications alleging a violation of s. 25.1 of the *Act* was summarized as follows in *Lawrence Berry v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep. 65, LRB File No. 134-93, 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.*

[17] In *Hargrave v. Canadian Union of Public Employees, Local 3833 and Prince Albert Health District,* [2003] Sask. L.R.B.R. 511, LRB File No. 223-02 the Board held that it was not up to a union to seek out grievances to file. Employees have a responsibility to bring their complaints to the attention of the union, except in cases where the facts are exceptional or warrant otherwise, such as when an employee reasonably is not able to do so.

[18] In the present case, the Applicant did not contact the Union to voice his complaint until about a year after his termination. At that time he advised the Union that he was not medically fit to return to work and in any event did not want to return to work at either of the Employer's plants. It was agreed between himself and the Union that the Union would assist him in pursuing an appeal of the denial of his workers' compensation claim. The Union fulfilled that undertaking. The Applicant did not contact the Union after the appeal was determined before he filed the present application. He said that this was because he did not have a telephone.

[19] The Applicant specifically stated that the Union had not acted in a discriminatory manner, but asserted simply that it had acted unfairly.

[20] As in *Hargrave*, *supra*, the Applicant had a responsibility to bring any complaint connected with his termination to the attention of the Union in a reasonably timely fashion. He did not do this. When he did contact the Union, in considering all of the circumstances at that time, it was agreed between them that proceeding with a workers' compensation claim appeal was the best course of action to obtain redress for the Applicant.

[21] While the Applicant has some difficulty with the English language, his statements as to whether and when he was medically fit to return to work and whether or not he was willing to

return to work with the Employer in any event, were confusing and contradictory to say the least. We accept that he advised the Union that he was not willing to return to work with the Employer.

[22] Considering the evidence in the context of the tests as to arbitrary or bad faith action by a bargaining representative, we conclude that the Union did not violate s. 25.1 of the *Act*.

[23] The application is dismissed.

DATED at Regina, Saskatchewan, this **30th** day of **August, 2006.**

LABOUR RELATIONS BOARD

James Seibel,
Chairperson