Labour Relations Board
Saskatchewan

WADE PETERS, Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 3967, and REGINA QU'APPELLE HEALTH REGION, Respondents

LRB File No. 253-03; January 24, 2006
Chairperson, James Seibel; Members: Leo Lancaster and Pat Gallagher

The Applicant: Wade Peters
For the Respondent Union: Peter Barnacle
No one appearing for the Employer

Duty of fair representation – Contract administration – Union may properly advance interpretation of selection provisions of collective agreement that accords with union's opinion as to best interests of membership as whole – Union's course of action, in advancing interpretation that coincides with personal interests of one member against personal interests of another member, not discriminatory or in bad faith.

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

REASONS FOR DECISION

Background:

[1] Canadian Union of Public Employees, Local 3967 (the "Union") is the designated bargaining agent for a unit of employees of the Regina Qu'Appelle Health Region (the "Employer"). At all material times, the Applicant, Wade Peters, was a member of the bargaining unit. Mr. Peters filed the present application alleging that the Union violated s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") with respect to the handling of his complaint arising out of a selection competition. Mr. Peters and another employee and member of the Union both applied for a posted position. The Employer awarded the position to Mr. Peters. The Union filed a grievance of the selection on behalf of the other employee, the resolution of which, at the last step of the grievance procedure prior to actual arbitration, resulted in the awarding of the position to the other employee. Subsequently, the Union refused to file and progress a grievance on behalf of Mr. Peters.

[2] 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.*

[3] In its reply to the application, the Union denied the allegation of failing to fairly represent Mr. Peters, specifically stating that, having resolved a grievance of the selection competition filed on behalf of another employee and member of the Union that resulted in that employee being awarded the position, it could not properly subsequently file and prosecute another grievance by Mr. Peters with respect to the same competition.

[4] Mr. Peters represented himself in the proceedings.

Evidence:

[5] The basic facts were not in dispute.

[6] At the time of the hearing, Mr. Peters had been employed by the Employer for some 13 years, the last six years as a CT technician at Regina General Hospital. In 2003, he applied for the posted position of CT team leader, in which position, at the time of the posting, he had been working temporarily for some two months. A co-worker and fellow member of the Union, B.M., also applied for the position. Although B.M. had greater seniority than Mr. Peters, the Employer advised B.M. that she did not have the requisite qualifications and it awarded the position to Mr. Peters. The Union filed a grievance on behalf of B.M. The grievance was resolved by the Union and the Employer at the dispute resolution committee, the last step in the grievance procedure before arbitration. The resolution was that the position was awarded to B.M.

[7] The dispute resolution committee, as established pursuant to the collective bargaining agreement between the Union and the Employer, is composed of six members, three appointed by the Union and three appointed by the Employer. The mandate of the dispute resolution committee is "to either resolve the dispute/issue or submit it to either one of expedited arbitration or full panel arbitration." The process includes the Union and the Employer each stating their respective positions to the dispute resolution committee in writing. In the present case, the

Employer took the position that B.M. was not qualified for the position because she lacked certain educational course requirements. The Union's position was that B.M. was qualified because she had been previously "grandfathered" into her present position despite the lack of the same educational requirements. In allowing the grievance, the dispute resolution committee described its rationale as follows:

> *The Employer has used the employee for relief work in a higher paid classification requiring same qualifications, therefore it is apparent that they have grandfathered her for more than her own position.*

[8] Mr. Peters testified in the proceedings before the Board that he was not informed by the Union that it had filed a grievance on behalf of B.M. with respect to the awarding of the CT team leader position to him, and he was never afforded the opportunity to make representations to the Union or to the dispute resolution committee. Subsequent to the resolution of the B.M. grievance, Mr. Peters asked the Union to file a grievance on his behalf. The Union refused to do so.

[9] In cross-examination Mr. Peters admitted that his position was the same as the Employer advanced in B.M.'s grievance proceeding. He said he could understand how the Union's "hands were tied" with respect to filing a subsequent grievance on his behalf, having already been successful on B.M.'s grievance, but stated that the Union nonetheless had the duty to represent him on his request to grieve.

[10] Andrew Huculak is a national representative of the Union. He has been employed by the Union since 1988. His responsibilities include acting as the Union's chief spokesperson with respect to the health care portfolio. He described the collective agreement clause at issue in the B.M. grievance as a "sufficient ability" type of selection provision, as opposed to a "relative ability" type provision or a "competitive" type provision. That being the case, the Union deemed it important to advance the grievance on behalf of B.M. on the basis that, because she had sufficient ability to perform the job and because she had greater seniority than Mr. Peters, she ought properly to have been awarded the position despite the fact that Mr. Peters had greater educational qualifications. Mr. Huculak described seniority as the "cornerstone" of the selection

process under the collective agreement. Selection grievances constitute approximately 30 to 40 per cent of the matters taken before the dispute resolution committee. Mr. Huculak said that it was not tenable for the Union to subsequently take a position contrary to its consistent interpretation of the collective agreement: acceding to Mr. Peters' request to grieve would have required the Union to do so.

Arguments:

[11] Mr. Peters argued that the duty of fair representation required the Union to contact him when it decided to advance B.M.'s grievance in order that he could have participated in the dispute resolution committee proceedings and that, having failed to do so, the Union was in violation of s. 25.1 of the *Act*.

[12] Mr. Barnacle, counsel on behalf of the Union, argued that the Union had fulfilled its duty of fair representation pursuant to s. 25.1 of the *Act*. He stated that selection grievances are difficult for trade unions because they often pit the individual interests of one member against those of another member. He argued that, for that reason, the Union's overarching duty was to act consistently in selection grievances and advance the position that was in the best interests of the Union and the membership as a whole as opposed to the interests of any individual member. In the present case, the "sufficient ability" type selection clause does not allow the Employer to select the applicant with the best qualifications as of right, but rather, the Employer must award the position to the senior applicant with sufficient qualifications. This was the interpretation the Union advanced in progressing the grievance on behalf of B.M. Even had the Union been inclined to do so (which it was not because of its interpretation of the selection clause), it would have been inappropriate to file and progress a grievance on behalf of Mr. Peters that took a position contrary to that successfully advanced by the Union before the dispute resolution committee. In support of his arguments Mr. Barnacle referred to the decisions of the Board in *Hawkins v. United Transportation Union, Local 1110 and Carlton Trail Railway Company*, [2003] Sask. L.R.B.R. 127, LRB File No. 193-01; *Johnson v. Amalgamated Transit Union, Local 588 and City of Regina*, [1997] Sask. L.R.B.R. 19, LRB File No. 091-96; and *Griffiths v. Construction and General Workers' Union, Local 890*, [2002] Sask. L.R.B.R. 98, LRB File No. 044-01.

Analysis and Decision:

[13] The Board's general approach to applications alleging a violation of s. 25.1 of the *Act* is summarised in *Berry v. Saskatchewan Government Employee's Union*, [1993] 4th Quarter Sask. Labour Rep. 65, LRB File No. 134-93, at 71-72, and essentially follows the principles laid down by the Supreme Court of Canada in its well-known decision in *Canadian Merchant Services Guild v. Gagnon*, [1984] 84 CLLC 12,181. The distinctive meanings of the terms "arbitrary, discriminatory or in bad faith" are described by the Board in *Glynna Ward v. Saskatchewan Union of Nurses*, [1988] Winter Sask. Labour Rep. 44, LRB File No. 031-88.

[14] A situation similar to the present case was considered by the Supreme Court of Canada in *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R., 1248. The employer had awarded a vacant position to one of four candidates. The three unsuccessful candidates grieved on the ground that the determining factor of previous experience had not been properly applied. As a result of a reassessment by the employer, one of the three was declared the successful candidate. The union subsequently presented two grievances arising out of management's decision, which were denied at the first two stages of the grievance procedure. The union's executive council determined that the grievances had no merit and recommended that the local not proceed further with them. An action was commenced against the union alleging a breach of the duty of fair representation. The Supreme Court of Canada held that the principles governing a union's duty of fair representation, which were set out in its decision in *Gagnon*, *supra*, clearly contemplate a balancing process. A union must in certain circumstances choose between conflicting interests in order to resolve a dispute. In *Gendron*, the Court stated that the union's choice was clearly due to the obvious error made in the selection process and it had no choice but to adopt the position that would ensure a proper interpretation of the collective agreement. The Court stated further that, in a situation of conflicting employee interests, the union may pursue one set of interests to the detriment of another as long as its decision to do so is not actuated by improper motives and as long as it turns its mind to all of the relevant considerations. The Board specifically applied *Gendron* in its decision in *Skomar v. Service Employees' International Union, Local 333 et al.*, [1992] 4th Quarter Sask. Labour Rep. 109, LRB File No. 181-92.

[15] In our opinion, the Union did not violate its duty of fair representation under s. 25.1 of the *Act* in this case. Selection grievances are notoriously difficult cases for trade unions for the reasons cited above by counsel for the Union. However, a trade union may properly advance an interpretation of the selection provisions of a collective agreement that accords with its opinion as to what is in the best interests of its membership as a whole. In such situations, the union's course of action in advancing an interpretation that coincides with the personal interests of one member and which is against the personal interests of another member does not constitute discrimination or action in bad faith. The decision by the union in such cases is not based upon the preferment of one member over another but rather the advancement of an interpretation of the collective agreement that, in the union's opinion as the bargaining agent, is in the best interests of the membership as a whole and the objectives of the union in its collective bargaining with the employer.

[16] The *bona fides* of such a course of action has been confirmed in many cases in this and other jurisdictions over the course of many years.

[17] In *Davies v. General Truck Drivers and Helpers Union, Local No. 31*, [1983] B.C.L.R.B. 136-06 (February 23, 1983), the British Columbia Labour Relations Board came to a conclusion similar to that in *Gendron*, *supra*, where a union grieved an employee's lay-off because the union felt it was contrary to the provisions of the collective agreement and contrary to the parties' understanding of how seniority worked. When the grievance succeeded, the union refused to take up the grievance of an affected employee, since it was at variance with the union's understanding of the seniority provisions. The British Columbia Labour Relations Board accepted the union's argument that it was entitled to pursue the interests of the bargaining unit as a whole, over the interests of an individual member whose interests could only be pursued if the union was prepared to set aside its view of the proper interpretation and application of the collective agreement. The British Columbia Labour Relations Board stated that, in these situations, even if the union's view was incorrect, that was a different thing than acting arbitrarily, discriminatorily or in bad faith. It was the union's judgment that the employee was promoted contrary to the terms of the collective agreement and the British Columbia Labour Relations Board agreed that, in these situations, a union must take a stance contrary to the

individual interests of an employee who has been unfairly rewarded by management at the expense of other employees.

[18] In *Anderson v. The Manitoba Government Employees' Association*, [1995] MLBD No. 5 (February 28, 1990), a selection grievance situation, the Manitoba Labour Relations Board held that the union was not obliged to represent a member in grievance proceedings where to advance the position would be detrimental to the union itself. In its brief reasons for decision, the Manitoba Labour Relations Board stated as follows:

> *The jurisprudence in this area is clear. A bargaining agent is not required to provide representation to, or advance grievances on behalf of members, where the bargaining agent, after due consideration, has decided are without merit or would be detrimental to the bargaining unit.*
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> *The Board, on hearing the submissions in this matter, is satisfied that a bargaining agent does not contravene section 20 when, after fairly considering the facts in a given situation, it declines to provide representation to a member in a situation where it already has agreed to represent or support a conflicting position of another member on the same issue, as long as that decision is arrived at after fairly weighing the competing interests of both employees*

[19] The Ontario Labour Relations Board took a similar position, also in a selection grievance situation. In *Mlakar v. CUPE, Local 79*, [1989] OLRB Rep. December 1246, the Ontario Labour Relations Board held that, where the union supports the interest of one bargaining unit member consistent with the application and administration of the collective agreement, it is not required to represent the opposing interest. The Ontario Labour Relations Board stated as follows at 1248 and 1249:

> *With respect to the allegation that the union failed to represent the complainant at the hearing of Ms. Fekete's grievance the following is clear. Unions are often placed in the position of having to deal with competing rights and interests as between individual members of the bargaining unit for which they hold bargaining rights. Invariably there are situations where there is "discrimination" as between individuals. For example, one is discriminating in conferring a preference to one employee over another based on seniority. It is discriminatory to confer a preference to a better qualified employee over another. However, that "discrimination" is, in and of itself, in no way improper. Choices as*

> *between individuals must be made. What gives rise to concern is where that choice is made based on arbitrary or other improper considerations. This Board has said on many occasions that making those difficult decisions is very much a part of the responsibility which a union bears in the representation of employees.*
>
> *...*
>
> *The union is entitled to challenge those decisions of management which it feels violate the collective agreement. Failing to do so would obviously run the risk of being accused of failing to represent the members of the bargaining unit. Having undertaken to refer this grievance to arbitration the union must represent Ms. Fekete's interest. The complainant would have the union represent her competing interest as well. Inherent in that is the requirement that the union take inconsistent positions at the arbitration and argue against itself. The nature of the proceedings is such that it is the decision of management that is being challenged. Obviously the complainant may be affected. But section 68 does not make a union the guarantor for every aggrieved employee nor does it require the union, having made its decision as between competing interests, to support both. It properly supports the interest that it feels is consistent with the proper application and/or administration of the collective agreement. The complainant was advised by Ms. Jewitt that the union would not represent her at the arbitration nor would it provide her with counsel. In so doing, the union did not violate section 68 of the Act.*

[20] In *Shipowich v. Service Employees' International Union, Local 333 and Saskatoon District Health Board*, [1999] Sask. L.R.B.R. 56, LRB File No. 271-98, at 68, the Board expressed the following opinion regarding the decision by a union to support interests at arbitration that in its opinion reflect a proper application of the collective agreement although it conflicts with the interests of an individual member:

> *[45] In the present case, we are of the opinion that the Union has decided to support the interests at arbitration that it, after due consideration, believes supports the proper application and administration of the collective agreement and the Framework Agreement. We also find that the Union gave due consideration to the competing interests of Ms. Shipowich in arriving at this decision. There is no evidence that the Union has acted in bad faith or in an arbitrary or discriminatory manner in arriving at its decision. It has chosen the path that it believes is best for the welfare of the bargaining unit and the bargaining process. To the extent that the Union has distinguished between members of the bargaining unit, it has demonstrated that it has well founded reasons for*

> *doing so; in the absence of any evidence to suggest otherwise, we are not prepared to second guess this decision.*

[21] Similar sentiments were expressed by the Board in *Hildebaugh v. Saskatchewan Government and General Employees' Union and Saskatchewan Institute of Applied Science and Technology*, [2003] Sask. L.R.B.R. 272, LRB File No. 097-02, as follows at 285 and 286:

> *[49] The Union's duty of fair representation is a dual responsibility. It owes a duty of diligent and competent representation to the bargaining unit as a whole, as in collective agreement negotiation, and a duty to fairly represent individual members in grievance and arbitration proceedings. The cases are legion that recognize that the two arms of the duty are often in conflict and that it is necessary for a union to engage in a balancing of collective and individual interests. However, it is clear that a bargaining agent need not grieve or arbitrate every individual complaint even if it is legitimate. It may decline to do so where the interests of the collective membership are reasonably deemed to be more important than those of the individual. A common example is the decision by a union to represent one of its members in a selection grievance based on its interpretation of the collective agreement and the interests of the wider membership where the successful outcome of the grievance will mean that another member will not be successful in obtaining the position.*

[22] In *Dorval v. Canadian Union of Public Employees, Local 59*, [1995] 2nd Quarter Sask. Labour Rep. 94, LRB File No. 289-94, the Board held that a trade union did not violate the duty of fair representation when it advanced a consistent position in accordance with its honestly held belief regarding the proper interpretation of the collective agreement to the advantage of the membership as a whole. The Board stated at 103:

> *The whole system of collective bargaining and representation by trade unions is based upon the Union's right and duty to arbitrate between the conflicting interests of its members and also between the interests of the collective membership and an individual member and to then put a single position forward to the employer. This is why unions exist and provided they do not act arbitrarily, discriminatorily or in bad faith, they have discharged their duty to their members.*

[23] In *Smith v. Canadian Union of Public Employees, Local 1975*, [2002] Sask. L.R.B.R. 110, LRB File No. 093-01, the Board reiterated this principle as follows at 118 and 119:

> *[19] In the present circumstances, whether or not the issue raised by Mr. Smith with the Union concerning the termination of his term employment is grievable or arbitrable is not relevant and not one that we will determine. The Union has a longstanding policy that favours the creation of full-time permanent positions filled through the posting and bidding process over a practice of making unposted successive term appointments that may result in an automatic change in status for the incumbent but which ignore the factor of seniority in the filling of positions. The Union's position is based upon the belief that the former process is in the best interests of the members of the bargaining unit as a whole. It arrived at its position after consideration of the significance of the principle of seniority in selection matters and the competing interests of individual term employees and the membership as a whole. It did not act arbitrarily or in bad faith.*
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> *[20] The Union's decision to support one collective agreement mechanism for the creation of full-time permanent positions over another has the effect of generally distinguishing against those members of the bargaining unit who are term employees, in that they tend to have less seniority than permanent employees. However, as in Lymer, supra, to the extent that it is based upon encouragement to create permanent positions and the promotion of seniority as a primary consideration in the filling of vacancies it does not improperly discriminate against Mr. Smith within the meaning of s. 25.1 of the Act.*

[24] The decision of the Board in *Lymer v. Saskatchewan Insurance Office and Professional Employees' Union, Local 397 (O.P.E.I.U.)*, [2000] Sask. L.R.B.R. 174, LRB File No. 176-99, is apposite to the present situation. In that case, the applicant complained that the union had breached its duty of fair representation, *inter alia*, by emphasizing seniority in the selection process allegedly resulting in discrimination against job applicants (such as the applicant) who met the posted qualifications by fulfilling educational requirements over those job applicants who qualified through job experience and a test procedure. In determining that the Union had not breached its duty, the Board stated, at 182, as follows:

> *[26] In the present case, it is not necessary for us to assess whether the issue raised by Mr. Lymer is or is not grievable under the collective agreement. We have determined on all of the evidence that the Union did not violate s. 25.1 of the Act. The Union was forthright with Mr. Lymer in relation to the issue about its interpretation of the collective agreement and its philosophy and practical emphasis. There is no general duty upon*

> *a union to seek an opinion from a legal professional regarding such matters. The essence of the Union's position was that there was no violation of the collective agreement, and that, in any event, the interest of Mr. Lymer was secondary to that which it perceived to be in the best interest of the membership as a whole.*
>
> *[27] The evidence establishes to our satisfaction that the Union arrived at its decision not to investigate further or file a grievance after fairly considering the facts and the competing interests at stake. A union, after giving the matter due consideration, is not obliged to represent a member in grievance proceedings where to advance the position would be detrimental to the union itself or to its interests in bargaining; it is entitled to support the interest that it feels is consistent with the proper application and/or administration of the collective agreement. This may result in "discrimination" as between individual employees, but this type of discrimination is not improper if it results from an informed consideration of the facts and a choice based upon well-founded reasons that are not arbitrary or otherwise offensive.*

[25] In the present case, for the foregoing reasons, we find that the Union did not violate s. 25.1 of the *Act* and, specifically, did not act in a manner that was arbitrary, discriminatory or in bad faith. Accordingly, the application is dismissed.

DATED at Regina, Saskatchewan, this **24th** day of **January, 2006.**

LABOUR RELATIONS BOARD

James Seibel,
Chairperson