Labour Relations Board
Saskatchewan

GARY HINKS, Applicant v. CONSTRUCTION AND GENERAL WORKERS' UNION, LOCAL 180 and JACOBS CATALYTIC LTD., Respondents

LRB File No. 067-05; January 17, 2007
Chairperson, James Seibel

The Applicant:	Gary Hinks
For the Respondent Union:	Neil McLeod, Q.C.
For the Respondent Employer:	No one appearing

Duty of fair representation – Contract administration – Union's representatives fairly investigated facts and circumstances of incident in workplace and subsequent lay-off of applicant – Union determined that no grievable violation of collective agreement occurred, that there was no evidence of animosity by employer toward applicant and that there was no suggestion that lay-off was for improper reasons – Board finds no violation of duty of fair representation.

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

REASONS FOR DECISION

Background:

[1] Construction and General Workers' Union, Local 180, (the "Union"), represents labourers in the general construction and pipeline construction industries[1]. At all material times the Union represented labourer employees in the construction sector and had a collective agreement with Jacobs Catalytic Ltd. (the "Employer") covering a bargaining unit of such employees engaged in maintenance work on behalf of the Employer at, *inter alia*, the IMC Potash plant at Belle Plaine, Saskatchewan. The Union operates a hiring hall dispatch system for its members as and when employers request workers.

[2] At all material times the Applicant, Gary Hinks, was a construction labourer, a member of the Union and a member of the bargaining unit represented by the Union. He worked for the Employer at the IMC Potash plant for approximately 19

[1] The jurisdiction of Local 180 is the area south of the 51st parallel. The jurisdiction of its sister Local 890 covers the area north of the 51st parallel in Saskatchewan.

years until he was laid off on or about August 21, 2004, more than 14 months after he made a report to the Employer in June 2003 of an altercation with his supervisor. The Union prepared a grievance of his discharge from employment dated August 25, 2004. Approximately three weeks later, the Union advised the Applicant that it declined to present the grievance to the Employer or otherwise process it further.

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

[4] In its reply to the application, the Union stated that it had withdrawn the grievance after making a thorough investigation of the situation and determining that the discharge was not related to the altercation with the supervisor, was because of a shortage of work and was not a violation of the collective agreement.

Evidence:

[5] The Applicant testified on his own behalf. He stated that he had been employed with the Employer from 1985 until he was laid off on August 25, 2004.

[6] The Applicant testified that he had an altercation with his supervisor in June 2003, during which he alleged he was assaulted. He reported the matter to the Employer. Within a few days, the Employer's human resources department in Calgary (represented by a Mr. Bollan) conducted an investigation including the taking of the Applicant's statement and interviewing other witnesses. Pursuant to the Applicant's request, he was transferred to a different job in a different work area away from the supervisor involved. The Applicant also reported the incident to the police but apparently they took no action. In February 2005, nearly two years after the incident, the Applicant reported it to Saskatchewan Labour, Occupational Health and Safety Division, complaining that he believed the incident had led to his lay-off the August before. The

Occupational Health and Safety Division conducted an investigation and concluded that the incident had not resulted in any injury and dismissed the complaint of alleged discriminatory action by the Employer pursuant to s. 27 of *The Occupational Health and Safety Act, 1993*, S.S. 1993, c. O-1.1.

[7] The Applicant testified that, in June 2004, approximately one year after the incident, he was summoned to meet with the Employer's project manager, Mr. Larson. He was accompanied by the Union's job steward, James Patterson. Mr. Larson offered the Applicant a severance package if he would resign his employment. The Applicant declined to accept the offer but, a short while later, he made a counter-proposal to Mr. Larson, which was not accepted by the Employer, and the Applicant remained in the Employer's employ. In cross-examination by counsel for the Union, the Applicant admitted that he did not consult the Union nor seek its assistance or advice regarding the situation.

[8] The Applicant testified that there was nothing unusual in terms of his treatment by the Employer until he was laid off over a year later on or about August 21, 2004. On approximately August 25, 2004, he and Mr. Patterson were again summoned to a meeting with Mr. Larson. He was given a notice of lay-off, ostensibly for lack of work. While the last five employees hired were also laid off at the same time – one labourer, two iron workers and two summer students – the Applicant claimed that he was third on a seniority list of sixteen employees. He stated that he believed he was laid off in retaliation for being a "whistle blower" in the incident the year before. The Union filed a grievance of the lay-off dated August 25, 2004. However, the Applicant took issue with the way that the Union's representative, Lori Sali, handled the situation and claimed that the collective agreement grievance procedure was not followed in that there was no first step meeting between the employee, job steward and supervisor.

[9] By letter dated September 14, 2004, Ms. Sali advised the Applicant that, after investigating the matter, the Union would not be taking the grievance forward. The letter provided, in part, as follows:

> *After a though (sic) investigation into your grievance it was found that there was no violation of the Collective Agreement. The reason for the lay off was shortage of work as indicated on your*

> *amended copy of the Record of Employment. On the day of your lay off, one other labourer, two ironworkers and two students were also laid off due to shortage of work.*

[10] The Applicant testified that Ms. Sali never questioned him about the circumstances of the lay-off and that he did not know to whom she had spoken in the course of her investigation.

[11] After that time, the Applicant was on the Union's out-of-work dispatch board. However, despite several dispatches for work, including some dispatch requests by the Employer, the Applicant did not accept any work. He said he did not do so because he was incapable of doing so, was under a physician's care and was receiving disability benefits until shortly before the hearing by the Board of this application. However, he admitted that he had not advised the Union of this.

[12] The Applicant called Mr. Patterson to testify on his behalf. At all material times, Mr. Patterson was the Union's job steward at the Belle Plaine site. Mr. Patterson testified that, following the June 2003 incident, he and Mr. Larson conducted an investigation, including meeting with all the witnesses involved and obtaining their statements. A short while later, Mr. Patterson and the Applicant met with a mediator engaged by the Employer. A short time later, the Employer brought in Mr. Bollan to do a further investigation to determine whether action should be taken against the supervisor. Subsequently, Mr. Larson advised Mr. Patterson that the Employer would place the supervisor under close observation.

[13] Mr. Patterson testified that the Employer appeared to take the incident seriously and did not appear to be at all angry or upset with the Applicant. Mr. Larson asked the Applicant if he wanted to stay on in his present position, be transferred to another area or accept a severance package. The Applicant was transferred to another area.

[14] About one year later, in June 2004, Mr. Larson offered the Applicant a severance package. Mr. Patterson confirmed his attendance at Mr. Larson's meeting with the Applicant, but said that he was not invited by the Applicant to be involved in, nor

was he privy to, any subsequent negotiations between the Applicant and Mr. Larson regarding severance.

[15] With respect to the lay-off of the Applicant in August 2004, Mr. Patterson testified that he and the Applicant met with Mr. Larson, who provided the Applicant with a record of employment and eight (8) weeks' pay as per the collective agreement concerning lay-off. The Applicant told Mr. Patterson that he wanted to file a grievance. Mr. Patterson met the Applicant at the Union's office in Regina to draft the grievance and they both met with Ms. Sali to review it. Ms. Sali advised them that she would have to set up a meeting with Mr. Larson to present the grievance.

[16] Mr. Patterson and Ms. Sali met with Mr. Larson and presented the grievance to him. Subsequently, he and Ms. Sali concluded that the grievance had no merit. Mr. Patterson testified that the collective agreement does not contain a seniority clause with respect to lay-offs, so the lay-off of the Applicant did not offend the collective agreement in that regard. Furthermore, Mr. Patterson concluded that there was no evidence that the lay-off was otherwise unjust – several other employees were laid off the same day — and there were general cutbacks in the workplace. Mr. Patterson did not feel there was any reason to conclude that the lay-off was related to the June 2003 incident.

[17] Ms. Sali has been the Union's business manager since 2000. Ms. Sali stated that, after the June 2003 incident, the Applicant did not request the assistance of the Union. However, Ms. Sali and Mr. Patterson interviewed witnesses and Ms. Sali discussed the matter with the Employer's human resources manager. In January 2004, when the Applicant still appeared to be upset about the incident, Ms. Sali advised him with respect to availing himself of the services of the Union's employee assistance program, but he declined to do so.

[18] In August 2004, Mr. Patterson told Ms. Sali that the Applicant had been laid off. Mr. Patterson told Ms. Sali that the Applicant wanted to file a grievance and she told them to come to the Union's office. Ms. Sali told the Applicant that she would meet with Mr. Larson before deciding whether to present the grievance to him. Ms. Sali and Mr. Patterson met with Mr. Larson on September 13, 2004. Ms. Sali testified that Mr.

Larson explained that there had been a general reduction in workers at the site and provided her with a list of persons in other trades who were laid off as well as labourers – in total, approximately ten tradespersons were laid off at the time.

[19] Ms. Sali confirmed that the Union's collective agreement for members working in "maintenance," including the Applicant and the other labourers employed by the Employer, does not contain a seniority clause regarding lay-off and there is no "last hired, first laid off" rule although that is a common belief of employees. The same situation exists with respect to its members employed under the "construction" agreement, but not in the "industrial" setting. Ms. Sali testified that she found no evidence that the lay-off of the Applicant was related to the June 2003 incident. The Employer had accommodated his transfer to a different work area and did not appear to harbour any ill feelings toward him. Ms. Sali's review of the Union's records of lay-offs by the Employer showed that, over the years, at least five labourers with more than five years' employment had been laid off and none had been dismissed for cause. Several had also been employed for many years with intermittent lay-offs. Ms. Sali said that the Union cannot force an Employer to lay off the last hired in a work reduction situation. She determined that there was no grievable offence under the collective agreement and did not present the grievance to the Employer.

[20] Ms. Sali testified that the Union's members are dispatched from the Union's hiring hall upon an employer's request according to the Union's rules. Mr. Larson confirmed to Ms. Sali that, if the Employer requested labourers from the hiring hall, it would accept the Applicant if he was dispatched. However, members must sign in once a month and bid on requests as they arise; if a member does not bid for three months, his or her name is removed from the out-of-work dispatch board. Ms. Sali testified that the Employer called the hiring hall for workers three times in May and June 2005, but the Applicant did not bid on any of the requests. Ms. Sali said that her examination of the Union's records showed that the Applicant would have been dispatched on at least one of those occasions. Ms. Sali testified that the Applicant had never contacted her about the opportunity for being recalled to work for the Employer.

Arguments:

[21] The Applicant's argument was brief. He iterated that he believed his lay-off was related to the June 2003 incident and that the Union failed to represent him properly.

[22] Mr. McLeod, counsel for the Union, argued that the Union had fulfilled its duty of fair representation. He asserted that the Applicant's complaint was based on two erroneous assumptions: that he had job security rights related to seniority, and that he was laid off because he had been a "whistle-blower" with respect to the June 2003 incident. Counsel for the Union said that the first assumption was simply not true, and the second was not supported by the facts. The collective agreement does not provide any security from lay-off and, as in the construction industry, the member's security is founded in the hiring hall dispatch system, under which an employer must accept whoever is sent out. Furthermore, the evidence did not support a consistent "last hired, first to be laid off" past practice by the Employer. After fairly investigating the situation, the Union determined there was a legitimate shortage of work and no evidence of lay-off for other improper reasons. Counsel argued that the Union had not violated s. 25.1 of the *Act*.

[23] In support of his arguments counsel referred to the following decisions of the Board: *Radke v. Canadian Paperworkers Union, Local 1120*, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92; *Taylor v. Regina Police Association Inc. and Regina Police Service*, [2003] Sask. L.R.B.R. 307, LRB File No. 016-03; *Mercer v. Communications, Energy and Paperworkers' Union and PCS Mining Ltd*., [2003] Sask L.R.B.R. 458, LRB File No. 007-02.

Analysis and Decision:

[24] 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.*

[25] It is our opinion that, on the whole of the evidence, the Union did not violate s. 25.1 of the *Act*. Its representatives fairly investigated the facts and circumstances of both the June 2003 incident and the August 2004 lay-off. It considered those facts and determined that there was no grievable violation of the collective agreement. It determined there was no evidence of animosity by the Employer towards the Applicant nor any suggestion that the lay-off was related to any improper reasons.

[26] In deciding not to file the grievance, 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 its course of action and making its decision not to file and prosecute the grievance.

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

DATED at Regina, Saskatchewan, this **17th** day of **January, 2007.**

LABOUR RELATIONS BOARD

James Seibel,
Chairperson