Labour Relations Board
Saskatchewan

ERIC MORIN, Applicant v. UNITED STEELWORKERS OF AMERICA, LOCAL 1-184, Respondent

LRB File No. 115-07; January 17, 2008
Chairperson, James Seibel; Members: Maurice Werezak and Clare Gitzel

The Applicant: Eric Morin
For the Union: Peter Barnacle

Practice and procedure – Summary dismissal – Board considers whether applicant has established arguable case that union acted arbitrarily, with discrimination or in bad faith in relation to union's representation of applicant in grievance or rights arbitration proceedings under collective agreement – Applicant does not allege facts to support any of prohibited grounds - Even if true, allegations made by applicant do not constitute violation of s. 25.1 of *The Trade Union Act* by union – Board summarily dismisses application.

Practice and procedure – Summary dismissal – Board considers whether appropriate case to summarily dismiss application without oral hearing – *Audi alteram partem* rule does not require oral hearing in every case – Holding oral hearing in present case would not be effective use of Board's resources – Board summarily dismisses application without oral hearing.

***The Trade Union Act*, ss. 18(p), 18(q) and 25.1.**

REASONS FOR DECISION

Background:

[1] United Steelworkers of America, Local 1-184 (the "Union"), is designated as the bargaining agent for a group of employees of the Town of Hudson Bay, Saskatchewan (the "Employer"). The Applicant, Eric Morin, was at all material times a member of the bargaining unit. The Applicant filed an application with the Board on September 17, 2007 alleging that the Union had failed to take certain actions on his behalf, including, *inter alia*, advancing a grievance filed on his behalf to arbitration. In his application the Applicant did not cite any particular breach of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act* ") by the Union, however, the nature of the allegations leads to the ineluctable inference that the Applicant alleges a violation of the duty of fair representation as outlined in s. 25.1 of the *Act*.

[2] Section 25.1 of the *Act* provides as follows:

> *25.1 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] In his application to the Board, the Applicant provided a detailed chronology of the events he assumed were relevant to his application. In its reply to the application, the Union denied the allegation that it failed to fairly represent the Applicant and provided a detailed account of the steps taken by it on the Applicant's behalf including assisting with the preparation and filing of a grievance, representing the Applicant at grievance meetings with the Employer and involving him in internal discussion by the Union with respect to the appropriateness of further advancing the grievance and consideration of options for dealing with his interests and concerns. Ultimately, the Union determined that it would not take the grievance to arbitration but continued to communicate with the Employer on ways to assist the Applicant to deal with the concerns of the Employer and to alleviate the Applicant's own concerns.

[4] The Union filed an application to summarily dismiss the Applicant's application without a *viva voce* hearing pursuant to ss. 18 (p) and (q) of the *Act* on the grounds that there is a lack of evidence or no arguable case. Those provisions provide as follows:

> *The board has, for any matter before it, the power*
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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;*

[5] On December 7, 2007 a panel of the Board sitting *in camera* determined that the application was an appropriate case for the Board to consider an application for summary dismissal without an oral hearing. The parties were advised of the decision and the Applicant was invited to file written submissions with the Board in response to the Union's submissions in support of the application for summary dismissal. The parties were also advised that the application for summary dismissal and the parties' submissions would be considered *in camera* by a different panel of the Board.

[6] On January 3, 2008, upon reading and considering the application and reply and the submissions of the parties, the Board allowed the application for summary dismissal and dismissed the Applicant's application alleging an unfair labour practice in violation of s. 25.1 of the *Act*. The Board's reasons for this decision follow.

Analysis and Decision:

[7] The Board's approach to applications for summary dismissal without a *viva voce* hearing pursuant to ss. 18(p) and (q) of the *Act* was outlined in detail in the Board's decision in *Soles v. Canadian Union of Public Employees*, [2006] Sask. L.R.B.R. 413, LRB File No. 085-06. We have endeavored to follow the same general approach in the present situation.

[8] The following issues are before the Board:

(1) Whether the Applicant has established an arguable case that the Union acted arbitrarily, with discrimination or in bad faith in relation to the Union's representation of him in grievance or rights arbitration proceedings under the collective agreement; and,

(2) If not, whether this is an appropriate case to summarily dismiss the Applicant's application without an oral hearing.

[9] With respect to s. 18 of the *Act*, it is not our function to assess the strength or weakness of the Applicant's case but to determine whether the application and written submission disclose facts that would form the basis of an unfair labour

practice or violation of the *Act*. We must examine whether the application discloses an arguable case such that it should not be dismissed without an oral hearing.

[10] The phrase "arguable case" is used in s. 18(p). As pointed out by the Board in *Soles*, *supra*, it is also the test used in the Board's jurisprudence in determining whether to grant interim relief under s. 5.3. The test as used in the latter instance is derived from that outlined by the Ontario Labour Relations Board in *United Food and Commercial Workers International Union, Local 175/633 v. Loeb Highland*, [1993] OLRB Rep. March 197 where the Ontario Labour Relations Board stated as follows, at 202:

> *Turning first to the idea of a threshold test with respect to the merits of the main application, we have some concern about applying a high level of scrutiny to that application at the time of a request for an interim order. To the extent that such scrutiny may imply a form of prejudgment of the final disposition of the main matter, it is not particularly compatible with the scheme for interim relief set out in the Act and the Board's Rules of Procedure. More specifically, the procedure for interim relief contemplated by the Board's Rules reflects the inherent necessity for expedition in these matters. To that end, evidence is filed by way of certified declarations which are not subject to cross-examination. Indeed, s. 104(14) of the Act and Rules 92 and 93 indicate the Board may not hold an oral hearing at all, but may receive the parties' arguments in writing as well.*
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> *This means that the Board is not in a position to make determinations based on disputed facts. In these circumstances, it would normally be unfair for an interim order to be predicated to any significant extent on a decision with respect to the strength or weakness of the main case. That should await the hearing of the main application when the Board hears oral evidence and can make decisions with respect to credibility based on the usual indicia, in a context where the parties have a full right of cross-examination. This is particularly important in cases such as the section 91 complaint to which this application relates, where decisions are often based on inferences and the various nuances of credibility play a key role. In other words, the granting of interim relief in this context should usually be based on criteria which minimize prejudging the merits of the main application.*
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> [emphasis added]

[11] 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.*

[12] We have examined the facts and allegations contained in the application, reply and written submissions of the parties.

[13] In his application and submissions the Applicant has outlined in detail the correspondence and actions of himself, the Union and the Employer, however, he has not specifically addressed the particulars of the Union's alleged failure to fairly represent him in terms of the concepts specified in s. 25.1 of the *Act* other than to allege that the Union declined to advance the grievance on his behalf or obtain the result he had hoped

for. In our opinion, even if the Applicant's allegations are true, they do not constitute a violation of s. 25.1 of the *Act* by the Union. There are no alleged facts to support any of the prohibited grounds of arbitrariness, discrimination or bad faith action and the Applicant has not established an arguable case.

[14] In determining whether, in such circumstances, it is an appropriate case to dismiss an application without an oral hearing, the Board in *Soles*, *supra*, held that, while the *audi alteram partem* rule requires the Board to hear both sides of a matter, it does not require that an oral hearing be held in every case. As stated by the Canada Industrial Relations Board in *McRaeJackson et al. v. CAW – Canada and Air Canada Jazz*, [2004] CIRB No. 290, at 18,

> *The reviewing courts have clearly stated that the Board is only required to grant to the parties an opportunity to present their case, whether by written submissions, documents produced and its own inquiries (see Commission des Relations de Travail du Quebec v. Canadian Ingersoll-Rand Company Limited, et al., [1968] S.C.R. 695; Anne Marie St. Jean, supra, Boulos v. Canada (Labour Relations Board), [1994] F.C.J. No. 1854 (QL); and Nav Canada, supra, with respect to the discretion of this Board).*

[15] In *Kelly v. Amalgamated Transit Union, Local 1415 and Greyhound Canada Transportation Corp*., [2002] CIRB No. 202, the Canada Industrial Relations Board outlined the rationale for exercising its discretion to decide a matter without holding an oral hearing, as follows at 10:

> *[23]. . . to provide a broader discretion to the Board and to allow it to reduce the time required and the expense of deciding any matter, where this is appropriate . . . .*
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> *[24] Under section 16.1 of the Code, the Board is required to carefully consider the facts and circumstances before it, and if the Board determines it is appropriate to decide a matter on the basis of the written submissions before it, it may do so (see Ghislaine Gagne, [1999] CIRB no. 18; Raynald Pinel, [1999] CIRB no. 19; Anne Marie St. Jean, [1999] CIRB no. 33; Greater Moncton Airport Authority Inc., [1999] CIRB no. 20; and Royal Aviation Inc., [2000] CIRB no. 69). In many cases, therefore, after considering the matters in issue, the available evidence and other relevant factors, the Board will decide the matters before it based on written submissions only.*

[16] The onus is on the Applicant to provide particulars to support his allegations that the Union has violated the duty of fair representation. We have determined that the Applicant has not established an arguable case. In endeavouring to apply these principles in the present case we have arrived at a conclusion similar to that reached by the Board in *Soles*, *supra*, that holding an oral hearing of the application in the present case would not be an effective use of the Board's resources.

[17] For the foregoing reasons, the Board issued an Order on January 8, 2008 dismissing the Applicant's application.

DATED at Regina, Saskatchewan, this **17th** day of **January, 2008.**

LABOUR RELATIONS BOARD

James Seibel,
Chairperson