LRB File No. 158-08

LABOUR RELATIONS BOARD
Saskatchewan

BETWEEN:

William Petite, Employee, Sydney, Nova Scotia

APPLICANT

- and -

International Brotherhood of Boilermakers, Irons Ship Builders, Blacksmiths, Forgers and Helpers, Local 555 and Babcock & Wilcox Canada Ltd.

RESPONDENTS

BEFORE:

Kenneth G. Love, Q.C., Chairperson

DATED at Regina, Saskatchewan, on the **1st** day of **June , 2009.**

ORDER

THE LABOUR RELATIONS BOARD, pursuant to Sections 5(d) and 25.1 of *The Trade Union Act*, having found a violation, **HEREBY ORDERS** that;

1. the Union file a grievance on behalf of the Applicant with respect to his termination on April, 16, 2008:

   a) that the Union processes the aforementioned grievance in a manner that is not arbitrary, discriminatory, and in good faith, as required by s. 25.1 of the *Act*;

   b) that due to the length of the proceedings before the Board, the Board suggests that the parties consider a mediation process as an initial step in the resolution of this grievance in the hope that settlement may occur;

2. Furthermore, should the matter go to arbitration, and should the arbitrator or board appointed to hear the matter so wish, a transcript of the evidence taken before the Board shall be provided to the arbitrator, the cost of which shall be borne equally by the Union and the Employer; and

3. that any time limits with respect to filing of grievances within a particular period of time following the incident alleged in the grievance are hereby extended or waived as necessary to permit the filing and processing of the grievance on behalf of the Applicant.

THE LABOUR RELATIONS BOARD FURTHER ORDERS that, pursuant to subclause 5(g), in order to place the Applicant in the same position that he would have been, but for the violation of the *Act,* and given the considerable expense to the Applicant in advancing this matter, the Board **FURTHER ORDERS:**

4. That the Union shall forthwith pay to the Applicant his reasonable and necessary expenses incurred for travel and sustenance from his home to attend the initial hearing of this matter and the continuation of the hearing; and

5. That the Union shall pay to the Applicant, or to his counsel upon written direction from the Applicant, a counsel fee for retained counsel in respect of this matter of $750.00 per hearing day.

FINALLY, THE LABOUR RELATIONS BOARD ORDERS THAT, in the event that the parties are unable to agree as to the amounts to be paid by the Union to the Applicant pursuant hereto, the parties may apply to the Registrar of the Board, or his designate, to determine or settle the amounts payable, who may determine the amount or, in the event that he, or his designate are unable to settle the amount to be paid, the Chairperson shall remain seized of this matter to make such determination.

DATED at Regina, Saskatchewan, this **1st** day of **June, 2009.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson

The Labour Relations Board
Saskatchewan

WILLIAM PETITE, Employee, Sydney, Nova Scotia, Applicant v. INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL 555 and BABCOCK & WILCOX CANADA LTD., Respondents

LRB File No. 158-08; June 1, 2009
Single Panel: Chairperson, Kenneth G. Love, Q.C.

For the Applicant:	Mr. Tom J. Waller, Q.C.
For the Respondent Union:	Ms. Bettyann Cox
For the Respondent Employer:	Mr. Philip J. Gallet

Duty of Fair Representation – Board reaffirms factors to be considered in applications brought under s. 25.1. Finds actions of Union to be arbitrary where incomplete investigation of incident, no statement taken from affected employee, and no grievance filed when employee requests one to be filed.

Standard of Investigation of incident. Duty upon Union to conduct thorough and complete investigation. Duty to file grievance when requested.

Remedy – s. 25.1 Remedial authority – Board's overriding goal is to place Employee in position he/she would have been in but for breach – Board avoids punitive remedies and seeks to design remedies that support and foster underlying purposes of *The Trade Union Act*.

Jurisdiction – Chairperson sitting alone pursuant to s. 4(2.2) has no jurisdiction to deal with any matters except matters brought pursuant to s. 25.1 or s. 36.1.

Extra-provincial Jurisdiction – Board declines to address issues from outside province.

***The Trade Union Act*, Sections 5(d), (e), and (g), 11(1)(a), 11(2)(a), 25.1 and 36.1**

REASONS FOR DECISION

Background:

[1] William (Billy) Petite, the ("Applicant") applied to the Board on July 18, 2008 alleging that the Respondent and/or the Employer had been or were engaging in an unfair labour practice or a violation of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") within the meaning of Sections 5(d), (e), and (g), 11(1)(a), 11(2)(a), 25.1 and 36.1 of the *Act*.

[2] The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 555 (the "Union") filed a reply to the application on September 2, 2008, wherein it denied any and all of the allegations contained within the application.

[3] A reply was filed by Babcock & Wilcox Canada Ltd. (the "Employer") on September 3, 2008, in which it denied any allegations of wrongdoing on the part of the Employer.

[4] While the application contained allegations of unfair labour practices, the Board and the parties treated this application as principally involving ss. 25.1 and 36.1 of the *Act*. As a result, the application was heard by a Chairperson, sitting alone, in accordance with s. 4(2.2) of the *Act*. No objection was taken by the parties on a single panel to hear and determine this application.

Facts:

[5] The Applicant is a journeyman boilermaker welder, holding an interprovincial red seal ticket for welding. He resides in Cape Breton Island. He is a member of Local 73 of the Boilermaker's Union.

[6] The Boilermaker's Union has a number of construction locals, shop locals and other locals throughout Canada and the United States of America. For the purposes of this application, we are concerned with three (3) of the construction Locals, Local 555 (against whom this application has been made), Local 128 and Local 73.

[7] Local 73 is the Applicant's home local. Local 555 has a wide geographic scope, encompassing Saskatchewan, Manitoba, parts of Ontario and Nunavut. Local 128's jurisdiction is Northern Ontario. All are locals chartered by the International Brotherhood of Boilermakers, Iron Ship Builders, Forgers and Helpers.

[8] The Employer obtained a contract with Saskatchewan Power Corporation for the retrofit of one of the boilers at SaskPower's power generating facility at the Poplar River Plant in Coronach, Saskatchewan. That project required a great number of boilermakers to complete the job. There was a shortage of work for boilermakers in the Applicant's home jurisdiction.

[9] In the early planning stages of the retrofit project, the Union met with the Employer to discuss manpower needs. There were a number of other projects within the Union's jurisdiction for which it would be required to provide manpower, and it was recognized that there would likely be a shortage of boilermakers in the Union's jurisdiction to supply all of the manpower required by the Employer to complete the retrofit project.

[10] The Union, recognizing that it would be hard pressed to provide sufficient manpower for the project, canvassed other union locals throughout Canada to attract qualified boilermakers to apply for work on the project. There were two means of doing so. One was at an on-line site where boilermakers could indicate their availability to work on the project; the other was by making direct contact with the office of the Union in Saskatchewan.

[11] The Applicant availed himself of the second of these options, and he was called to work on the project commencing on March 10, 2008. In order to accept the position within local 555, the Applicant was required to obtain a traveling card from his home local, Local 73, which he did.

[12] The term for which the Applicant was hired was a minimum of ten (10) weeks, which was to be worked in a rotation of fifteen (15) days on, followed by three (3) days off. A daily living allowance (subsistence) of $110.00 was to be paid.

[13] The Applicant was familiar with the project because he had worked on a similar retrofit at Coronach for 11.5 weeks in 2006.

[14] The Applicant left his home in Cape Breton by personal vehicle and traveled approximately 4,600 km to Coronach, reporting to work as stipulated on March 10, 2008.

[15] On about March 14, 2008, the Applicant found that he had been hired in mid-rotation, that is, that his three (3) days off break would start after he had completed eight (8) days of work rather than the full fifteen (15) that he had been expecting. Furthermore, he learned that subsistence would be paid only for working days, not the three (3) days off.

[16] This shortened rotation, compounded with the lack of subsistence on days off was a financial difficulty for the Applicant, who had spent considerable out of pocket monies to travel to Coronach from Nova Scotia. As a result of arriving in mid schedule, he would not receive a pay cheque prior to going on days off.

[17] The Applicant learned that other boilermakers who had arrived in mid schedule had been permitted to skip their days off and work an extended period before taking their first days off. He was initially advised by one of the General Foremen on the job that he could also be permitted to work through his break period. However, when he had completed his initial eight (8) day rotation, he was advised that he would have to take the three (3) days off as scheduled.

[18] The Applicant's evidence was that he discussed the issue with Chris Dufault, the Job Steward at the workplace, advising him that he wished to grieve the issue. His evidence was that Mr. Dufault advised him that the Employer could enforce the rotation schedule and there was no point in pursuing the issue. Mr. Dufault's evidence was that, while he recalled a conversation with the Applicant on this point, and speaking to Dallas Rogers, the Business Manager of the Union, about the issue and advising the Applicant that the rotation could be enforced, he does not recall the Applicant asking to file a grievance in respect of this issue. The Board accepts Mr. Dufault's evidence on this point.

[19] The Applicant also testified that he observed that many members of the Union returned to work earlier than they were scheduled from their days off and were paid for those days.

[20] As the work progressed on the retrofit, it became increasingly difficult for the Union to supply the manpower needs of the job. They exhausted all of their available resources, including members of their Union who had been laid off from positions where they work in fabrication shops, including one fabrication shop operated by the Employer in Melville, Saskatchewan. There was apparently a distinction drawn by union members with respect to "shop" members and "construction" members. Shop members were generally represented by their own Local for the workplace in which they worked and they did not normally work on construction sites. Local 555, Local 128 and Local 73 were "construction" locals, and their members were usually dispatched to construction projects such as the Coronach retrofit.

[21] Having exhausted all of its available resources, that is, both construction members and shop members from across Canada, the Union agreed that the Employer could utilize what I will refer to as "Plan B". A similar issue of shortage of manpower had arisen in 2006, and the Union and the Employer had, prior to commencement of this 2008 retrofit, discussed the potential that the Union would be unable to supply all of the needed manpower. Plan B involved the Employer contracting with a firm in the United States, Wach's of North Carolina, to have them perform some of the work on site utilizing boilermakers.

[22] American boilermakers arrived on site on April 7, 2008. The Applicant and other Canadian boilermakers became aware that those boilermakers would have their travel paid from the U.S. to Coronach, they would be provided with a rented automobile while in Canada, and that they would receive subsistence allowance not only for days they worked, but also on their days off. The Applicant, and other Canadian boilermakers, were unhappy that the U.S. boilermakers would be provided benefits greater than they were receiving under the collective agreement which governed work on the project.

[23] The Union and the Employer had anticipated that there may be an issue concerning the use of the U.S. boilermakers. As a result, they set up a meeting at the site in order for Mr. Rogers of the Union, to explain to the boilermakers working on the project, why it was necessary to bring in the U.S. workers. On April 14, 2008, Mr. Rogers met first with the day shift and, following that meeting, with the night shift.

[24] The Applicant was working on the night shift and participated in the meeting on April 14, 2008. His evidence was that he was quite vocal at the meeting concerning the benefits being provided to the U.S. boilermakers. He also testified that following the meeting he and some others at the meeting met with Mr. Rogers and suggested that he should "get back to them" before the following Friday. Mr. Dufault testified that four (4) or five (5) people came to see Mr. Rogers at the close of the meeting, wanting to file a grievance. He also acknowledged that they asked Mr. Rogers to get back to them by Friday. His evidence was that Mr. Rogers said he would need more time than that because "SaskPower doesn't work that fast."

[25] What the Canadian boilermakers wanted the Union to pursue were benefits similar to those being paid to the U.S. workers. Mr. Rogers testified that he did discuss the

possibility of making accommodations for the Canadian boilermakers with the Employer, but those discussions were not successful.

[26] Following the meeting on April 14, 2008, the Applicant and his welding partner, Pat McGrath, were told by the night shift welding foreman to move their tools to a new location in the boiler. That new location was inside the boiler, 12.5 stories above the ground. They set up their tools and equipment in that location and worked there for the balance of their shift.

[27] The next evening, April 15, 2008, the Applicant and his partner were told to return to the location in the boiler that they were at the previous night. On arriving at that location, they found another pair of welders working in the space that they had been occupying. There is mixed evidence as to what occurred upon their arrival at their workplace, but the following are the facts the Board found, based on the evidence lead from the various witnesses.

[28] When the Applicant and Mr. McGrath arrived to find another team of welders occupying their workspace, Mr. McGrath began to yell through the access manhole to those individuals, that they were in their workspace. One of the individuals working inside the boiler was Kim Knoblauch, who was a shop member of the Boilermakers. As is not unusual on construction sites, the language used by Mr. McGrath to draw Mr. Knoblauch's and his partner's attention was somewhat coarse. Mr. McGrath was reported to say "get the fuck out of our spot." He also called Mr. Knoblauch a "fucking shopee" and questioned his welding credentials.

[29] During the time that Mr. McGrath was shouting at Mr. Knoblauch and his partner, the Applicant was sitting in a chair near the access manhole, but not participating in the verbal exchange.

[30] Mr. Knoblauch finally had enough and started to crawl out of the workspace towards the access manhole. While he was crawling out of the workspace, he was exchanging insults with Mr. McGrath and was beginning to get angry.

[31] When he exited the access manhole, the Applicant came over to him and began a heated exchange of words with him. The language used during that exchange was no less colourful than the language which had been used in the exchange initiated by Mr. McGrath.

Again, the Applicant called Mr. Knoblauch a "fucking shopee", and suggested that he had no business being on a construction site. During the exchange, both the Applicant and Mr. Knoblauch were very close together, with their faces within inches of each other.

[32] At one point, Mr. Knoblauch turned his back and moved away from the Applicant. The Applicant pursued him, calling him a coward and other names. Mr. Knoblauch stopped and turned around, at which time, the Applicant's shoulder went into Mr. Knoblauch's chest. From the evidence which was presented, this was the only physical contact between the two and the Board has concluded that it was not a deliberate attempt to injure by the Applicant, but, rather was an incidental contact due to Mr. Knoblauch turning suddenly while the Applicant was pursuing him. The Applicant's shoulder would have contacted Kim Knoblauch's chest because of the differential in their heights. Mr. Knoblauch is somewhat taller than the Applicant. From the evidence which was presented by the Applicant, Mr. Knoblauch and the other witnesses, the Board concluded that there was no intention on the part of the Applicant to injure or assault Mr. Knoblauch.

[33] While the heated exchange of words was going on, two foremen, Gerry Combot and Bill Purvis, the night welding foreman, arrived on the scene. While they did not witness the beginning of the encounter, but they were able to hear the shouting during the argument between the Applicant and Mr. Knoblauch. They calmed the situation down and sent the Applicant and Mr. Knoblauch to separate areas to cool down. The Applicant went down to the ground level and Mr. Knoblauch went to the lunch room.

[34] The Applicant was away from his assigned workplace for some time. When he returned, he was met by the general foreman, Danny Counchaine, who was angry because the Applicant had not let anyone know where he was. The Applicant apologized to the general foreman for having left without telling anyone where he could be found. Mr. Couchaine then called Mr. Dufault to deal with the incident.

[35] The Applicant discussed the incident with Mr. Dufault and following that discussion advised him that he wanted to take the rest of the evening off. Mr. Dufault agreed that that would be acceptable and he would advise the foreman of the request. However, before he left for the night, the Applicant asked Mr. Dufault to find Mr. Knoblauch in order that he could

apologize to him regarding the incident. Mr. Dufault left the Applicant in the safety room and went to find Mr. Knoblauch.

[36] Mr. Dufault found Mr. Knoblauch in the lunch room (it was by then the lunch break for the workers) and brought him to the safety room to meet with the Applicant. The Applicant shook hands with Mr. Knoblauch and gave him what Mr. Dufault described in his notes as a "heartfelt" apology. Mr. Knoblauch reportedly told the Applicant that he had been concerned that the Applicant might have been waiting for him in the parking lot or that he might find a rock through his car windshield. At that point, Mr. Knoblauch testified that the Applicant said, holding up his hands "it's not me you have to fear, it's these."

[37] The Applicant denied making any such threat. In the notes prepared by the Job Steward in his interview with Mr. Knoblauch, he writes "Bill said, "I won't. I'd find anything I can pick up and use that." However, in cross-examination, he was unable to recall the Applicant making any such remark.

[38] Mr. Dufault met with Ray Prystupa, the Night Superintendent sometime following the incident between the Applicant and Mr. Knoblauch. Mr. Prystupa told him to interview those involved in the incident and to get statements from them. When Mr. Dufault spoke to Mr. Rogers the next day, he was told by Mr. Rogers to get statements as well. During that telephone conversation, Mr. Dufault told him he "was already on it." Sometime shortly after the incident, he did interview most of those involved, made notes, which he later transcribed into a notebook which he utilized as Job Steward.

[39] It should be noted that Mr. Dufault had only recently achieved his journeyman status and it was the first time he had acted as Job Steward on a construction project. He acknowledged in his testimony that he felt somewhat inadequate to the task, but was assigned the position in the start up of the project as he had been assigned to the job as part of the first wave of boilermakers on the job and was the only boilermaker from those assigned to the job who was not a foreman or superintendent on the job.

[40] As it turned out, his investigation and the notes that he took was the only investigation that took place concerning the incident. Later that night, he allowed Mr. Prystupa,

the Night Superintendent to copy his notes. Those notes were left for Norm Trebick, the Site Superintendent, who in turn faxed those notes to Mr. Rogers for Local 555.

[41] After the meeting in the Safety Room between the Applicant and Mr. Knoblauch, both the Applicant and Mr. Knoblauch took the remainder of the shift off. Mr. Knoblauch also took the next day off as well. After that day, Kim Knoblauch was on four (4) days off.

[42] However, as noted above, after the Applicant and Mr. Knoblauch had left the site wheels continued to turn which would lead eventually to this hearing. Mr. Dufault made his notes, which were photocopied by the night superintendent and left for the site superintendent the following morning. Those notes were also faxed by the site superintendent to Mr. Rogers for the Union. Mr. Dufault called Mr. Rogers about the incident about 2:00 p.m. the following day, but Mr. Rogers had already received the notes by fax and had discussed the situation with both Mr. Trebick and the Dan Legere, Labour Relations Manager for the Employer, who happened to be at a meeting with Mr. Rogers the following day in Melville.

[43] By the time Mr. Dufault and Mr. Rogers talked by telephone, the Employer, through Mr. Trebick, determined that they would likely fire the Applicant from his position. That decision was faxed to Mr. Rogers by Mr. Trebick on April 15, 2008 at about 10:45 a.m. That memo read as follows:

> *Please forward this info to Dallas and Dan*
> *Dallas I am getting Chris Dufault to come in early to discuss this issue. As of now my feeling is to terminate Billy Petite Bill was the one who was in the meeting with you on the subject of the Americans the other two were Dave Bishop & Larry Phillips. Dan Counchaine also had discussions with Bill last night. It seems the main argument was between Billy and Kim Knoblauch It also sounds like it was very heated. You need to talk to Danny, Chris, Kim, Jerry Combot, Pat McGrath, Lee Crowder and Ryan. You and Dan get back to me today if at all possible.*
>
> *Regards, Norm Trebick*

[44] The following day, April 16, 2008, Mr. Dufault came in an hour early and met with Mr. Trebick, Mr. Prystupa, and Mr. Purvis about the incident the previous night. Mr. Dufault testified that the notes he made were faxed to Babcox & Wilcox lawyers in Cambridge, Ontario. A decision was made to terminate the Applicant.

[45] When the Applicant arrived at work the following night, he testified that members of Local 555 were pointing at him and whispering. He was asked by Mr. Dufault to come with him to the foreman's shack. The Applicant did so and was met by Danny Hawes, the welding general foreman, Mr. Purvis and Mr. Prystupa. The Applicant was told that he was being terminated. According to the Applicant, Mr. Prystupa told him "we received a letter from the hall and you're being fired." Mr. Dufault does not recall any such statement. Nor does he recall any reason being given for the Applicant being terminated. I accept Mr. Dufault's recollection of this event.

[46] It is clear, however, that when he was leaving, the Applicant advised those present that they were opening up a can of worms, and that they hadn't heard the last of him. He was escorted off the property by Mr. Dufault. Both the Applicant and Mr. Dufault described the Applicant as being calm after the dismissal and that they shook hands when the Applicant left the property.

[47] The next morning, April 17, 2008, the Applicant called Local 555's office to speak to Dallas Rogers. He wasn't available, and the Applicant spoke to Gaylene Syrnyk, the dispatcher for Local 555. Ms. Syrnyk testified about the call she received. She said that the Applicant was quite upset and was swearing. She asked him to settle down and quit swearing, which he did and apologized to her. She reported that the Applicant wanted to file a grievance against "Dallas Rogers, Local 555, and Babcox & Wilcox." Ms. Syrnyk immediately typed up a note of her conversation with the Applicant. In that note, the fact that the Applicant wanted to file a grievance was noted four (4) times. Her advice to the Applicant was that it would be necessary to file the grievance through Mr. Rogers. Ms. Syrnyk advised the Applicant that Mr. Rogers would call him shortly.

[48] Mr. Rogers, at the time of the telephone call (8:35 AM) was on his way to the site to meet with Mr. Trebick, Mr. Legere, and representatives from SaskPower over the U.S. worker issue. On his arrival in Coronach, he took the opportunity to call the Applicant. The conversation did not start well, nor did it end well. Both men swore at each other during the conversation and the Applicant ultimately hung up on Mr. Rogers. Mr. Rogers did not take further steps to process a grievance on behalf of the Applicant.

[49] Mr. Rogers testified that the matter of the Applicant's termination did arise during his meeting in Coronach that day. However, he testified that while he tried to have the Employer reconsider its decision, he felt that they were justified in terminating the Applicant. As noted above, no steps were taken to process a formal grievance on behalf of the Applicant.

[50] Later that day, the Applicant, set up and informational picket line near the road access to the site. He carried a placard that said "SaskPower Babcock & Wilcox of Canada Unfair Labour Practices." Someone also placed a sign on a building in Coronach which read "InTL Brotherhood of Boilermakers Local 555 Weakest "union" leader in "all of Canada."

[51] The Applicant advised the local newspaper of his picket line and he was photographed by that newspaper for a story published on Monday, March 24, 2008 on the protest. The newspaper, which was a weekly newspaper, also sought out and obtained comment from Mr. Rogers concerning the protest and the story was published.

[52] The Applicant then left Coronach to return home to Cape Breton Island. However, he called his local union who advised him that there was a chance to obtain some work in Ontario at a power plant at Lambton, Ontario, which was just outside of Sarnia. He was to drive to the plant in Lambton, take a welding test and if he passed the test, would be hired on the night shift starting at 6:30 p.m. on Monday, April 21, 2008.

[53] Due to a late arrival in Sarnia, the Applicant was able to work the assigned shift on April 21, 2008, but was to take his welding test the following day, which he took and passed. He reported to work that evening at 6:30 p.m., but before the shift started, he was approached by the Job Steward on that project, and another Local 128 member, who advised him that they had been contacted by Local 555 and told of the incident in Coronach. As a result, he was advised that he was not allowed to work within Local 128 or anywhere else in Canada for thirty (30) days.

[54] The thirty (30) day suspension from work was imposed, the Board was told, pursuant to the rules for dispatch of members promulgated by the various locals. These dispatch or referral rules are adopted by the local membership, but are not bylaws of the Local, which would be subject to approval by the international organization. Each Local has its own rules.

[55] Local 555 has no rule that requires a member be subject to suspension if he is fired or quits a job to which he is dispatched. However, both Local 73, the Applicant's home local, and Local 128, under whose jurisdiction he was working in Ontario, have suspension rules. Local 73's Rule 8 reads as follows;

> *8) Any member who quits or is fired or fails to report to a job without an excuse acceptable to the Business Manager or his designee shall be liable to appear before the Business Manager which may result in a suspension from the out of work lists for a period not to exceed thirty (30) days.*

[56] Local 128 has Rule 4.10 which provides:

> *4.10 Members dispatched through Local 128 who voluntarily quit or get fired from a job without reasonable excuse acceptable to the Business Manager or his designee, shall be suspended from the out of work list for a period not to exceed thirty (30) calendar days.*

[57] At no time does it appear that the Applicant was afforded any form of hearing before either the Business Manager of Local 555, Local 73 or Local 128 with respect to the thirty (30) day suspension which was imposed upon him both his home jurisdiction (Local 73) or Local 128 as a result of this incident.

[58] The thirty (30) day suspension was not the only penalty imposed upon the Applicant. In addition to suffering the suspension imposed by Locals 73 and 128, he later received a letter from his International Union dated April 28, 2008 advising him that he was no longer welcome to work "in any International Brotherhood of Boilermakers Local Lodge in Western Canada indefinitely." The authority for making this interdiction was not provided at the hearing, however, it was noted by Mr. Rogers in his testimony that the letter did provide that the Applicant was offered the opportunity to contact the International Vice-President who imposed the suspension, to discuss the matter. The Applicant did not avail himself of the opportunity to contact Mr. Maloney.

[59] Also, just prior to the letter from the International having been sent on April 23, 2008, Mr. Legere, on behalf of the Employer, sent a letter to Mr. Rogers in his capacity as Business Manager for Local 555 and to Jean-Yves Poirier, Business Manager for Local 73, to

advise that the Employer was also imposing a ninety (90) day suspension to the Applicant as a result of his termination in Coronach. As a result, the Applicant was "not eligible to work for Babcock & Wilcox Canada for a period of ninety (90) days from the date of termination." In his testimony, Mr. Legere said that the suspension was somewhat moderate and that he had come under criticism for it being so short.

[60] The letter is interesting as well for a couple of other reasons. The first is that, somewhat incredibly, it was never sent to the Applicant. It was not until his wife, Clara Gray, managed to obtain a copy of it from Local 73's files, did the Applicant first become aware that he had been suspended. Nor was the Applicant at any time made aware of the reason for his termination in Coronach by the Employer. Secondly, the letter contains the following statements: "On or about the 15th of April 2008, Mr. Petite instigated a dispute between himself and a co-worker, Mr. Kim Kloubach. [sic] Mr. Petite was very aggressive to Mr. Kloubach [sic] and during the course of the incident Mr. Petite pushed and uttered threats to Mr. Kloubach [sic]." For the reasons that follow, this statement is important.

[61] The incident, as noted above, had a profound impact on the Applicant. In addition to being interdicted from working by his Local Union by the Employer, as well as his International Union, he was unable to obtain employment insurance due to his having been terminated. As a result, he began to make inquiries concerning his termination through his Local Union.

[62] The Applicant's spouse is a Barrister and Solicitor practicing in Nova Scotia. She was called to testify on behalf of her spouse. When he was denied employment insurance and the family was having difficulty making payments on a farm they had purchased in Nova Scotia, she began to make inquiries on his behalf. One of these inquiries was to Local 73 who provided her with information which it had obtained from Local 555. That information disclosed the letter from the Employer dated April 23, 2008. She also had a conversation with someone (she was unable to identify the person), who it later turned out was Mr. Legere on behalf of the Employer, when she called to see if she could have the Employer change the record of employment issued to her husband from a termination in order that he could collect employment insurance.

[63] However, that was not the most startling part of her testimony. She had not intended to testify at the hearing. Arrangements had been made for Mr. McGrath to come to the

hearing to testify. He acknowledged he would do so, she says, but when her spouse left to attend the hearing, they had not heard from Mr. McGrath for about a week. She continued to try to reach him after her spouse left for the hearing. She testified that she finally was able to reach Mr. McGrath who told her that he would not be coming to testify. She testified that he told her that he had been told by his Union that if he came to testify the he "would never work in Newfoundland" again. He was a member of the Newfoundland Local of the Boilermakers.

[64] This comment is hearsay and she is therefore unable to provide direct testimony as to the veracity of what she was told by Mr. McGrath, but as an officer of the Court, the Board has no doubt that she was in fact told by Mr. McGrath that he had been threatened by his Local to induce him not to testify. It remains, however, unclear as to whether or not, in fact, such threats were made. In response to this testimony, Mr. Rogers advised that he would provide Mr. McGrath with an undertaking that he would suffer no prejudice if he came to testify. However, in the final result, Mr. McGrath did not testify.

[65] It also was clear from the testimony that there was a reasonably close relationship between Mr. Rogers and the Business Manager for the Newfoundland Local. Additionally, Mr. McGrath was living common law with the sister of the Business Manager for Newfoundland. One of many inter-relationships among and between Boilermakers, it seems.

Relevant statutory provisions:

[66] Relevant statutory provisions provide as follows:

> *5. The board may make orders:*
>
> *(d) determining whether an unfair labour practice or a violation of this Act is being or has been engaged in;*
>
> *(e) requiring any person to do any of the following:*
>
> *(i) to refrain from violations of this Act or from engaging in any unfair labour practice;*
>
> *(ii) subject to section 5.1, to do any thing for the purpose of rectifying a violation of this Act, the regulations or a decision of the board;*
>
> ...

(g) fixing and determining the monetary loss suffered by an employee, an employer or a trade union as a result of a violation of this Act, the regulations or a decision of the board by one or more persons, and requiring those persons to pay to that employee, employer or trade union the amount of the monetary loss or any portion of the monetary loss that the board considers to be appropriate;

...

11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:

(a) in any manner, including by communication, to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any right conferred by this Act;

...

11(2) It shall be an unfair labour practice for any employee, trade union or any other person:

(a) to interfere with, restrain, intimidate, threaten or coerce an employee with a view to encouraging or discouraging membership in or activity in or for a labour organization, but nothing in this Act precludes a person acting on behalf of a trade union from attempting to persuade an employer to make an agreement with that trade union to require as a condition of employment membership or maintenance of membership in the trade union or the selection of employees by or with the advice of a trade union or any other condition in regard to employment, if such trade union has been designated or selected by a majority of employees in an appropriate unit as their representative for the purpose of bargaining collectively;

...

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.

...

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.

Analysis:

[67] As noted above, the application alleged breaches of ss. 5(d), (e) and (g), 11(1)(a) and 11(2)(a) of the *Act*. Because it was a single panel with respect to this matter under s. 4(2.2) of the *Act*, the Board's jurisdiction with respect to this application is limited to dealing with the application under s. 25.1 or s. 36.1 of the *Act*. Section 4(2.2) of the *Act* provides as follows:

> *4(2.2) The chairperson may designate himself or herself or a vice-chairperson to hear a matter alone for proceedings related to section 25.2 or 36.1.*

[68] For all other matters, the *Act* requires that a matter be heard by a panel of the Board comprising three members, one of whom must be the Chairperson or a Vice-Chairperson.

[69] For the reasons that follow, the Board finds the application to be well founded under s. 25.1 of the *Act*. However, because of the single panel status, the Board lacks jurisdiction to deal with the other matters alleged in the application. Leave is hereby given to apply to the Registrar of the Board, should any of the parties so desire, within thirty (30) days of the date of these Reasons for Decision, to have the matters alleged under s. 5(d), (e) and (g), 11(1)(a) and 11(2)(a) of the *Act* scheduled to be heard before a full panel of the Board in accordance with the usual practices of the Board concerning scheduling of hearings. Leave is also given to allow the parties to file a transcript of this hearing before the panel who may be scheduled to hear such application in lieu of rehearing any of the witnesses called to testify in this hearing, the cost being borne by the party requesting same.

[70] The duty of fair representation was 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 quid pro quo 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.*** *[Emphasis added]*

[71] 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] 84 CLLC 12,181*: 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."

[72] The onus of showing a breach of the duty of fair representation falls upon the Applicant in these proceedings.

[73] In *Deb Hargrave, Joan Hayes, Jan Kapacila, Sandra Sawatsky and Hazel Anderson v. Canadian Union of Public Employees, Local 3833 and Prince Albert Health District*, [2003] Sask. L.R.B.R. 511, LRB File No. 223-02, the Board set out the principles applicable to an analysis of the duty of fair representation, with a particular focus on arbitrariness and the scope of the Union's duty. The Board stated at 518 to 526:

> *[27] As pointed out in many decisions of the Board, a succinct explanation of the distinctive meanings of the concepts of arbitrariness, discrimination and bad faith, as used in s. 25.1 of the Act, was made in Glynna Ward v. Saskatchewan Union of Nurses, [1988] Winter Sask. Labour Rep. 44, LRB File No. 031-88, at 47, as follows:*
>
> > *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.

[28] In Toronto Transit Commission, [1997] OLRD No. 3148, at paragraph 9, the Ontario Labour Relations Board cited with approval the following succinct explanation of the concepts provided by that Board in a previous unreported decision:

> *. . . a complainant must demonstrate that the union's actions were:*
>
> *(1) "Arbitrary" – that is, flagrant, capricious, totally unreasonable, or grossly negligent;*
>
> *(2) "Discriminatory – that is, based on invidious distinctions without reasonable justification or labour relations rationale; or*
>
> *(3) "in Bad Faith" – that is, motivated by ill-will, malice hostility or dishonesty.*
>
> *The behaviour under review must fit into one of these three categories. ...[M]istakes or misjudgments are not illegal; moreover, the fact that an employee fails to understand his rights under a collective agreement or disagrees with the union's interpretation of those rights does not, in itself, establish that the union was wrong – let alone "arbitrary", "discriminatory" or acting in "bad faith".*
>
> *The concept of arbitrariness, which is usually more difficult to identify than discrimination or bad faith, is not equivalent to simple errors in judgment, negligence, laxity or dilatoriness. In Walter Prinesdomu v. Canadian Union of Public Employees, [1975] 2 CLRBR 310, the Ontario Labour Relations 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.*

. . . .

[34] There have been many pronouncements in the case law with respect to negligent action or omission by a trade union as it relates to the concept of arbitrariness in cases of alleged violation of the duty of fair representation. While most of the cases involve a refusal to accept or to progress a grievance after it is filed, in general, the cases establish that to constitute arbitrariness, mistakes, errors in judgment and "mere negligence" will not suffice, but rather, "gross negligence" is the benchmark. Examples in the jurisprudence of the Board include Chrispen, supra, where the Board found that the union's efforts "were undertaken with integrity and competence and without serious or major negligence. . . ." In Radke v. Canadian Paperworkers Union, Local 1120, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92, at 64 and 65, the Board stated:

> *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 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.*

[35] Most recently, in Vandervort v. University of Saskatchewan Faculty Association and University of Saskatchewan, [2003] Sask. L.R.B.R. 147, LRB File Nos. 102-95 & 047-99, the Board stated, at 193:

> *[215] Arbitrariness is generally equated with perfunctory treatment and gross or major negligence. This standard arose from Canadian Merchant Service Guild v. Gagnon . . . .*

And further, at 194-95, as follows:

> *[219] In Rousseau v. International Brotherhood of Locomotive Engineers et al., 95 CLLC 220-064 at 143, 558-9, the Canada Labour Relations Board described the duty not to act in an arbitrary manner as follows:*
>
> > *Through various decisions, labour boards, including this one, have defined the term "arbitrary." Arbitrary conduct has been described as a failure to direct one's mind to the merits of the matter; or to inquire into or to act on available evidence; or to conduct any meaningful investigation to obtain the data to justify a decision. It has also been described as acting on the basis of irrelevant factors or principles; or displaying an indifferent and summary attitude. Superficial, cursory, implausible, flagrant, capricious, non-caring or perfunctory are all terms that have also been used to define arbitrary conduct. It is important to note that intention is not a necessary ingredient for an arbitrary characterization.*

> *Negligence is distinguishable from arbitrary, discriminatory or bad faith behaviour. The concept of negligence can range from simple negligence to gross negligence. The damage to the complainant in itself is not the test. Simple negligence may result in serious damage. Negligence in any of its variations is characterized by conduct or inaction due to inadvertence, thoughtlessness or inattention. Motivation is not a characteristic of negligence. Negligence does not require a particular subjective stage of mind as does a finding of bad faith. There comes a point, however, when mere/simple negligence becomes gross/serious negligence, and we must assess when this point, in all circumstances, is reached.*
>
> *When does negligence become "serious" or "gross"? Gross negligence may be viewed as so arbitrary that it reflects a complete disregard for the consequences. Although negligence is not explicitly defined in section 37 of the Code, this Board has commented on the concept of negligence in its various decisions. Whereas simple/mere negligence is not a violation of the Code, the duty of fair representation under section 37 has been expanded to include gross/serious negligence . . . The Supreme Court of Canada commented on and endorsed the Board's utilization of gross/serious negligence as a criteria in evaluating the union's duty under section 37 in Gagnon et al. [[1984] 1 S.C.R. 509]. The Supreme Court of Canada reconfirmed the utilization of serious negligence as an element to be considered in Centre Hospitalier Régina Ltée v. Labour Court, [1990] 1 S.C.R. 1330.*

[36] In North York General Hospital, [1982] OLRB Rep. Aug. 1190, the Ontario Labour Relations Board addressed the relation of negligence to arbitrariness as follows, at 1194:

> *A union is not required to be correct in every step it takes on behalf of an employee. Moreover, mere negligence on the part of a union official does not ordinarily constitute a breach of section 68. See Ford Motor Company of Canada Limited, [1973] OLRB Rep. Oct. 519; Walter Princesdomu and The Canadian Union of Public Employees, Local 1000, [1975] OLRB Rep. May 444. There comes a point, however, when "mere negligence" becomes "gross negligence" and when gross negligence reflects a complete disregard for critical consequences to an employee then that action may be viewed as arbitrary for the purposes of section 68 of the Act. In Princesdomu, supra, the Board said at pp 464-465:*
>
> > *Accordingly at least flagrant errors in processing grievances–errors consistent with a "not caring" attitude--must be inconsistent with the duty of fair representation. An approach to a grievance may be*

> *wrong or a provision inadvertently overlooked and section 60 has no application. The duty is not designed to remedy these kinds of errors. But when the importance of the grievance is taken into account and the experience and identity of the decision-maker ascertained the Board may decide that a course of conduct is so, implausible, so summary or so reckless to be unworthy of protection. Such circumstances cannot and should not be distinguished from a blind refusal to consider the complaint.*

[37] In a subsequent decision, Canada Packers Inc., [1990] OLRB Rep Aug. 886, the Ontario Board confirmed this position as follows, at 891:

> *A review of the Board's jurisprudence reveals that honest mistakes, innocent misunderstandings, simple negligence, or errors in judgment will not of themselves, constitute arbitrary conduct within the meaning of section 68. Words like "implausible", "so reckless as to be unworthy of protection", "unreasonable", "capricious", "grossly negligent", and "demonstrative of a non-caring attitude" have been used to describe conduct which is arbitrary within the meaning of section 68 (see Consumers Glass Co. Ltd., [1979] OLRB Rep. Sept. 861; ITE Industries, [1980] OLRB Rep. July 1001; North York General Hospital, [1982] OLRB Rep. Aug. 1190; Seagram Corporation Ltd.. [1982] OLRB Rep. Oct. 1571; Cryovac, Division of W.R. Grace and Co. Ltd., [1983] OLRB Rep. June 886; Smith & Stone (1982) Inc., [1984] OLRB Rep. Nov. 1609; Howard J. Howes, [1987] OLRB Rep. Jan. 55; George Xerri, [1987] OLRB Rep. March 444, among others). Such strong words may be applicable to the more obvious cases but may not accurately describe the entire spectrum of conduct which might be arbitrary. As the jurisprudence also illustrates, what will constitute arbitrary conduct will depend on the circumstances.*

[38] The British Columbia Labour Relations Board has taken a similar view with respect to matters of process. In Haas v. Canadian Union of Public Employees, Local 16, [1982] BCLB No. L48/82, that Board stated as follows:

> *... similarly, the Board will be reluctant to find a breach of Section 7 by virtue of the manner in which particular grievances are pursued. As stated earlier, a complainant must demonstrate shortcomings in the union's representation beyond the areas of mere negligence, inadvertent errors, poor judgment, etc. The shortcomings must be so blatant as to demonstrate that the grievor's interests were pursued in an indifferent or perfunctory manner.*
>
> *Too often the intended purpose and limits of Section 7 are not well understood. A union is afforded wide latitude in the manner in which it deals with individual grievances; the Board will only find violations of Section 7 where a union's manner of representation of an individual grievor is found to be an obvious disregard for his rights or for the merits of the particular grievance. Broadening the scope of Section 7 beyond the areas*

> *described in earlier pages of this decision would not be in keeping with the purpose and objects of the Labour Code; it would encourage the filing of a myriad of unfounded and frivolous Section 7 applications to the Board and it could also force unions to untenable positions in grievance handling because of the weight they would have to give to possible Section 7 complaints hanging over their heads.*
>
> . . .
>
> *Each case must be decided on its own merits; suffice to say, however, that the Board may well find shortcomings in the manner in which the union dealt with a particular matter without finding that such shortcomings support a Section 7(1) complaint. The Board may well find that a union could have been more vigourous and thorough in its investigation of the facts in a particular case; it may even question the steps taken in dealing with a grievance and the ultimate decision made with respect to that grievance. However, that does not necessarily mean that a complaint under Section 7(1) will be substantiated. To substantiate a charge of arbitrariness, there must be convincing evidence that there was a blatant disregard for the rights of the union member.*

[39] As noted above, the Canada Labour Relations Board took a similar view in Rousseau v. International Brotherhood of Locomotive Engineers et al., supra. In Johnson v. Amalgamated Transit Union, Local 588 and City of Regina, [1997] Sask. L.R.B.R. 19, LRB File No. 091-96, the Board referred to the evolution of the treatment of the issue of arbitrariness by the Canada Board. At 31-32, the Board observed as follows:

> *The Canada Labour Relations Board initially accepted the notion that, in the case of what were termed "critical job interests," the obligation of a trade union to uphold the interest of the individual employee affected would be close to absolute. What might constitute such critical job interests was not entirely clear, but loss of employment through discharge was clearly among them.*
>
> *The Board continued to hold the view that the seriousness of the interest of the employee is a relevant factor. In Brenda Haley v. Canadian Airline Employees' Association, [1981] 81 C.L.L.C. 16,096, the Canada Board made this comment, at 609:*
>
> > *This concept (i.e. critical job interests] is a useful instrument to distinguish circumstances where the balance between the individual and union or collective bargaining system interests will tilt in one direction or another. A higher degree of recognition of individual interests will prevail on matters of critical job interest, which may vary from industry to industry or employer to employer. Conversely on matters of minor job interest for the individual the union's conduct will not receive the same scrutiny and the Board's administrative processes*

will not respond with the same diligence or concern. Many of these matters may not warrant an expensive hearing. Examples of these minor job interests are the occasional use of supervisors to do bargaining unit work, or isolated pay dispute arising out of one or a few incidents and even a minor disciplinary action such as a verbal warning.

They concluded in the Brenda Haley case, however, that this factor should be evaluated along with other aspects of the decisions taken by the trade union. The decision contains this comment, at 614:

> *As frustrating as duty of fair representation discharge cases may be and as traumatic as loss of employment by discharge may be, we are not persuaded mandatory discharge arbitration is the correct response. It is an easy response but its effect on the group and institutional interests is too harsh. With the same view of the integrity of union officials and the merits of the grievance procedure shared by Professor Weiler we say unions must continue to make the difficult decisions on discharge and we must continue to make the difficult decisions complaints about the unions' decisions often require.*

They went on to summarize the nature of the duty imposed on the trade union, also at 614:

> *It is not the Board's task to reshape union priorities, allocate union resources, comment on leadership selection, second guess its decisions, or criticize the results of its bargaining. It is our task to ensure it does not exercise its exclusive majoritarian based authority unfairly or discriminatorily. Union decision makers must not act fraudulently or for improper motives such as those prohibited by human rights legislation or out of personal hostility, revenge or dishonesty. They must not act arbitrarily by making no or only a perfunctory or cursory inquiry into an employee's grievance. The union's duty of fair representation does not guarantee individual or group union decision makers will be mature, wise, sensitive, competent, effectual or suited for their job. It does not guarantee they will not make mistakes. The union election or selection process does not guarantee competence any more than the process does for those selected to act in other democratic institutions such as Parliament or appointees to administrative agencies.*

[40] Thus, there is a line of cases that suggests that where "critical job interests" are involved (e.g., discharge from employment), depending upon the circumstances of the individual case, a union dealing with a grievance may well be held to a higher standard than in cases of lesser importance to the individual in determining whether the union has acted arbitrarily (including whether it has been negligent to a degree that constitutes arbitrariness). The Board has taken a generally favourable view of this position as demonstrated in Johnson and Chrispen, supra.

[41] However, in Haley, supra, a case involving the missing of a time limit for referral to arbitration, the Canada Board also recognized that the experience of the union representative and available resources are relevant factors to be considered in assessing whether negligence is assumed to be of a seriousness that constitutes arbitrariness, stating as follows:

> *...The level of expertise of the union representative and the resources the union makes available to perform the function are also relevant factual considerations. These and other relevant facts of the case will form the foundation in each case to decide whether there was seriously negligent, arbitrary, discriminatory or bad faith, and therefore unfair, representation.*

[42] In Chrispen, supra, the Board approved of this position also, stating, at 150, as follows:

> *The reason why cases involving allegations of arbitrariness are the most vexing and difficult is because they require the Board to set standards of quality in the context of a statutory scheme which contemplates that employees will frequently be represented in grievance proceedings by part-time union representatives or even other co-workers. Even when the union representatives are full-time employees of the union, they are rarely lawyers and may have few qualifications for the responsibilities which this statutory scheme can place upon them.*
>
> *In order to make this system work, the legislature recognized that union representatives must be permitted considerable latitude. If their decisions are reversed too often, they will be hesitant to settle any grievance short of arbitration. Moreover, the employer will be hesitant to rely upon any settlement achieved with the union if labour boards are going to interfere whenever they take a view different from that of a union. The damage this would do to union credibility and the resulting uncertainty would adversely affect the entire relationship. However, at the same time, by voluntarily applying for exclusive representative status, the union must be prepared to accept a significant degree of responsibility for employees, especially if an employee's employment depends upon the grievance.*

[74] Also, as the Board pointed out in *Chabot v. C.U.P.E. Local 477* [2007] Sask. L.R.B.R. 401, LRB File No. 158-06 at para. 71:

> *The Board does not sit in appeal of decisions made by unions, does not decide if a union's opinion of the likelihood of success of a grievance was correct and does not minutely assess and second guess every union action.*

[75] However, the Board's reluctance to interfere in decisions made by a trade union in the processing of grievances is based upon an objective standard. That is, the Board must be shown that the Union has taken steps to investigate a potential grievance and has taken a measured view of that grievance and made a reasoned decision in respect thereof. Furthermore, as noted above, a Union may be held to a higher standard when "critical job interests" (*i.e.* discharge from employment) are involved.

[76] The standard required by this Board in respect of s. 25.1 was demonstrated by this Union in *Leblanc v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 555 and Lloydminster Maintenance Ltd.*, [2007] Sask. L.R.B.R. 648, LRB File No. 028-07. In that case, the Union took significant steps to investigate the layoff of Mr. Leblanc by his Employer. The investigation was conducted by the Assistant Business Manager, Mr. Eric Zimmerman, in consultation with Mr. Rogers for the Union.

[77] Following the investigation by Mr. Zimmerman, the Union filed a grievance on his behalf. They also consulted with a representative of the International Union and sought legal advice concerning the grievance. They communicated with the Applicant throughout the process. Ultimately, however, it was determined that the grievance would not succeed and the grievance was abandoned.

[78] The Union's approach in the present case differed markedly from what occurred in the *Leblanc* case, *supra*. While the Job Steward did conduct an investigation, it was not independent, that is, independent of management. Furthermore, the investigation was instigated by management and the results of the investigation were turned over to management and used by them as the basis for their termination of the Applicant.

[79] The Applicant was never asked to give, nor did he provide a statement other than his discussions with the Job Steward following the incident. All other parties to the incident were interviewed and notes kept by the Job Steward. Many of those notes were erroneous. For example, statements were given by Mr. Combot and Mr. Purvis which suggested that they had

witnessed the whole incident, when it is clear they did not. Much weight was given to these comments which were clearly assumptions and or hearsay on their part.

[80] Nor do the notes provide a complete picture of the event. They are sketchy and limited at best. No fault is attributed to Mr. Dufault in respect of this, as he was both inexperienced and had limited time to interview and write up his notes. On the other hand, the Board has had the benefit of hearing from all of the parties to the dispute, save for Mr. McGrath. Nor did I hear from the person who should have witnessed the whole episode, another employee who was stationed near the access manhole as a safety officer.

[81] However, apart from the notes made by the Job Steward, no other investigation was conducted by the Union to ascertain precisely what happened. Everyone, from Mr. Trebick to Mr. Rogers leapt, in the Board's opinion, to the conclusion that the incident had been solely precipitated by the Applicant. As the evidence presented to the Board has shown, this was clearly not the case.

[82] Ms. Syrnyk's evidence and the notes of her conversation with the Applicant show clearly that he wanted to file a grievance related to his termination. Rather than do so, Mr. Rogers got into a shouting match with the Applicant, and later agreed with Mr. Trebick that he was justified in the termination of the Applicant without having given the Applicant any opportunity to either know the reasons for his termination, nor to hear his side of the story.

[83] In my view, Mr. Rogers did not handle the situation well. Notwithstanding the volatility of the Applicant, he should have remained calm and deliberate in his representation of the Applicant in respect of the dismissal. Out of an abundance of caution, he should have filed a grievance, completed an independent investigation, taken independent advice, if necessary, and taken a more reasoned approach to the conduct of the grievance. If filed, the grievance could have been withdrawn if it turned out that the facts were as he understood them. As it turns out, the Board has found them to be much different than what it appears the Employer and the Union relied upon, that is that the Applicant was the sole instigator of the incident and that the Applicant had been physical with Mr. Knoblauch.

[84] It is also surprising that neither Mr. Knoblauch nor Mr. McGrath received any discipline with respect to the incident. Mr. Knoblauch testified that he understood that he would

be "written up" as a result of the incident, but that did not, in fact occur. Nor was Mr. McGrath disciplined in any way and he worked until the end of the project in Coronach without incident.

[85] As noted in *Rousseau v. International Brotherhood of Locomotive Engineers et al, supra*, arbitrary conduct has been described as:

> *A failure to direct one's mind to the merits of the matter, or to inquire into or act on available evidence; or to conduct any meaningful investigation to obtain the data to justify a decision. It has also been described as acting on the basis of irrelevant factors or principles or displaying an indifferent and summary attitude. Superficial, cursory, implausible, flagrant, capricious, non-caring or perfunctory are all terms that have also been used to define arbitrary conduct.*

[86] The conduct of the Union in this case, was clearly arbitrary insofar as it did not conduct a meaningful investigation of the incident to determine if the discipline was justifiable, and, in fact, it did not even file a grievance to preserve the Applicant's rights in that regard after being made aware of the Applicant's desire to file a grievance. It appeared that there was personal hostility between the Applicant and Mr. Rogers, but this is no excuse for Mr. Roger's failure to advance a grievance on the part of a member.

[87] There was also a display of indifference and summary attitude concerning the Applicant and his termination. That is particularly shown by the Union's response to his picketing at the job site, which resulted in the International Union taking steps to impose an interdiction against his working in Western Canada. Furthermore, steps were taken that resulted in the Applicant being terminated in Ontario for conduct which did not occur in Ontario, without a hearing of any sort. Similarly, he was suspended in his home jurisdiction for thirty (30) days, again without a hearing, for conduct which did not occur in Nova Scotia. Mr. Rogers pointed out in his testimony that while he discussed the incident at Coronach with the Business Managers for Local 128 and Local 73, he says that he did not call for the suspension to be invoked. However, given the reaction of the International Union to the picketing activities of the Applicant, the Board has no difficulty concluding that this was not the case, and the imposition of these suspensions were further punishment imposed upon the Applicant by the Union for his picketing activities.

[88] The Applicant was also treated arbitrarily by the Employer. He alone was given discipline for the incident. The Employer also failed to undertake any independent investigation of the incident and relied upon statements from supervisors who were not present to witness the

incident. They jumped to the conclusion that the Applicant had physically assaulted Mr. Knoblauch and that the Applicant was solely responsible for instigating the incident.

[89] In his testimony, Mr. Legere noted that the Employer normally imposed "progressive discipline." He acknowledged that that had not been done in this case. Had a proper or any investigation been done by the Employer, the results may well have been different with respect to the discipline imposed upon the Applicant.

Decision:

[90] In his argument, Philip Gallet, counsel for the Employer opined that if culpability were found by the Board under s. 25.1, that the responsibility for failure to represent the Applicant should be solely the responsibility of the Union. He argued that the Employer bears no responsibility under s. 25.1 to represent Union members. Mr. Gallet further argued that the Board had no jurisdiction under s. 25.1 to make an order which involved the Employer. In support of its view, the Employer cited *Royal Oaks Mines Inc. v. Canada (Labour Relations Board),* [1996] 1 S.C.R. 369 (S.C.C.), wherein, he confirmed the following fundamental principles of the Board's remedial jurisdiction:

> *The Board has broad powers under the provisions of the Act to make orders which are designed to rectify or overcome, as best as possible, a violation of the Act. In this regard, we are guided by the judgment of Cory J. in Royal Oak Mines, supra, where His Lordship stated as follows:*
>
> > *There are four situations in which a remedial order will be considered patently unreasonable: (1) where the remedy is punitive in nature; (2) where the remedy granted infringes the Canadian Charter of Rights and Freedoms; (3) where there is no rational connection between the breach, its consequences, and the remedy; and (4) where the remedy contradicts the objects and purposes of the Code.*

[91] While this decision predated the Supreme Court of Canada decision in *Dunsmuir v. New Brunswick* 2008 SCC 9 (CanLII), apart from the references to the patently unreasonable standard, the comments by Mr. Justice Cory remain valid. The Board confirmed its adherence to these principles in *Amalgamated Transit Union, Local 588 v. Firstbus Canada Limited* 2007 CanLII 68764. At paragraph 9, the Board says:

> *In making its remedial order, the Board has considered the following principles that have been established with respect to remedial orders for unfair labour*

practices, specifically as they apply to s. 11(1)(c), confirming the Employer's duty to bargain collectively with the Union:

1. *The overriding goal of the Board in designing an appropriate remedy is to place the Union and its members in the position they would have been in but for the Employer's breach of the Act (Loraas Disposal Services Ltd. supra);*

2. *The remedy should support and foster the encouragement of unionized workplaces and the encouragement of healthy collective bargaining, which the Board has on numerous occasions found to be the underlying purpose of the Act (Loraas Disposal Services Ltd. supra for example);*

3. *The remedy should not be punitive in nature (Royal Oak Mines Inc. v. Canada (Labour Relations Board)) 1996 CanLII 220,(S.C.C.) [1996] 1 S.C.R. 369;*

4. *The remedy should not infringe on the Canadian Charter of Rights and Freedoms and, specifically should not require a party to make statements that it does not wish to make (Royal Oak Mines Inc. supra);*

5. *There must be a rational connection between the breach, its consequences and the remedy (Royal Oak Mines Inc. supra); and*

6. *The order must be within the Board's jurisdiction as defined by the Act.*

[92] The usual remedy ordered when a breach of s. 25.1 is found is for the Board to order that the matter be dealt with under the grievance procedure in the collective agreement governing the parties in dispute, or, alternatively, as appropriate, to resume the grievance process at the point it became derailed.

[93] As noted above, the overriding goal in designing an appropriate remedy is to place the parties in the position they would have been in but for the breach of the *Act*. In the case of s. 25.1, that would be to put the Employee in the same position he would have been in but for the breach of that provision of the *Act*.

[94] While it may be open to the Board to determine the amount of compensation due to the Applicant as a result of his termination, I do not feel that it is appropriate for the Board to attempt to adjudicate such issues when there is provision in the collective bargaining agreement between the parties for the resolution of issues such as this. Therefore, the Board hereby orders that the Union shall file a grievance on behalf of the Applicant with respect to his termination on April, 16, 2008, and shall process that grievance on behalf of the Applicant in a manner that is not arbitrary, discriminatory, and in good faith, as required by s. 25.1 of the *Act*.

[95] However, due to the length of the proceedings before the Board, the Board suggests that the parties should consider a mediation process as an initial step in the resolution of this grievance in the hope that settlement may occur. Furthermore, should the matter go to arbitration, and should the arbitrator or board appointed to hear the matter so wish, a transcript of the evidence taken before the Board shall be provided to the arbitrator, the cost of which shall be borne equally by the Union and the Employer.

[96] The Board further orders that any time limits with respect to filing of grievances within a particular period of time following the incident alleged in the grievance are hereby extended or waived as necessary to permit the filing and processing of the grievance on behalf of the Applicant.

[97] The Applicant has also been put to considerable expense with respect to prosecution of his application against the Union. In order to place the Applicant in the same position that he would have been, but for the failure, the Board is of the opinion that it is appropriate to provide some compensation for the expense to which he has been put. Accordingly, the Board further orders:

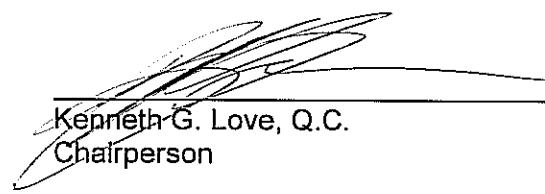
1. That the Union shall forthwith pay to the Applicant his reasonable and necessary expenses incurred for travel and sustenance from his home to attend the initial hearing of this matter and the continuation of the hearing.

2. That the Union shall pay to the Applicant, or to his counsel upon written direction from the Applicant, a counsel fee for retained counsel in respect of this matter of $750.00 per hearing day.

3. In the event that the parties are unable to agree as to the amounts to be paid by the Union to the Applicant pursuant hereto, the parties may apply to the Registrar of the Board, or his designate, to determine or settle the amounts payable, who may determine the amount or, in the event that he, or his designate are unable to settle the amount to be paid, I shall remain seized of this matter to make such determination.

DATED at Regina, Saskatchewan, this **1st** day of **June, 2009.**

LABOUR RELATIONS BOARD



Kenneth G. Love, Q.C.
Chairperson