Labour Relations Board
Saskatchewan

STEWART MARTIN UNIQUE, Applicant v. TEAMSTERS LOCAL UNION 395, Respondent

LRB File No. 006-08; June 6, 2008
Chairperson, Kenneth G. Love, Q.C.

The Applicant: Stewart Unique
For the Respondent: Rick Engel, Q.C.

Duty of fair representation – Jurisdiction of Board – Board reviews s. 25.1. and the Saskatchewan Court of Appeal decision in *McNairn v. United Assn. of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 179*

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

REASONS FOR DECISION

Background:

[1] Stewart Martin Unique (the "Applicant") filed an application under s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") on January 11, 2008, alleging that the Teamsters Local Union 395 (the "Union") had failed in its duty to fairly represent him as follows:

> *The union held a vote on a tentative agreement on November 20th 2007. Included in the documentation provided to the membership were yearly wage increases and some special adjustments to certain classifications. The proposed term was for a three years commencing Jan 1, 2007. (attached)*
>
> *At no time did our union representative Randy Powers report to the membership that the special adjustments to certain classifications were not retroactive to Jan 1st 2007.*
>
> *Members voted on the tentative deal under the understanding that these adjustments would be retroactive.*
>
> *When the employees in those certain classifications received there retroactive pay, the adjustments were not included.*

> *I spoke with human resources Susan Brown and she told me that there was an agreement at the table that the special adjustments would not be retroactive.*
>
> *I raised this matter with our union representative Randy Powers and he confirmed the information that I received from human resources that there was a verbal agreement with the employer to the effect that these rate adjustments would not be retroactive.*
>
> *The membership was not made aware of this verbal agreement prior to voting on the tentative agreement.*
>
> *When I asked our union representative why this was not reported at the meeting he stated "well you didn't ask if the adjustments were retroactive".*
>
> *If there was a verbal agreement with the employer then our union representative has a legal obligation to disclose this at our meeting prior to the members taking the vote.*

[2] A hearing of this matter commenced on May 9, 2008 and the Union denied that it had failed in its duty of fair representation. At the commencement of that hearing, the Union also raised a preliminary objection to the jurisdiction of the Board to hear and decide the application brought by the Applicant. In light of the nature of the matter before the Board and the importance of this issue to the labour relations community, the Board agreed to adjourn the hearing to issue an interim ruling on the jurisdictional issue. The Applicant was granted until May 23, 2008 to file additional materials in respect of the arguments advanced by the Union regarding jurisdiction. The Union was granted until May 30, 2008 to file materials in reply to those provided by the Applicant. The Applicant did file material with the Board as did the Union.

Facts:

[3] For the purposes of this application, because the panel of the Board did not hear evidence on May 9, 2008, the Board, for the purposes of this ruling only, has relied upon the facts outlined in the application and the reply filed by the Union.

[4] The Applicant is employed at Plastipak Industries Inc. (the "Employer") in Regina, Saskatchewan. The Applicant says that when the Union was negotiating a collective agreement with the Employer, the Union failed to disclose to himself and other

members of the bargaining unit that certain special wage adjustments were not retroactive to some of the classifications of employees in the bargaining unit.

[5] The Applicant says that a representative of the Union, Randy Powers, was leading the discussion concerning the proposed agreement. At the meeting to consider and possibly ratify the proposed agreement, Mr. Powers not disclose that there had been a verbal agreement with the Employer that the special wage adjustments for lid press operators and materials handlers, which classifications were given special adjustments, were not to be retroactive.

[6] All other wage increases in the collective agreement were retroactive from January 1, 2007. The term of the contract was from January 1, 2008 to December 31, 2010.

Statutory Provisions:

[7] Section 25.1 of the *Act* reads:

> *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.*

Analysis & Decision:

[8] The Union raises its objection to the Board's jurisdiction to hear and determine this matter in reliance upon the decision of the Court of Appeal for Saskatchewan in *McNairn v. United Assn. of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 179* (2004), 240 D.L.R. (4th) 358. That decision involved a dispute between a union member and his union over whether the union removed the member's name from the top of the unemployment board in breach of its obligations pertaining to maintenance of the unemployment board. The process and procedure related to the maintenance of the unemployment board were governed by the bylaws and working rules of the union. The Union alleges that matters regarding negotiations and ratification meetings, including the nature and content of communication by the Union to its members, are governed by the bylaws of the Union and therefore, as in *McNairn*, *supra,* fall outside the jurisdiction of

the Board and fall to be determined, not by the Board, but by the Court of Queen's Bench.

[9] Before commencing an analysis of the *McNairn* decision, *supra,* and the applicable law which the Board must regard, it is useful to recount a short history of the duty of fair representation, as outlined by the Board in *Mary Banga v. Saskatchewan Government Employees' Union,* [1993] 4th Quarter Sask. Labour Rep. 88, LRB File 173-93 at 97 and 98:

> *…As we have pointed out before, the duty of fair representation arose as the guid pro guo for the exclusive status as bargaining agent which was granted to trade unions under North American collective bargaining legislation. Once a certification order is granted on the basis of majority support, members of the bargaining unit have no choice as to who will represent them, whether or not they were among those who supported the union. This exclusive status gave trade unions security and influence; it was, however, viewed as imposing upon them an obligation to represent all of those they represented in a way which was not arbitrary, discriminatory or in bad faith.*
>
> *The concept of the duty of fair representation was originally formulated in the context of admission to union membership. In the jurisprudence of the courts and labour relations boards which have considered this issue, however, it has been applied as well to both the negotiation and the administration of collective agreements. Section 25.1 of The Trade Union Act, indeed, refers specifically to the context of arbitration proceedings. This Board has not interpreted the section in a way which limits the duty to that instance, but has taken the view that the duty at "common law" was more extensive, and that Section 25.1 does not have the effect of eliminating that duty of fair representation in the context of union membership, collective bargaining, or the grievance procedure.*

[10] The duty of fair representation requires the Union to act in a manner that does not demonstrate bad faith, arbitrary treatment or discrimination. The general requirements were set out by the Supreme Court of Canada in *Canadian Merchant Services Guild v. Gagnon*, [1984] 1 S.C.R. 509. In particular, the Court held that "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."

[11] In *Gilbert Radke v. Canadian Paperworkers Union, Local 1120,* [1993] 2nd Quarter Sask. Labour Rep. 57*,* LRB File No. 262-92, the Board expanded on the requirement to avoid "arbitrary" treatment as follows at 64 and 65:

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

[12] In *United Steelworkers of America v. Six Seasons Catering Ltd.,* [1994] 3rd Quarter Sask. Labour Rep. 311, LRB File No. 118-94, the Board examined the application of the duty to bargain in good faith in relation to the negotiation of a collective agreement and commented as follows at 318:

> *In the case of the negotiation of provisions for a collective agreement, however, there are obvious difficulties of determining what constitutes a breach of the duty of fair representation. Unlike the situation which obtains in the case of decisions made in relation to grievances, the range of considerations of policy, practicality, strategy and resources which are legitimately taken into account are virtually limitless. Although labour relations tribunals and courts have acknowledged that this aspect of the duty exists, they have shown themselves reluctant to contemplate the chastisement of trade unions for a breach of the duty to negotiate fairly.*
>
> *The difficulty of determining how the principles of the duty of fair representation would apply where the issue arises in the context of the bargaining process is particularly acute in the case of an allegation that the conduct of the union is "discriminatory," which is the sort of charge the Union fears here. Collective bargaining is by nature a discriminatory process, in which the interests of one group may be traded off against those of other groups for various reasons - to redress historic imbalances, for example, or to reach agreement within a reasonable time, or to compensate for the achievement of some other pressing bargaining objective. The role of the union is to think carefully about the implications of the choices which are*

> *made, and no employee or group of employees can be assured that their interests will never be sacrificed in favour of legitimate bargaining goals or strategies.*

[13] The principles outlined in *Banga, supra,* were acknowledged by the Board as well in *Roger Johnston v. Service Employees' International Union, Local 333*, [2003] Sask. L.R.B.R. 7, LRB File No. 157-02. That decision was issued by the Board on January 2, 2003. The *McNairn* decision, *supra,* was issued by the Court of Appeal for Saskatchewan on April 19, 2004.

[14] There have been no other decisions of the Board which have considered the *McNairn* decision and s. 25.1 since the issuance of that decision

[15] In *McNairn*, *supra,* the Court of Appeal was sitting in appeal of a decision of the Court of Queen's Bench for Saskatchewan. The Court of Queen's Bench struck out Mr. McNairn's Statement of Claim which he had brought to that Court on the ground that the Court lacked jurisdiction to hear his claim.

[16] Mr. McNairn had also brought an application before the Board under s. 25.1 of the *Act* (*McNairn v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179*, [2001] Sask. L.R.B.R. 874, LRB File No. 278-99). The Board dismissed his application under s. 25.1. At 884 the Board held:

> *[33] Mr. McNairn's complaint about his treatment on the unemployment board is a concern about the application of the Union's work rules and bylaws, but does not relate to his application under s. 25.1 of the Act, and does not demonstrate bad faith, discrimination or arbitrariness with respect to the Union's obligation to fairly represent.*

[17] The Court of Queen's Bench agreed with the Board that the Board had the exclusive jurisdiction to hear and determine the matter. At para. 14 of the Court of Appeal decision, the Court summarized the decision of the Court of Queen's Bench as follows:

> *The application came before Mr. Justice Hrabinsky. He concluded that the Union was right about the Labour Relations Board having exclusive jurisdiction over the subject matter of the action. He*

> *reached this conclusion on the operative basis the dispute between the parties, in its essential character, was grounded in sections 25.1 and 36.1 of The Trade Union Act and therefore fell within the jurisdiction of the Board to the exclusion of the Court.*

[18] The appeal by Mr. McNairn to having his claim struck out by the Court of Queen's Bench came to the Court of Appeal on a question of law, being one of jurisdiction. The Court considered the question which it was to answer to be:

> *Does the Court have jurisdiction under The Queen's Bench Act, 1998 to entertain the cause of action in light of the jurisdiction of the Labour Relations Board over matters falling within sections 25.1 and 36.1 of The Trade Union Act.*

[19] At para. 23 the Court of Appeal went on to say:

> *Since the question posits a choice between the jurisdiction of the Court of Queen's Bench and that of the Labour Relations Board, it invites the comment on the relationship between the two. How is it that the Court rather than the Board, or the Board rather than the Court might have jurisdiction to entertain Mr. McNairn's claim? And upon what basis does this fall to be resolved.*

[20] Relying upon its earlier decision in *Floyd v. University Faculty Association et al.,* [1996], 148 Sask. R. 315 (Sask. C.A.), the Court of Appeal adopted the reasoning of Bayda, C.J. (as he then was) that any uncertainty as to the jurisdiction of the Board and the courts was to be determined by determining the "essential character of the dispute, having regard for its substance rather than its form." At para. 2, Justice Bayda said:

> *Our task then is to determine the "essential character" of the dispute between [the parties]. In going about our task we are not to concern ourselves with the labels or with the manner in which the legal issues have been framed-in short with the packaging of the dispute. We must proceed on the basis of the facts surrounding the dispute. Given that this is an application to strike out the statement of claim, we must take our facts from the statement of claim and for the purposes of this application must accept as true the facts there pleaded.*

[21] The Court in *Floyd*, *supra*, quoted with approval the decision of the Board in *Lien v. Chauffeurs, Teamsters and Helpers Union, Local 395*, [2001] Sask. L.R.B.R. 395, LRB File No. 203-00, where at 401, the Board said:

> *The duty of fair representation, which is set out in s. 25.1 of the Act, refers to the representation of employees by unions with respect to disputes that arise under the terms of a collective agreement. It does not cover matters that arise under the constitution and bylaws of a union.*

[22] The Court in *Floyd, supra*, then went on to say at para. 34:

> *Were the dispute between the parties grounded in section 25.1, there could be no doubting the Board's exclusive jurisdiction to entertain it. However, the facts as pleaded in the statement of claim do not reveal a dispute of that character. They reveal a dispute over whether the Union removed Mr. McNairn's name from the top of the employment board in breach of its obligation pertaining to the maintenance of the board. The Union's obligation to place the names of its unemployed members on the unemployment board in appropriate sequence did not arise out of its statutory duty of fair representation. Rather, it arose out of the Working Rules and Bylaws. Nor is this dispute otherwise concerned with whether the Union breached its statutory duty of fair representation. Indeed, on the facts as we know them the Union was found not to have done so by the Labour Relations Board. Assuming the allegations in the statement of claim are true, the fact is the Union violated Article 11(d) of the Bylaws and Working Rules of the Union, not section 25.1 of the Act.*

[23] *McNairn, supra,* has been considered by the Court of Appeal more recently in *Lockwood v. Rollheiser* (2006), 279 Sask. R. 113. In that case, a union member filed a claim against the union for what she termed "harassment and malicious treatment." In response, the union submitted the member's claim fell under the exclusive jurisdiction of the Board pursuant to s. 25.1 of the *Act.* In Chambers, Richards J.A. discussed the scope of s. 25.1 at para. 6:

> *Counsel for Ms. Lockwood was unable to identify any authority suggesting that s. 25.1 could be read so broadly as to make it applicable to the circumstances at hand. Of course* ***this is not determinative of the merits of the case because, in principle, it is open to this Court to move the interpretation of s. 25.1 in a new direction.*** *However, the absence of any authorities supporting Ms. Lockwood's position does tend to highlight its apparent frailty. To the extent there are decided cases in this area, they certainly do not help Ms. Lockwood. See: McNairn v. U.A., Local 179 2004 SKCA 57 (CanLII), (2004), 240 D.L.R. (4th) 358 (Sask. C.A.); Krasko v. Kuling et al. 2004 SKQB 466 (CanLII),*

> *(2004), 256 Sask. R. 143 (Q.B.). It seems clear enough that s. 25.1 does not bring every dispute with a union or a union representative within the exclusive jurisdiction of the Labour Relations Board. [emphasis mine]*

[24] The *McNairn* decision, *supra,* was also mentioned by the Court of Queen's Bench in *Taylor v. Saskatoon Civic Employee's Union, Local 59* (2007) 303 Sask. R. 151. The facts in *Taylor, supra,* are long and convoluted and a detailed recitation is not necessary for the purpose of this decision. In summary, Taylor (a union member) had advanced defamation actions against three officers of the union. As a result, the union passed an indemnity provision to ensure officers who had been sued would have the costs of their defence paid by the union. Taylor was denied the benefit of this clause, resulting in his advancement of a further claim that he was also entitled to the benefit of the indemnity clause in the union bylaws because (in suing the officers for defamation) he was involved in union-related litigation.

[25] Following a review of ss. 25.1 and 36.1, as interpreted in *McNairn, supra,* the Court characterized the dispute as "contractual" in nature, and "indistinguishable" from the dispute in *McNairn, supra*. This dispute was purely internal as it involved the interpretation of a provision from the union bylaws (and thus, automatically outside the scope of s. 25.1 as found in *McNairn, supra*). Furthermore, the claim did not relate to a denial of natural justice and was thus outside the scope of s. 36.1. At para. 30 of the decision, the Court stated:

> *In short, this is precisely the type of internal dispute that is not within the exclusive realm of the Labour Relations Board. The forum for this contest is The Queen's Bench Court.*

[26] What the cases show is, as stated by Mr. Justice Richards in *Lockwood, supra,* "It seems clear enough that s. 25.1 does not bring every dispute with a union or a union representative within the exclusive jurisdiction of the Labour Relations Board." However, the question which the Board must determine in this case is whether or not this case, on the facts presented in the application and reply fall within the Board's exclusive jurisdiction under s. 25.1 of the *Act*.

[27] While the Union has argued that the dispute between it and the Applicant is, in substance, one relating to the bylaws of the Union, the Applicant maintains that his

dispute is with respect to the collective bargaining agreement and the undisclosed verbal agreement between the Union and the Employer that certain provisions of the agreement were not to be retroactive.

[28] The Board has held, since at least 1980 as outlined at 317 in the *Six Seasons Catering* decision, *supra,* that the duty of fair representation owed by a union to its members includes a duty to "represent fairly employees who depend upon the union to act as their exclusive representative in bargaining with their employer." Prior to the inclusion of s. 25.1 in the *Act*, the Board concluded in *Doris Simpson v. United Garment Workers of America*, [1980] July Sask. Labour Rep. 43, LRB File No. 069-80, that even in the absence of a specific reference to such a duty in the *Act*, the obligation of a union to represent members of a bargaining unit fairly was a logical extension of its obligation to bargain collectively on behalf of employees.

[29] The *Banga* decision, *supra,* stated that s. 25.1 was not effective to derogate from the common law duty of fair representation. As noted above, the Board said at 98:

> *The concept of the duty of fair representation was originally formulated in the context of admission to union membership. In the jurisprudence of the courts and labour relations boards which have considered this issue, however, it has been applied as well to both the negotiation and the administration of collective agreements. Section 25.1 of The Trade Union Act, indeed, refers specifically to the context of arbitration proceedings.* ***This Board has not interpreted the section in a way which limits the duty to that instance, but has taken the view that the duty at "common law" was more extensive, and that Section 25.1 does not have the effect of eliminating that duty of fair representation in the context of union membership, collective bargaining, or the grievance procedure.*** [emphasis mine]

[30] Nevertheless, as instructed by the Court of Appeal in *McNairn*, *supra*, for the Board to find jurisdiction in this case, the Board must determine "the essential character of the dispute, having regard for its substance rather than its form."

[31] The Applicant's complaint is substantially with respect to the collective agreement between the Union and the Employer. On its face, the collective agreement, grants pay increases to classifications of employees as of January 7, 2007. However,

there was a verbal agreement between the Union and the Employer that certain of those increases would not be retroactive. This was not apparent on the face of the collective agreement.

[32] The Union does not dispute the following facts in its reply:

1. The Union held a vote on a tentative agreement on November 20, 2007.
2. Included in the documentation provided to the membership were yearly wage increases and some special adjustments to certain classifications.
3. I raised this matter with our union representative Randy Powers and he confirmed the information that I received from human resources that there was a verbal agreement with the employer to the effect that these rate increases would not be retroactive.

[33] The acceptance of these statements leads the Board to conclude that the essential character of the dispute is related to the negotiation by the Union of the collective agreement and the undisclosed negotiations to restrict the applicability of the retroactivity of wage increases in respect of certain classifications. It does not relate, as argued by the Union, to the conduct of meetings or the duties and responsibilities of union officials as outlined in the bylaws of the Union.

[34] This type of dispute falls under the jurisdiction of the Board as outlined above. The Board therefore concludes that it has jurisdiction to hear and decide the Applicant's claim.

DATED at Regina, Saskatchewan this **6th** day of **June, 2008.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson