The Labour Relations Board
Saskatchewan

JASON G. RATTRAY, Employee, Applicant v. COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 481, Respondent

LRB File No. 064-08; October 16, 2008
Vice-Chairperson, Steven Schiefner

The Applicant: Jason Rattray
For the Respondent Union: Peter Barnacle

Practice and procedure – Summary dismissal – Board considers whether applicant has established arguable case that union breached a principle of natural justice contrary to ss. 36.1(1) of *The Trade Union Act* – Board does not assess strength or weakness of applicant's case, but simply determines whether the alleged facts could form basis of a violation of *The Trade Union Act* falling within Board's jurisdiction to determine – Board finds Applicant not an employee at time of impugned conduct by union – Board finds no arguable case.

Practice and procedure – Summary dismissal – Board considers whether applicant has established arguable case that union breached a principle of natural justice contrary to ss. 36.1(1) of *The Trade Union Act* – Board does not assess strength or weakness of applicant's case, but simply determines whether the alleged facts could form basis of a violation of *The Trade Union Act* falling within Board's jurisdiction to determine – Board finds, even if allegations true, impugned conduct was not contrary to Union's constitution – Board finds no arguable case.

Practice and procedure – Summary dismissal – Where alleged facts do not disclose arguable case, holding oral hearing concerning application would be ineffective use of Board's resources – allowing Applicant to amend Applicant and adjourn proceedings until internal union procedures are complete would be prejudicial to union – Board summarily dismisses application without oral hearing.

***The Trade Union Act*, ss. 18(o), 18(p), 18(q) and 36.1(1)**

REASONS FOR DECISION

[1] The Communications, Energy and Paperworkers Union of Canada, Local 481, (the "Union") is certified as the bargaining agent for a unit of employees of the

Saskatchewan Government and General Employees' Union (the "Employer") by an Order of the Board dated July 28, 2003.

[2] Jason Rattray, (the "Applicant") filed an application with the Board on May 15, 2008 alleging that the Union had violated s.36.1(1) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"). The facts plead by the Applicant in his application to the Board are as follows:

> *CEP Local 481 on May 3, 2008 at their mid-year meeting, made and passed a motion that denied me status as a member "in good standing" based on the groundless allegation that I was a "scab" during the CEP/SGEU labour dispute. To date this has not been rescinded, nor have I been provided evidence as to the allegation*.

[3] The Union filed their reply with the Board on June 27, 2008 and, in so doing, brought a preliminary application requesting the Board to exercise its jurisdiction under section 18(p) and (q) to summarily dismiss this application on the basis that it discloses no arguable case and that this is an appropriate case to summarily dismiss without an oral hearing. The Union's application for summary dismissal was heard by the Board in Regina on September 23, 2008. Evidence given at the hearing was confined to the Union's application for summary dismissal and not the merits of the Applicant's case. These reasons for decision deal with the Union's application for summary dismissal.

Background:

[4] Ms. Susan Saunders was called to testify on behalf of the Union. Ms. Saunders is a national representative of the Communications, Energy and Paperworkers Union of Canada (the "CEP National"), a position she has held since June 10, 2008. Ms. Saunders has been a member of the Communication, Energy and Paperworkers Union since 2003.

[5] The Union is a charted local of CEP National, with CEP National providing guidance and support to its locals, *inter alia*, in the governance of their internal affairs. Ms. Saunders' duties with CEP National include responsibility for the Union and, in this capacity, she testified as to the constitution of CEP National and the bylaws of the Union.

[6] Locals of CEP National, including the Union, must conduct their internal affairs in accordance with, and be bound by, the constitution[1] of CEP National (the "Constitution"). The following articles of the Constitution govern issues of eligibility for membership, the grounds upon which membership can be denied, and an applicant's right of appeal.

> *5.02.01 Membership in the Union shall be obtained and maintained through a Chartered Local of the Union.*
>
> *. . .*
>
> *5.02.04 Every Local may establish a membership committee or membership committees, which shall act upon applications for membership. Membership committees shall accept or reject applications for membership, subject to the right of the local to overrule the committee.*
> *. . .*
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> *5.02.06 A Local shall have the right to deny membership to an applicant for good and valid reason or if the applicant has committed any of the offences listed in Article 17.01 of this Constitution.*
>
> *5.02.07 An applicant who has been denied membership by a Local shall have the right to appeal the decision of the Local to a Local membership meeting and to present the appeal in person.*
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> *. . .*
>
> *17.01 Members may be reprimanded, fined, suspended or expelled by the Locals in the manner provided in this Constitution for any of the follows acts:*
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> *. . .*
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> *17.01.05 Working without proper Union authorization, during a properly approved labour dispute;*
>
> *…*
>
> *17.01.11 Engaging in acts, which tend to hinder the execution of a properly recognized and authorized labour dispute conducted by the Union*

[1] Ms. Saunders testifying the current and relevant version of same being the "Constitution of the Communications, Energy and Paperworkers Union of Canada", adopted November 28, 1992 and amended from time to time.

…

17.04.01 The accused …. may appeal a decision putting an end to the case made … by the Local Union to an ombudsperson or the President of the National Union at the choice of the appellant;

[7] Ms. Saunders testified that, in accordance with Article 12.07.04 of the Constitution, while Locals, including the Union, may adopt their own bylaws and/or rules, such bylaws and rules must be consistent with the Constitution. Ms. Saunders further testified that the Union had adopted their own bylaws[2] (the "Union Bylaws"). The following provisions of the Union Bylaws govern the duties of the Local 481's "Membership and Bylaw Committee" and eligibility for membership:

ARTICLE IX STANDING COMMITTEES

Section 7 Membership & Bylaws Committee

It shall be the duty of the Membership & Bylaws Committee to:

a) review and recommend acceptance of application for membership in this Local;
b) develop and deliver union orientation to new members;
c) maintain and recommend changes to the Local bylaws.

The Membership & Bylaws Committee shall consist of three (3) members, with at least one (1) from a Regional office."

ARTICLE XII MEMBERSHIP

Section 1 Eligibility

a) Any worker within the jurisdiction of CEP Local 481 shall be eligible to apply for membership in the Local.
b) No person shall hold membership simultaneously in this Local and another Local of the National Union.
c) In order to be a member in good standing of CEP Local 481, members of SGEU hired as an employee of SGEU shall be required to resign from all SGEU elected positions."

[8] Ms. Saunders testified that, at a special meeting held on May 31, 2008, the membership of the Union adopted a series of amendments to the Union bylaws, including amendments affecting the above captioned provisions. Specifically, paragraph (a) of Section 7 of ARTICLE IX was amended to read as follows (change identified in bold):

[2] Ms. Saunders testified that the current and relevant version of same being the "Bylaws of the Communication, Energy and Paperworkers Union of Canada Local 481" as approved at the Mid Year Meeting, May 2004.

ARTICLE IX STANDING COMMITTEES

Section 7 Membership & Bylaws Committee

It shall be the duty of the Membership & Bylaws Committee to:

*(a) review and recommend acceptance **or rejection** of application for membership in this Local;*

(b) develop and deliver union orientation to new members;

(c) maintain and recommend changes to the Local bylaws.

i. The Membership & Bylaws Committee shall consist of three (3) members, with at least one (1) from a Regional office.

[9] In addition, the May 31, 2008 amendments to the Union Bylaws added the following sections to ARTICLE XII thereof:

ARTICLE XII MEMBERSHIP

Section 2 Application

a) The Membership & Bylaws Committee for the Local shall accept or reject applications, subject to the right of the Local to overrule the committee.

b) The Local shall have the right to deny membership to an applicant for good and valid reason or if the applicant has committed any of the offences listed in Article XII Section 3.

c) Any membership rejection, and the reasons for it, must be reported by the Local Executive to the next regular meeting of the membership.

d) An applicant who has been denied membership by a Local shall have the right to appeal the decision to the Annual General Meeting or Mid-Year meeting of the Local and to present the appeal in person.

Section 3 Offences

Members may be denied membership or reprimanded, fined or suspended or expelled by the Local for any of the following acts:

i) Making false statements or withholding information when applying for membership;

ii) Wilfully refusing to pay dues or assessments properly established or other valid financial obligations to the Union or Local;

iii) Disobeying or willfully failing to comply with any decision or order of the Union or Local;

iv) Working without proper Union authorization, during a properly approved labour dispute;

v) Instigating or knowingly participating in an unauthorized strike or slowdown;

vi) Wilfully violating the adopted standards as to wages, hours, benefits or working conditions;
vii) Misappropriating money or property of the Union or Local;
viii) Taking any civil action, suit or proceeding in any court or before any administrative body, against the Union, or any of its subordinate bodies, or any officer or member of the Union without first exhausting all remedies provided for in the Constitution for appeal;
ix) For such other offences, equally serious, which tend to bring the Union or Local into disrepute;
x) Engaging in acts, which tend to hinder the execution of a properly recognized and authorized labour dispute conducted by the Union;
xi) Providing a complete or partial membership list to persons other than those whose official business requires such a list;
xii) Tampering with ballots or interfering with the fair and proper conduct of elections;
xiii) Maliciously, falsely or otherwise defaming officers or members of the Union;
xiv) Laying frivolous or vexatious charges and/or laying repeated unfounded charges;
xv) Crossing a picket line to work without the approval of the Local during a legal strike or lockout;
xvi) Doing the work of the Local bargaining union during a legal strike or lockout;
xvii) Maintaining an elected position in SGEU in violation of Article XII Section 1 c).

[10] Ms. Saunders testified that, pursuant to Article 9.08.09 of the Constitution, the Executive Board of CEP National could order the repeal of any bylaw or rule of a local found by CEP National to be inconsistent with the Constitution. Ms. Saunders further testified that the May 31, 2008 amendments adopted by the Union had been reviewed and approved by CEP National.

[11] Ms. Saunders confirmed the following motion was passed by the membership of the Union on May 3, 2008 and this motion is the "motion" referred to in Mr. Rattray's Application:

> *That any scab hired into our bargaining unit be declared members not in good standing and not administered the oath.*

[12] In cross examination, Ms. Saunders testified that she was present at the May 3, 2008 meeting of the Union and indicated that, while she was (and presumably other members were also) aware of allegations of "scabs" (persons crossing a picket line and/or

doing the work of the Local bargaining unit during a legal strike or lockout), she did not recall any specific names being used during the meeting.

[13] Mr. Rattray commenced employment with the Employer on or about May 5, 2008 and made application for membership on May 20, 2008 by completing the Union's application form[3] (as it was then).

[14] The Union's Membership & Bylaw Committee met on June 4, 2008 to consider, *inter alia*, various applications for membership, including the application of Mr. Rattray. The decision of the Membership & Bylaw Committee was to "recommend rejection" of Mr. Rattray's application, for reasons set forth in the minutes of that meeting.

[15] The decision of the Membership & Bylaw Committee to recommend the rejection of Mr. Rattray's application for membership was communicated by email to Mr. Rattray on or about May 4, 2008 by Mr. Joe Pylatuk, A/President of CEP Local 481. Mr. Pylatuk's email indicated the reasons the Membership & Bylaws Committee recommended rejection of Mr. Rattray's application together with information as to his right to appeal the committee's recommendation to the membership of the Union.

[16] By letter dated August 27, 2008, Mr. Joe Pylatuk advised Mr. Rattray that a membership meeting of the Union had been scheduled for September 6, 2008 and that membership could hear his arguments with regard to the recommendations of the Membership & Bylaws Committee regarding his membership at that time. Ms. Saunders testified that Mr. Rattray attended this meeting of the Union but declined "to appeal to local membership."

[17] Ms. Saunders testified that Mr. Rattray's application is still pending before the Union (albeit with a recommendation from the Membership & Bylaws Committee to reject) and that Mr. Rattray's next opportunity to appeal to the membership of the Union would be at the upcoming annual general meeting scheduled to take place in Regina on November 15, 2008.

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[3] Ms. Saunders testified that Local 481's membership application was amended concomitant with the amendments to Local 481's bylaws.

Statutory Provisions:

[18] Relevant provisions of the *Act* include the following:

> *18. The board has, for any matter before it, the power:*
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> *. . .*
>
> *(o) to summarily refuse to hear a matter that is not within the jurisdiction of the board;*
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> *(p) to summarily dismiss a matter if there is a lack of evidence or no arguable case;*
>
> *(q) to decide any matter before it without holding an oral hearing;*
>
> *. . .*
>
> *36.1(1) Every employee has a right to the application of the principles of natural justice in respect of all disputes between the employee and the trade union certified to represent his bargaining unit relating to matters in the constitution of the trade union and the employee's membership therein or discipline thereunder.*
>
> *(2) Every employee shall be given reasonable notice of union meetings at which he is entitled to attend.*
>
> *(3) No employee shall unreasonably be denied membership in a trade union.*

The Union's Position:

[19] The Union advanced a number of arguments in support of their application to have the Board summarily dismiss this application without an oral hearing on the merits.

[20] Firstly, the Union argued that, at the time his application was filed with the Board on May 15, 2008, Mr. Rattray had not yet made application for membership in the Union. The Applicant's application for membership was not completed by the Applicant nor received by the Union until May 20, 2008. Therefore, the Union took the position that the timing of the Applicant's application is flawed on the basis that the Union could not have breached any principle of natural justice in handling or processing of the Applicant's membership if he hadn't, at that point, even made application for membership.

[21] Secondly, the Union argued that the facts forming the basis of this application was a motion of the Union that took place on May 3, 2008, prior to the Applicant becoming an employee of the Employer. The Applicant commenced employment on or about May 5, 2008. However, the impugned conduct of the Union (passage of a motion alleging to deny him status as a member "in good standing") took place on May 3, 2008. Therefore, the Union took the position that the Applicant was not an "employee" within the meaning of section 36.1(1) of the *Act* at the time of the offence took place.

[22] Thirdly, the Union argued that, while the application is brought pursuant to section 36.1(1) of the *Act*, the substance of the Applicant's allegation is that he has been denied membership in the Union, which, if true, would be a breach of subsection 36.1(3); not subsection 36.1(1). Further, the Union argued that this would not be an appropriate case to permit the Applicant to amend his application because doing so would only replace one defect with another; that being that this application would then be premature. The Applicant has not been denied membership in the Union. In fact, at the date of this application on May 15, 2008, the Applicant had not yet made application for membership in the Union and, at the date of hearing, the membership of the Union had yet to made a determination with respect to the recommendation of their Membership & Bylaw Committee and/or to hear the Applicant's appeal from said recommendations. Rather, the Union argues that the Board should summarily dismiss the Applicant's application to give the membership of the Union a chance to decide the status of the Applicant's application before the Board is asked to step in. In this proposition, the Union relied on the cases of *British Columbia Hydro and Power Authority and Office and Technical Employees Union, Local 378 and Christopher R. Tottle*, BCLRB Decision No. 9/78, and *Montague (Re)*, BCLRB Letter Decision No. B239/97.

[23] Fourthly, the Union argued that, since the breach that has been alleged by the Applicant on the part of the Union was in a contravention of subsection 36.1(1) of the *Act* and the purpose of this provision is to protect employees from "procedural" errors on the part of their union, the only reasonable remedy that could be anticipated from the Board (if a breach was found) would be "procedural". In other words, the purpose of subsection 36.1(1) is to protect employees within the jurisdiction of the Union from breaches of the principles of natural justice on the part of the Union in relation to its dealings with its members. As a consequence, the only reasonable remedy that could be anticipated from the Board, if a breach was found, would be for an Order directing the Union to "re-do its procedures and

reconsider the Applicant's application." In other words, even if the Board was to conclude that a breach of the principles of natural justice had been committed by the Union, the most probable Order of the Board would be an order directing the Union to reprocess the Applicant's application. However, since the processing of the Applicant's application is not complete, the Board would be required to adjourn this application until the Union's internal procedures were complete. The Union argued that continuing with the Applicant's application would result in an unjustified misuse of the Board's scarce resources and that attempting to cure any defects in his application through amendment or delay would be prejudicial to the Union by leaving them subject to a merely speculative claim.

[24] Finally, the Union argued that, since the Applicant's employment is not at issue (only his membership in the Union), the Board should show deference to the internal proceedings, recommendations and decisions of the Union by dismissing this Application. In this respect, the Union relied on the recent decisions of the Board in *Pacholik and Wilson v. Construction and General Labourer' Union, Local 180*, [unreported] September 16, 2008, L.R.B. File No. 073-06 and *Boos v. Health Sciences Association of Saskatchewan*, [unreported] September 16, 2008, L.R.B. File No. 181-05.

The Applicant's Position:

[25] The Applicant alleges that the Union breached a principle of natural justice in their dealing with him and, in particular, his application for membership. The Applicant argued that the actions of the Union in deal with his membership, including their actions prior to his employment, were fundamentally flawed such that all future dealings of the Union in this regard will be tainted. The Applicant pointed to the motion of the membership of the Union that occurred on May 3, 2008 as demonstrative of bias on the part of the Union toward his application for membership. In short, the Applicant believes that the other members of the Union have already closed their minds against his membership in the Union and that this bias is sufficient to prevent the Union from fairly considering his appeal of the decision of the Membership & Bylaws Committee and/or his application for membership in the Union.

Analysis and Decision:

[26] The Board's approach to applications for summary dismissal without an oral hearing pursuant to paragraphs 18(p) and (q) of the *Act* was outlined in detail in the Board's

decision in *Soles v. Canadian Union of Public Employees, Local 4777*, [2006] Sask. L.R.B.R. 413, LRB File No. 085-06.

[27] In considering the Union's applications, the Board's role is not to assess the relative strength or weakness of the subject case (which has yet to be heard), but rather to determine whether the material filed with the Board (which in this case consists of this application and the Union's Reply), together with the evidence tendered during hearing of the Union's application, disclose facts that could form the basis of a violation of the *Act*. In other words, the Board must first determine whether this application discloses an "arguable case" such that it should not be dismissed without an oral hearing. The next step is then to determine whether or not it is an appropriate case to summarily dismiss.

[28] The Applicant has alleged that the Union breached a principle of natural justice in their dealing with him and, in particular, his application for membership contrary to subsection 36.1(1) of the *Act*. The right to the application of the principles of natural justice and the content thereof was extensively canvassed by this Board in the decision of *Lalonde v. U.B.C.J.A., Local 1985,* [2004] Sask. L.R.B.R. 244 dated November 5, 2004, L.R.B. File No. 222-02. At paragraph 88, 89, 90, 91, 92, and 93, the Board wrote as follows:

> ***(i) The Content of the Principles of Natural Justice***
>
> *Section 36.1(1) of the Act confines the Board's supervision to disputes between union members and a union relating to matters in the union's constitution and the member's membership therein or discipline thereunder. The Board's supervision of those matters is further confined to determining whether the member has been afforded the right to the application of the principles of natural justice, as opposed to considering the merits or perceived correctness of the decision by the union.*
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> *Labour relations boards are generally reluctant to interfere with the right of a trade union to demand solidarity and compliance from its members, as long as the union acts within the bounds of the its constitution and applies same in accordance with the rules of natural justice. The content of the principles of natural justice is not rigid. It is variable, depending upon the nature of the dispute and the rights alleged to have been violated: See, Staniec, supra, and Ward v. Saskatchewan Government Employees' Union, [1994] 4th Quarter Sask. Labour Rep. 94, LRB File No. 173-94. Quite recently, the Saskatchewan Court of Appeal carefully and extensively reviewed the jurisprudence supporting this proposition in Saskatoon District Health Board v. Rosen (2001), 213 Sask. R.*

61, 202 D.L.R (4th) 35. At paragraphs 59 and 60, Vancise, J.A., on behalf of the majority, stated:

> *59 Having found that there is a duty of procedural fairness both at common law and under the statute and the regulations, one must determine the scope or the extent of that duty in the present circumstances. The scope or content of the duty to act fairly is succinctly set out in Knight. Madam Justice L'Heureux-Dubé writing for the majority stated that like the principles of natural justice the contents of procedural fairness are extremely variable and its content is to be determined in the specific context of each case. The Supreme Court of Canada had previously adopted the famous passage of Lord Morris of Borth-Y-Gest in Furnell v. Whangarei High Schools Board that:*
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> > *Natural justice is but fairness writ large and juridically. It has been described as "fair play in action". Nor is it a leaven to be associated only with judicial or quasi-judicial occasions. But as was pointed out by Tucker L.J. in Russel v. Duke of Norfolk [1949] 1 All E.R. 109, 118, the requirements of natural justice must depend on the circumstances of each particular case and the subject matter under consideration.*
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> *60 The Supreme Court pointed out in Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission that the rules of natural justice are variable standards and the content will depend on the circumstances of each case, the statutory provisions and the nature of the matter to be decided. There is no fixed content. The court will decide the approach to be adopted by reference to all the circumstances under which the tribunal operates*

In Knight v. Indian Head School Division No. 19, [1990] 1 S.C.R. 653 (referred to in the passage above), a case involving termination of employment, L'Heureux-Dube, J., on behalf of the majority, described the common law duty of fairness as depending upon three factors, as follows, at paragraph 24:

> *24 The existence of a general duty to act fairly will depend on the consideration of three factors: (i) the nature of the decision to be made by the administrative body; (ii) the relationship existing*

> *between that body and the individual; and (iii) the effect of that decision on the individual's rights.*

In Schreiner, at 458 (as cited supra), the Board advocated a restrained approach to the exercise of its jurisdiction under s. 36.1 of the Act, at least as concerns matters of internal discipline, as being necessary to further the interests of the union in maintaining solidarity in support of effectively achieving collective bargaining objectives.

And recently, in Hill and Rattray v. Saskatchewan Government and General Employees' Union, [2003] Sask. L.R.B.R. 371, LRB File Nos. 002-03 & 011-03, at 372-373 (application for judicial review dismissed [2004] S.J. No. 502, July 26, 2004 (Sask. Q.B.)), the Board commented that:

> *[7] The Board is the monitor of union membership disputes within a unionized setting only to the extent of determining if the processes used to discipline union members meet the basic contextual requirements of natural justice. The Board's role is not to provide definitive interpretations of a union's constitution, which is a fluid, political document, subject to change at each annual convention of the union.*

However, in our opinion, the degree of "restraint" exercised by the Board in matters of union membership and internal discipline is variable and also depends upon a consideration of the three factors referred to by Madam Justice L'Heureux-Dube in Knight, supra. For example, a more restrained approach may be exercised where a union is dealing with matters that may bear upon its very survival, and a less restrained approach may be appropriate where the effect of the union's actions on individual rights weighs more heavily in the balance.

[29] The Board notes that, in *Dunsmuir v New Brunswick*, 2008 SCC 9, the Supreme Court of Canada reconsidered and partially overturned its previous decision in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, a case referred to with approval by this Board in *Lalonde*, *supra*. As a consequence, the Board has taken the opportunity to reconsider its previous reliance on this case. In doing so, the Board notes that the aspect of *Knight*, *supra,* that was overturned by the Supreme Court of Canada in *Dunsmuir, supra,* related to (in the opinion of Dastarache and LeBel, JJ. speaking on behalf of the majority) that Court's previous incorrect analysis of the effect of a contract of

employment on the applicability of a duty of fairness in the context of public employment.[4] The Supreme Court of Canada did not alter its description of the general duty of fairness and thus this Board's reliance on that description continues to be valid.

[30] The right to the application of the principles of natural justice and the content thereof was also canvassed by the Saskatchewan Court of Appeal in the case of *McNair v. United Association of Journeymen and Apprentices of Plumbing and Pipe Fitting Industry, Local 179*, 2004 SKCA 57. At paragraph 38, Cameron J.A., speaking on behalf of the Court, wrote as follows:

> *Thus subsection 36.1(1) imposes a duty upon a union (again correlative to the right thereby conferred upon an employee), to abide by the principles of natural justice in disputes between the union and the employee involving* ***the constitution of the trade and the employee's membership therein*** *or* ***discipline thereunder****. As such, the subsection embraces what may be characterized as "internal disputes" between a union and an employee belonging to the union, but it does not embrace all manner of internal disputes. For the subsection to apply, the dispute must encompass the constitution of the union and the employee's membership therein or discipline thereunder. And when it does apply, it requires that the principles of natural justice be brought to bear on the resolution of the dispute.*

[31] Part of the Union argument was that this application should be summarily dismissed on the basis that the Applicant had not yet made application for membership at the time of his application to this Board. In other words, the Union argues, it is not possible for the Union to have breached any principle of natural justice in relation to the Applicant's membership if he hadn't even applied for membership in the Union at the time he commenced proceedings before the Board.

[32] While the Union may have a point, this is will be an evidentiary problem for the Applicant. It, in itself, is not a bar to his claim at this stage. The use of the word "employee" in subsection 36.1(1) by the authors of this legislation was intended to grant protection from breaches by the Union to any persons in the employ of the employer within the jurisdiction of the Union, irrespective of that employee's membership status in the Union. This would include an employee, such as the Applicant, who believes that the union having

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[4] 2008 CSC 9, at pp. 81 and 82.

jurisdiction over his workplace has committed a breach of natural justice that will affect his potential to seek membership in that union or in the processing of his application for membership. The fact that the Applicant did not make application for membership in the Union prior to bringing his application to this Board does not eliminate the potential for an arguable case.

[33] The Union also argued that the Applicant's application should be summarily dismissed on the basis that he was not an "employee" at the time of the impugned conduct by the Union and that the Board has no jurisdiction to hear allegations of a breach of the principles of natural justice with respect to events that transpired prior to the Applicant becoming an "employee". In this respect, the Board is in concurrence with the Union. The Board has historically been cautious in the application of subsection 36.1(1) to the internal proceedings of trade unions. In *Pacholik and Wilson, supra*, this Board wrote at paragraph 112:

> *It is clear in Lalonde that the Board applied s.36.1(1) only to the dispute between the applicant and the union concerning his membership, that is, to the process the union engaged in that led to the expulsion of the applicant from membership. The Board did not extend the scope of s. 36.1(1) to examine whether the rule under which the applicant was expelled (i.e. the rule against holding dual membership) had been properly made, in a procedural sense by the union. The rule itself was examined in a substantive way, only under s.36.1(3) to determine whether the Applicant had been unreasonably denied membership in the union, that is, whether the rule against dual membership was reasonable in the circumstances of the case.*

[34] The impugned conduct of the Union was the passage of a motion on May 3, 2008 that the Applicant alleges is demonstrative of bias on the part of the Union. Even if the board were to accept this assertion to be true (a fact yet to be proven), it occurred prior to the Applicant commencing employment with the Employer. To open section 36.1(1) to allegations of breaches of procedural justice with respect to conduct of the Union that occurred prior to the complainant commencing employment would seem contrary to the numerous cautions of this Board and the Courts regarding the narrow application of this provision.

[35] The Applicant argues that the Union's motion is demonstrative of bias. On the other hand, the motion was not contrary to the bylaws of the Union or the Constitution of CEP National, to which the Union is subject. Furthermore, the impugned motion of the Union may merely be the membership of the Union signaling their desire to either adopt a more strict policy regarding applications for membership or enforce existing policies already within the constitution of CEP National. While an oral hearing of the Applicant's application may resolve this fact, even giving the benefit of the doubt to the Applicant (that the motion was indicative of bias), for the Board to allow section 36.1(1) to be used to examine this allegation would require the Board to examine whether or not the rule potentially restricting the Applicant's membership in the Union was properly made, in a substantive sense, by the Union. The Board would be required to examine the "reasonableness" of the rule and, in particular, the steps taken by the Union to bring that rule into existence; not just the procedure used by the Union in considering the Applicant's application for membership and whether or not this procedure was in compliance with the Union's rules, bylaw and Constitution. This Board has previously stated it will not embark on such enquires under the limited jurisdiction of subsection 36.1(1). See: *Lalonde*, *supra*, and *Pacholik*, *supra.*

[36] Is it possible to amend the Applicant's application or otherwise cure the defects therein? The "essential character" of the dispute between the parties, without concerning oneself with labels or the manner in which the legal issue has been framed by the Applicant, is his desire for membership (in good standing) within the Union and his concern that he will not be granted same. While it might be possible to permit the Applicant to amend his application to include allegations (together with concomitant facts) of a breach of subsection 36.1(3), the Board accepts the position of the Union that doing so would merely replace one defect in the Applicant's application with another. While proceeding under subsection 36.1(3) would grant the Board broader jurisdiction to examine, in a substantive way, the rules of the Union that the Applicant alleges unreasonably deny him membership in the Union, the fact is that he has not been denied membership in the Union. As a consequence, an application under subsection 36.1(3) would be premature at this time.

[37] Similarly, while the Board could adjourn the Applicant's application until such time as the membership of the Union had considered his appeal of the decision of the Membership & Bylaws Committee and, thus, his application for membership in the Union, even this may not complete the processing of his application. Pursuant to Article 17.04.01

of the Constitution of CEP National, the Applicant may well have the option to appeal the decision of the membership of the Union to either an ombudsman or the President of CEP National. Allowing the Applicant to amend and then to adjourn his application until such time as the processing of the Applicant's application for membership in the Union has concluded, would be both prejudicial to the Union and an unreasonable use of the Board's scarce resources.

[38] In conclusion, having examined the facts and allegations contained in this application and the Union's Reply, together with the evidence of Ms. Saunders and having given the benefit of the doubt as to any finding of fact to the Applicant (where doubt may have existed), the Board concludes that the Union's application for summary dismissal must be granted. The Applicant's application is hereby summarily dismissed pursuant to paragraphs 18(o), (p) and (q) of the *Act* on the basis that the application discloses no arguable case and that it is an appropriate case for summary dismissal without oral hearing.

[39] In coming to this conclusion, the Board is mindful that the Applicant is not prevented from bringing a new application to the Board should future circumstances warrant. However, in the ordinary course of events and barring unusual circumstances, the general membership and officials of a union, who have a vested interest in the proper conduct of the affairs of their union, should have the first opportunity to hear the allegations of a complainant as to its conduct and to attempt to resolve such disputes using the internal procedures established by the union's constitution.

DATED at Regina, Saskatchewan, this **16th** day of **October, 2008.**

LABOUR RELATIONS BOARD

Steven Schiefner,
Vice-Chairperson