Labour Relations Board
Saskatchewan

DAVE LEBLANC, Applicant v. INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL 555, and LLOYDMINSTER MAINTENANCE LTD., Respondents

LRB File No. 028-07; November 15, 2007
Chairperson, James Seibel

The Applicant: Dave LeBlanc
For the Respondent Union: Bettyann Cox
No one appearing for the Employer

Duty of fair representation – Scope of duty – Board's function not to determine merits of grievance or substitute Board's opinion for union's opinion – Board's function to determine whether union fairly and reasonably arrived at decision without acting in bad faith or in arbitrary or discriminatory manner – Where union fairly investigated and considered circumstances, sought legal advice, took not unreasonable view of situation and made thoughtful decision not to advance grievance, Board finds no violation of duty of fair representation.

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

REASONS FOR DECISION

Background:

[1] At all material times International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 555, (the "Union"), had a project collective agreement with the Boilermakers' Contractors' Association of Saskatchewan and CLR Construction Labour Relations Association of Saskatchewan Inc., the representative employers' organization pursuant to *The Construction Industry Labour Relations Act, 1992*, S.S. 1992, c. C-29.11. Lloydminster Maintenance Ltd. (the "Employer") is certified by the Union with respect to workers in the Union's trade jurisdiction. The Employer is engaged in maintenance and repair work at certain electrical generating stations in Saskatchewan. The Union operates a hiring hall dispatch system for its members as and when unionized employers request workers in the trade.

[2] At all material times the Applicant, Dave LeBlanc, was a boilermaker, a member of the Union for some 19 years and a member of the bargaining unit covered by the project collective agreement. He worked for the Employer at Boundary Dam from January 15, 2007, when he was dispatched from the Union's hiring hall, until he was laid off on February 2, 2007. The Employer also sent a memorandum to the Union asking that the Union not dispatch the Applicant pursuant to any future request for workers by the Employer (the "do-not-dispatch memorandum").

[3] The Union filed grievances relating to each of these actions by the Employer on the Applicant's behalf. The Union subsequently withdrew the grievances.

[4] The Applicant filed an application with the Board alleging that the Union committed an unfair labour practice(s) in violation of s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act* ") in failing to pursue the grievances. 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.*

[5] In its reply to the application, the Union stated that it withdrew the grievance of the Applicant's lay-off after conducting a thorough investigation and determining that the Employer did not violate the project collective agreement. The Union further stated that it withdrew the grievance of the do-not-dispatch memorandum after the Employer withdrew the do-not-dispatch memorandum, on certain conditions, at a meeting with the Union and the Applicant.

[6] The Board heard the case over two days on July 11 and 12, 2007.

Evidence:

[7] The Applicant testified on his own behalf. The Union's business manager and assistant business manager, Dallas Rogers and Eric Zimmerman, testified on behalf of the Union. We shall not iterate the entire sequence of events in detail. The basic facts are fairly straightforward. Following is a brief summary.

[8] Employers call the Union's hiring hall when they are in need of qualified boilermakers. Starting at the top of the dispatch list, the first qualified member is offered employment, and so on down the list, subject to an employer's right to "name hire" one in four members dispatched by the Union. Name-hired members jump the queue. Once a member is cleared for dispatch, the Union completes and faxes a project clearance form to the employer. The nature of the work performed by the Employer is often temporary and cyclical. In the present case, it involved equipment shutdown and scheduled maintenance. When a member is laid off or quits, his or her name goes to the bottom of the dispatch list.

[9] On December 21, 2006 the Employer requested the Union to dispatch eight workers for January 15, 2007 including four boilermaker mechanics. The boilermaker mechanics the Union dispatched included the Applicant and Chris Shepley, who was appointed shop steward by the Union.

[10] On Tuesday, January 31, 2007, by fax, the Employer requested the Union to dispatch six boilermaker mechanics to start on February 5, 2007. On Wednesday, February 1, 2007 the Union's assistant business manager, Mr. Zimmerman, received a telephone call from the Applicant who complained that Mr. Shepley was not fairly representing the Applicant with respect to a situation regarding his switching to work the night shift

[11] Mr. Zimmerman became aware that the Applicant had been laid off by the Employer on Friday, February 3, 2007 at approximately 3:45 p.m. when Mr. Zimmerman received a telephone call from the Applicant. The Union had three days to file a grievance. On Monday, February 5, 2007 at 7 a.m., Mr. Zimmerman called Ron Jickling, the Employer's foreman, to discuss the situation. Mr. Jickling advised Mr. Zimmerman that, because the Employer had been led to believe that the Applicant was switching to the night shift, it requested more workers from the Union for the day shift; when the Applicant changed his mind the Employer was then overstaffed on days starting February 5, 2007 and laid the Applicant off. There are no seniority rights regarding lay-off under the collective agreement.

[12] Soon afterwards, Mr. Zimmerman spoke with Mr. Shepley, the Union's shop steward on site. Mr. Shepley advised Mr. Zimmerman that the Applicant had agreed to switch to night shifts starting Sunday, February 4, 2007 but then changed his mind. Mr. Zimmerman asked Mr. Shepley to send him a statement by fax, which he received later that day, and then he called Mr. Shepley again and went over it with him. After consulting with the Union's business manager, Mr. Rogers, Mr. Zimmerman said he decided to file a grievance out of an abundance of caution due to the short time frame in which to do so, in other words, to preserve his rights pending further investigation and discussion with the Employer.

[13] After making his inquiries, Mr. Zimmerman finally decided that the Applicant had not been laid off improperly. Mr. Zimmerman determined that, on the morning of Wednesday, January, 31, 2007, the Applicant asked Mr. Shepley to see if Mr. Shepley could get the Applicant onto the night shift. Mr. Shepley advised the Applicant that he would try but it was unlikely that he would be successful because two other workers who made a similar request had already been declined. Later that same morning, Mr. Jickling met with Mr. Shepley and advised him that the instructor working the night shift had fallen ill and, because there was no replacement with an overhead crane operation "ticket," the night shift crew would have to be sent home. Mr. Shepley suggested that the Applicant be transferred to the night shift because he had the requisite crane ticket. Mr. Jickling agreed. Mr. Shepley then advised the Applicant that he had been successful in getting him transferred to the night shift. However, the Applicant indicated that, if the change was to help out the Employer, he would not make the change. Finally the Applicant agreed to do it. However, after Mr. Shepley had advised Mr. Jickling that the Applicant agreed to make the switch, the Applicant told Mr. Shepley he had changed his mind unless the Employer met certain conditions involving payment of money and time off. In the interim, the Employer had placed its request with the Union for more day shift workers. When Mr. Shepley told Mr. Jickling of the Applicant's refusal to switch unless certain conditions were met, the Employer declined to agree. As there were going to be too many boilermaker mechanics starting the day shift on February, 5, 2007, the Employer's assistant superintendent, Mike Bolen, advised the Applicant he was laid off at the end of his shift on Friday, February 2, 2007. The Applicant filed a harassment complaint against Mr. Bolen under the Employer's harassment policy. The Employer responded with the do-not-dispatch memorandum.

Throughout all of this, Mr. Zimmerman said he spoke with the Applicant at least a dozen times.

[14] In all of the circumstances, Mr. Zimmerman and Mr. Rogers, in consultation with a representative of the international Union and after seeking legal advice, determined that the Employer did not violate the collective agreement by laying off the Applicant. Nonetheless, the Union continued to advance the Applicant's case, advising the Employer on February 20, 2007 that the Union was proceeding to the next step of the grievance procedure. A meeting was arranged for February 27, 2007 between the Employer and the Union to discuss the situation. The Applicant was in attendance. As a result of the meeting, the Union withdrew the grievances, the Employer withdrew the do-not-dispatch memorandum and the Applicant withdrew his harassment complaint.

[15] Unfortunately, the Employer then exacerbated the situation by sending the Union a memorandum requesting that it not dispatch the Applicant pursuant to any further request for workers by the Employer because he made a harassment complaint to the Employer that it considered was obviously without merit

Arguments:

[16] The Applicant's argument was brief. He argued that the grievances ought to have been advanced to arbitration. He asserted there was no shortage of work; rather, the Employer had ordered too many workers. He said he filed the harassment complaint because he felt he was being bullied.

[17] Ms. Cox, counsel on behalf of the Union, argued that there was no evidence that the Union had violated s. 25.1 of the *Act*. The Union expended great effort in investigating the situation and arriving at its decision not to proceed to arbitration. It was successful in having the do-not-dispatch memorandum rescinded. The Employer believed the Applicant was going to the night shift and it needed more people on the day shift. By the time it found out otherwise, the requested workers had been cleared to work by the Union. The Union cannot manipulate the dispatch board. It has certain responsibilities to all of its members whose individual interests may not always coincide. In support of her arguments, counsel referred to the following decisions: *Griffiths v.*

Construction and General Workers' Union, Local 890, [2002] Sask. L.R.B.R. 98, LRB File No. 044-01; *Stevenson v. United Food and Commercial Workers, Local 226*, [2000] Sask. L.R.B.R. 517, LRB File No. 006-99; *Aupperle v. United association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 179 and Honeywell Limited*, [2002] Sask. L.R.B.R. 251, LRB File No. 247-01*; Datchko v. Deer Park Employees' Association and Board of Education of the Deer Park School Division No. 26*, [2006] Sask. L.R.B.R. 354, LRB File Nos. 262-03 & 263-03; *Gregoire v. United Steelworkers of America, Local 5890 and IPSCO Inc.*, [1997] Sask. L.R.B.R. 766, LRB File No. 317-95; *McRae-Jackson v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)* (2004), 115 C.L.R.B.R. (2d) 161 (CIRB); *Hinks v. Construction and General Workers' Union, Local 180 and Jacobs Catalytic Ltd.*, [2007] Sask. L.R.B.R. 1, LRB File No. 067-05; *Duperreault v. UNITE HERE, Local 41 and West Harvest Inn*, [2007] Sask. L.R.B.R. 257, LRB File No. 181-06

Analysis and Decision:

[18] 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.*

[19] In an application under s. 25.1 of the *Act*, it is not the function of the Board to determine the merits of a grievance or to substitute our opinion for a union's opinion on the basis that we might think the union was wrong. Our function is to determine whether a union has fairly and reasonably arrived at its decision without acting in bad faith or in an arbitrary or discriminatory manner. This is often difficult for individual members to understand given that the concepts are somewhat legalistically complex and that their individual interests may be in conflict with those of the collective membership. An example is where a union has certain goals it wishes to achieve in bargaining which, in its opinion, are in the interests of its membership as a whole that do not coincide with the interests of an individual member. 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, the Board observed as follows at 285 and 286 :

> *[49] The Union's duty of 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 the 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 ion 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.*

[20] It is our opinion that on the whole of the evidence the Union did not violate s. 25.1 of the *Act* in the present case. Its representative, Mr. Zimmerman, fairly investigated the facts and circumstances of both the lay-off of the Applicant and the issuing of the do-not-dispatch memorandum. Mr. Zimmerman, along with more senior representatives of the Union, considered those facts, sought legal advice and, not unreasonably, determined that there was no arbitrable violation of the collective agreement with respect to the lay-off.

[21] In deciding not to advance the grievance to arbitration, the Union took a not unreasonable view of the situation and made a thoughtful decision. It did not act arbitrarily or in bad faith and did not discriminate against the Applicant in taking the course of action that it did. The meeting with the Employer, at which the Applicant was present, resulted in the withdrawal of the do-not-dispatch memorandum and a statement by the Employer to the effect that going forward it would work with the Union to make the Applicant's future employment with the Employer a success.

[22] For the foregoing reasons, the application is dismissed.

DATED at Regina, Saskatchewan, this **15th** day of **November, 2007.**

LABOUR RELATIONS BOARD

James Seibel,
Chairperson