Labour Relations Board
Saskatchewan

DENIS DUPERREAULT, Applicant v. UNITE HERE, LOCAL 41 and WEST HARVEST INN, Respondents

LRB File No. 181-06; June 19, 2007
Vice-Chairperson, Angela Zborosky

The Applicant:	Denis Duperreault
For the Union:	Garry Whalen
For the Employer:	No one appearing

Duty of fair representation – Contract negotiation – Employer and union did not contemplate conditions or limitations on lump sum payments during negotiations – Board notes that not possible for parties to anticipate every potential problem of interpretation during negotiations and finds no obligation on union to discuss all possible scenarios, particularly scenario that had not yet arisen, at ratification meeting – Union's failure to be more explicit in collective agreement language concerning conditions or limitations on lump sum payments not motivated by bad faith or done in arbitrary or discriminatory manner.

Duty of fair representation – Contract administration – Union had necessary information about member's situation and made reasonably thoughtful assessment of situation – Not for Board to determine whether union interpreted provision correctly but rather whether union's decision free from arbitrariness, discrimination and bad faith – Union's conduct not arbitrary, no evidence of bad faith and union's treatment of member consistent with manner in which other members treated – Union did not breach duty of fair representation.

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

REASONS FOR DECISION

Background:

[1] UNITE HERE, Local 41 (the "Union"), is designated as the bargaining agent for a group of employees of the West Harvest Inn (the "Employer"). The Applicant, Denis Duperreault, was at all material times a member of the bargaining unit. The Applicant filed an application with the Board alleging that the Union had violated s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the *"Act"*) by refusing to file a grievance in relation to the Employer's failure to provide the Applicant with a lump sum

payment required by the collective agreement, while the Applicant was on extended sick leave.

[2] Section 25.1 of the *Act* 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] At the outset of the hearing and/or in its reply to the application, the Union denied the allegation that it had failed to fairly represent the Applicant. The Union stated that the lump sum payments in the collective agreement were negotiated in lieu of an hourly wage increase and, because the Applicant had not worked during the time period to which the lump sum payment was attributed, he was not entitled to the lump sum payment. The Union indicated that, if the Applicant returns to work within the relevant time period, the Employer has agreed that the Applicant will receive a pro-rated amount of the lump sum payment. The Union indicated that other similarly situated employees were treated in this manner and argued that it was and is justified in its refusal to file a grievance on behalf of the Applicant.

[4] A hearing was held on June 5, 2007.

Evidence:

[5] The Applicant testified on his own behalf. Garry Whalen, the representative of the Union responsible for servicing the bargaining unit, testified on behalf of the Union.

[6] The Applicant has been employed by the Employer in the maintenance area for a period in excess of ten years. The Applicant testified that he attended a union meeting to ratify the current collective agreement for the period from October 1, 2005 to September 30, 2007. The Applicant became aware at that meeting that the revised collective agreement provided for wage increases in the form of lump sum payments. Article 20 of the collective agreement provides for a wage scale and job classifications

and references wage rates in Appendix A of the collective agreement. That portion of Appendix A dealing with lump sum payments reads as follows:

> *Effective October 1, 2005:*
>
> *- Employees over 10 years of service as of October 1, 2005 $500.00*
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> *- Employees over 5 years of service as of October 1, 2005 $350.00*
>
> *- Employees less than 5 years of service as of October 1, 2005 $200.00*
>
> *. . .*
>
> *Effective October 1, 2006*
>
> *- Employees over 10 years of service as of October 1, 2006 $750.00*
>
> *- Employees over 5 years of service as of October 1, 2006 $600.00*
>
> *- Employees less than 5 years of service as of October 1, 2006 $400.00*

[7] The Applicant testified that he voted in favour of ratification of the revised collective agreement but stated that there was no specific discussion about the lump sum payments provided for in the collective agreement and that the collective agreement set out no conditions concerning these payments.

[8] Mr. Whalen testified that, during negotiations for the current collective agreement, the Union agreed to a wage freeze on the hourly rates set out in the collective agreement in exchange for lump sum payments to be paid on October 1, 2005 and October 1, 2006, the amounts of which were based on the employees' years of service. Mr. Whalen agreed that the collective agreement was otherwise silent on any conditions concerning the payments. He also acknowledged that, while the employees had the opportunity to discuss and ask questions concerning the revisions to the collective agreement, there was no specific discussion about any conditions on the payment of the lump sums provided for in the collective agreement.

[9] The Applicant testified that, on October 1, 2005, he properly received a lump sum payment in the amount of $350.00, as he had less than ten years of service as of that date. The Applicant continued to work for the Employer until he went on extended sick leave on March 9, 2006. The Applicant had not returned to work as of the date of the hearing of this application.

[10] The Applicant testified that, in approximately August 2006, he attended a union meeting with other employees of the Employer to discuss a number of concerns of the employees. During that meeting, the Applicant raised with Mr. Whalen the issue of the lump sum payment payable October 1, 2006. He stated that he asked Mr. Whalen what he would be paid and when he would be paid and that he received no answers from Mr. Whalen. The following day, the Applicant's brother, who also works for the Employer, told the Applicant that the Union's shop steward said that the Applicant should not worry and that he would be paid.

[11] Mr. Whalen's recollection of his discussion with the Applicant at the union meeting in August 2006 was substantially different. Mr. Whalen testified that, when the Applicant asked what he would receive, Mr. Whalen advised the Applicant that, based on when the Applicant returned to work, he would receive a pro-rated amount of the lump sum payment. Mr. Whalen stated that this was consistent with how two other employees had been treated who had been on sick leave at the time a payment was due because the lump sum payment was not a bonus but had been agreed to in lieu of a wage rate increase. As Mr. Whalen later explained, an employee would not be entitled to the payment unless the employee was working and earning it, just as if the employee was working and earning a higher hourly wage rate. Mr. Whalen testified that the Applicant raised the issue a number of times during the August 2006 meeting insisting that he should receive the full amount of the lump sum payment. It was clear to Mr. Whalen that the Applicant was not happy with the answers Mr. Whalen gave him and that the Applicant was refusing to listen to Mr. Whalen.

[12] Concerning Mr. Whalen's statement that the Union must treat the Applicant in a manner consistent with how other employees had been treated, Mr. Whalen referred to an earlier situation that arose in relation to two other employees who were on sick leave when the October 1, 2005 lump sum payment became payable. He stated that, in approximately March 2006, two employees who had been on sick leave since prior to October 1, 2005 had inquired of him whether they would receive the October 1, 2005 payment and, if so, the amount of the payment. Mr. Whalen discussed the matter with the shop steward and the general manager, Chris Rieger, and they agreed that, because the employees were returning from sick leave during the year in

which the lump sum payment was for (i.e. the time period from October 1, 2005 to September 30, 2006), they would get a portion of the payment. They agreed that the employees would receive a pro-rated sum based on the time they were working during that time period, which amounted to approximately six months (mid-April 2006 to September 30, 2006). These sums were paid to these employees when they returned to work in April 2006.

[13] At some later point in time (although it was not clear whether this occurred before or after the Applicant found out that he had not received a cheque for the lump sum payment on October 1, 2006), the Applicant was having breakfast at the Employer's premises with his brother when he ran into the Employer's general manager, Mr. Rieger, and inquired about the lump sum payment. The Applicant testified that Mr. Rieger told the Applicant that Mr. Rieger had agreed with Mr. Whalen that the Applicant would be paid when he returned to work. Following this conversation, the Applicant stated that he attempted to contact Mr. Whalen several times by telephone. As he was not able to reach Mr. Whalen to discuss the matter further, the Applicant called a management representative in Calgary in an attempt to find out why he had to wait until he returned to work before he could receive the lump sum payment. The management representative advised the Applicant that he would have to speak to Mr. Whalen.

[14] The Applicant then spoke to the Union's shop steward and indicated that he wanted to file a grievance over the non-payment of the lump sum. The Applicant stated that the shop steward later advised him that Mr. Whalen would not file a grievance on his behalf and that he could file a complaint with the labour board. The Applicant had no further discussions with Mr. Whalen. At the time of filing this application with the Board, the Applicant understood that he would get paid when he returned to work but he felt he should not have to wait. He was also concerned that he might not ever return to work. In cross-examination, while he admitted that the Union might be following the contract, the Applicant said he was operating on what he thought was fair in the circumstances.

[15] Mr. Whalen stated that it is his understanding that he has an agreement with the Employer that, if the Applicant returns to work before October 1, 2007, he will get a pro-rated amount of the lump sum payment due on October 1, 2006. Mr. Whalen

stated that it was unfortunate that there was nothing in the collective agreement to deal with this situation but that during negotiations the parties cannot think of every instance that might arise over the duration of the collective agreement. In cross-examination, Mr. Whalen acknowledged that rather than dealing with the Applicant at the August 2006 meeting -- a meeting that had become “chaotic” -- he should have met with the Applicant alone to discuss the matter. Mr. Whalen explained that, when the Applicant had tried to reach him by telephone, he had been away from the office for an extended period of time attending to the Union’s business outside of the city and province and assisting his ill mother but had left instructions for his secretary and the shop steward to tell the Applicant that there was no basis for a grievance and that, if the Applicant did not agree, he would have to take the Union to the labour board and file a duty of fair representation complaint. Mr. Whalen tried to reach the Applicant by phone a number of times, without success, upon his return to the office.

Arguments:

[16] The Applicant submitted that the Union violated s. 25.1 of the *Act*. He believes that the collective agreement should have been clearer on whether and how the lump sum payments would apply to an employee in his situation. He believes the fair and proper interpretation of the collective agreement is that the payments should be tied to years of service rather than considered a wage increase. He indicated that, had he known how the lump sum payments would work for someone on sick leave, he might not have voted in favour of ratification of the collective agreement, although, at that time, he did not expect he would be on sick leave on the date of the payments.

[17] Mr. Whalen, on behalf of the Union, submitted that the Union has represented the Applicant fairly and is not in violation of s. 25.1 of the *Act*. He acknowledged that, in hindsight, he could have communicated better with the Applicant but said that that should not make the Union liable.

[18] While regretting the failure to be more specific in the collective agreement concerning the lump sum payments and what should occur if an employee was on sick leave when a payment was due, Mr. Whalen submitted that such a failure is not in violation of the *Act*. Faced with this problem of interpretation, the Union and Employer had to agree on an appropriate interpretation of the provision in question. Mr. Whalen

believes that the interpretation the Union and Employer placed on the provision of the lump sum payments is a reasonable one. He stated that the lump sum payments were negotiated in lieu of an hourly rate increase and that therefore the employee must be working in order to receive the payment, the same as if the wage increase had been an addition to the hourly rate – an employee only receives the benefit of a wage increase if he or she is working and getting paid for those hours of work. Mr. Whalen stated that the parties had never intended that the lump sum payment be considered a "bonus" of some sort, tied to years of service, but rather intended that it was a wage increase that had to be earned.

Analysis and Decision:

[19] 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.*

[**emphasis added**]

[20] The ground of arbitrariness can often be more difficult to apply than those of bad faith and discrimination. The concept of arbitrariness has been described in *Walter Prinesdomu v. Canadian Union of Public Employees*, [1975] 2 Canadian LRBR 310, a decision of the Ontario Labour Relations Board which has often been followed by this Board. In that case, the Ontario Board stated, at 315:

> *It could be said that this description of the duty requires the exclusive bargaining agent to* ***"put its mind" to the merits of a grievance and attempt to engage in a process of rational decision making that cannot be branded as implausible or capricious****.*
>
> *This approach gives the word arbitrary some independent meaning beyond subjective ill will, but, at the same time, it lacks any precise parameters and thus is extremely difficult to apply. Moreover, attempts at a more precise adumbration have to reconcile the apparent consensus that* ***it is necessary to distinguish arbitrariness (whatever it means) from mere errors in judgment, mistakes, negligence and unbecoming laxness****.*

[**emphasis added**]

[21] In *Radke v. Canadian Paperworkers Union, Local 1120*, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92, the Board outlined the nature of representation an employee might reasonably expect from his or her union. The Board stated at 64-65:

> *What is expected of trade union officials in their representation of employees is that they will act honestly, conscientiously and without prejudgment or favouritism.* ***Within the scope of these criteria, they may be guilty of honest errors or even some***

> ***laxity in the pursuit of the interest of those they represent.*** *In making decisions about how or whether to pursue certain issues on behalf of employees,* ***they should certainly be alert to the significance for those employees of the interests which may be at stake.*** *Given the importance of the employee interests the union has the responsibility to pursue, they should also carry out their duties seriously and carefully.* ***The ultimate decision made or strategy adopted, however, may take into account other factors than the personal preferences or views of an individual employee.***
>
> [**emphasis added**]

[22] In the present case, the Applicant's complaints centre around the failure of the Union to include in the collective agreement more explicit language concerning any conditions on the payment of the lump sums as well as the refusal of the Union to file a grievance when the Applicant did not receive the lump sum payment on October 1, 2006. In relation to the latter point, the Applicant disagrees with the Union's interpretation that the provision relating to the lump sum payment is tied to working rather than being a payment for years of service. In examining these complaints, the Board prefers the evidence of Mr. Whalen to that of the Applicant concerning the content of the parties' communications. That is not to say that the Board considers the Applicant untruthful; only that Mr. Whalen appeared to have a more detailed recollection of events and his testimony in this regard was consistent with the sequence of events testified to by Mr. Whalen and the Applicant.

[23] With respect to the complaint that the Union should have been more explicit in the language of the collective agreement concerning any conditions or limitations on the payment, the Board is satisfied that the Union's failure to do so was not motivated by bad faith nor was it done in an arbitrary or discriminatory manner. Both the Union and the Employer simply did not contemplate such matters at the time of negotiations. It is not possible to anticipate every potential problem of interpretation during negotiations. Grievances often arise under a collective agreement concerning issues of interpretation simply because the provisions agreed to by the parties have not clearly provided an answer to a problem. Similarly, there was no obligation on the Union to discuss all possible scenarios at the ratification meeting, particularly in light of the fact that the issue of an employee being on sick leave at the time of a payment had not yet

arisen. The Applicant's suggestion that he might not have voted in favour of ratification of the collective agreement does not change this conclusion as both his suggestion and the result of him not voting in favour of ratification are speculative and, in any event, do not support the conclusion that the Union acted in a manner that was arbitrary, discriminatory or in bad faith in the negotiation of this provision in the collective agreement.

[24] With respect to the Union's decision not to file a grievance on the Applicant's behalf, the Board does not decide the merits of the purported grievance itself but rather assesses the reasonableness of a union's conduct in the context of evidence concerning the nature of the grievance and the steps the union took in handling the employee's problem. As the Board stated in *Banga v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep. 88, LRB File No. 173-93, at 98:

> *It is clear from the jurisprudence which has accumulated concerning the duty of fair representation that it is not the task of a labour relations board to second guess a trade union in the performance of its responsibilities, or to view the dealing of that union with a single employee without considering a context in which numerous other employees and the union itself may have distinct or competing interests at stake.*

[25] In the present case, the Board is satisfied that the Union had the necessary information concerning the Applicant's situation and made a reasonably thoughtful assessment of that situation. The Union determined that, while it was not necessary for the Applicant to be actually working on the date of the payment in question, the purpose of the payment was to be compensation for work performed rather than a bonus not tied to the actual performance of work. In light of this interpretation, the Union agreed with the Employer that the Applicant could still receive a pro-rated portion of the October 1, 2006 payment if he returns to work before October 1, 2007. It is not for the Board to determine whether the Union gave the provision a correct interpretation in law or one that an arbitrator would accept, but rather to determine whether the Union's decision was free from arbitrariness, discrimination and bad faith. The Union did not act in a cursory or perfunctory manner but rather took an informed, rational and reasonable view of the problem when it reached an agreement with the Employer and when it

determined that a grievance was not supportable. The Union's conduct was therefore not arbitrary. There was no evidence of bad faith by the Union and, given the agreement reached between the Union and the Employer that the Applicant could still receive a pro-rated payment if he returns to work before October 1, 2007, the Union's treatment of the Applicant was consistent with the manner in which other employees on sick leave were treated and was therefore not discriminatory.

[26] As has been stated in numerous decisions of the Board, for example, in *Hidlebaugh 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, it is not for the Board to minutely assess and second guess the actions of a union in its conduct of the grievance procedure. In the Board's view, the Union appropriately put its mind fairly and reasonably to an assessment of the facts and the collective agreement provision in question, without arbitrariness, discrimination or bad faith. The fact that the Union's decision did not coincide with the personal interests of the Applicant does not lead us to the conclusion that those interests were ignored. The Union is entitled to take into account factors other than the Applicant's personal preferences. The Board finds that the Union did not breach its duty of fair representation under s. 25.1 of the *Act*.

[27] The Board agrees with Mr. Whalen's comment that the Union could have better communicated its position to the Applicant, although the Union explained its position right from the outset and maintained that position throughout its dealings with the Applicant. Any subsequent delay in responding to the Applicant's request to file a grievance was adequately explained by Mr. Whalen and it is clear that the Applicant's request to file a grievance arose out of his dissatisfaction with the position the Union had taken from the outset and his refusal to accept that position. In these circumstances, any laxity in the Union's communication of its position, while it may have prompted the Applicant to bring this application, does not constitute arbitrary treatment and does not support a finding of a violation of s. 25.1 of the *Act*.

[28] The application is dismissed.

DATED at Regina, Saskatchewan, this **19th** day of **June, 2007.**

LABOUR RELATIONS BOARD

Angela Zborosky,
Vice-Chairperson