The Labour Relations Board
Saskatchewan

STEWART KOOP, Employee, North Battleford, Applicant v. SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Respondent and THE GOVERNMENT OF SASKATCHEWAN (MINISTRY OF HIGHWAYS), Interested Party

LRB File No. 192-08; October 1, 2009
Chairperson, Kenneth G. Love, Q.C.

For the Applicant: Ms. Angela Giroux and Mr. Steve Seiferling
For the Respondent Union: Ms. Juliana Saxberg
For the Interested Party: Mr. Curtis Talbot

Duty of Fair Representation – Scope of duty – Union takes Employee's grievance to expedited arbitration – employee alleges Union erred in failing to tender certain evidence, including evidence from witness which Applicant refused to name – Board will not sit on appeal of the decisions of Union as to how to conduct arbitration hearing, including what evidence to tender, which witnesses to call, and which arguments to advance or abandon – Employee's applications dismissed.

Duty of fair representation – Employee alleges Union did not like Applicant, sided with Employer regarding request for medical consultation – Board finds no evidence of discrimination or bias or bad faith on part of Union – Employee's applications dismissed.

Practice and procedure – Non-suit – Board satisfied that employee had tendered no evidence constituting *prima facie* case of a violation of s. 25.1 of *The Trade Union Act* – Union's application for non-suit granted – Employee's applications dismissed.

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

REASONS FOR DECISION

Background:

[1] Kenneth G. Love Q.C., Chairperson: Stewart Koop, (the "Applicant") is a long term employee of the Ministry of Highways. At the time of the facts giving rise to this application he was employed in North Battleford, Saskatchewan on the sign truck. During the times in question, he was responsible for replacement and maintenance of road signage within the area serviced from North Battleford. The Applicant was at all material times a member of the Saskatchewan Govnernment and General Employees' Union (the "Respondent").

[2] The Applicant filed a number of grievances regarding his employment, and in particular, his termination from his employment and his subsequent re-instatement as a result of an expedited arbitration conducted by Mr. Vince Ready. His application to the Board was filed on December 1, 2008 and alleged that the Respondent:

> 1. *The SGEU failed to notify the Applicant of the April 21, 2008 hearing;*
> 2. *The SGEU failed to conduct a full and thorough investigation of the allegations against the Applicant in the context of the Applicant's Grievance thereby impairing the SGEU's ability to make full representation on the Applicant's behalf;*
> 3. *The SGEU failed to allow the Applicant to make full representations with respect to his Grievance, thereby violating the Collective Agreement;*
> 4. *The SGEU failed to make full representations on behalf of the Applicant with respect to his Grievance by only including a single line about the disputed facts which led to the discipline of the Applicant;*
> 5. *The SGEU failed to elicit or receive evidence from the Applicant with respect to his Grievance, despite expressly telling the Applicant that his evidence would be received by the SGEU at a later date;]*
> 6. *The SGEU violated the Collective Agreement by agreeing to the two-page, two citation limitation to the presentation of the Applicant's Grievance, breaching the Applicant's right to make full representations;*
> 7. *The SGEU breached the duty of fair representation by agreeing not to judicially review any of the decisions of the Arbitrator on the outstanding grievances, including the Applicant's grievance; and*
> 8. *The SGEU refused, and continues to refuse, to file an application for judicial review of the Arbitrator's decision, in direct contrast with the wishes of the Applicant.*

[3] In its Reply, the Respondent denied the allegations contained in the application. On March 4, 2009, the Respondent applied to the Board for a summary dismissal of the application under Sections 18(p) and (q) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"). In accordance with its usual two step process, the Board considered the application in camera, but denied the Respondent's application for summary dismissal. The application then came before Chairperson Love on September 9 and 10, 2009, sitting alone pursuant to ss. 4(2.2) of the *Act*. At the conclusion of the Applicant's case, an application was made by Mr. Curtis Talbot, counsel for the Interested Party, and also by the Respondent, for a non-suit of the Applicant's case. Following consideration of the request for non-suit, with oral reasons provided

at that time, the application for non-suit was granted. Those oral reasons, which have been transcribed by Valerie J. McPherson, C.S.R, are attached hereto as Appendix "A". These written Reasons are to supplement those oral reasons.

Facts:

[4] The Applicant lead testimony from himself and his wife, Constance Koop. The Applicant testified that he commenced employment with the Ministry of Highways in 1975. He worked with the Employer in various locations in the Province. In 1995, he moved to North Battleford where he began work on the sign truck, which involved the installation and repair of highway signs in the area served by the North Battleford office of the Ministry.

[5] He testified that he had been a union member since commencing his employment. He had been a shop steward of the Respondent for a couple of years and attended two (2) annual conventions of the Respondent.

[6] The issues faced by the Applicant began when there was a change in the Applicant's supervisors within the Ministry. The former supervisor retired and was replaced by a new supervisor who took a different view than the former supervisor. That difference was evident in July of 2004 when the Applicant was disciplined by his senior supervisor for his unauthorized use of a department owned satellite phone during his vacation. The Ministry also imposed discipline with respect to an incident on June 21, 2004 when he allegedly verbally abused his supervisor, Mr. Jeff McSween. On that date, he allegedly also threatened Mr. McSween with physical harm.

[7] The Applicant testified that he did take the satellite phone he had been provided to allow contact with him while he was in remote areas not served by normal cell phones. In his testimony, he denied threatening Mr. McSween. He testified that his former supervisor allowed him, and in fact, encouraged him, to keep the satellite phone with him during his non working time. His wife, in her testimony confirmed that the former supervisor often called him on the satellite phone after hours.

[8] The Employer imposed a three (3) day suspension in respect of this discipline by letter to the Applicant dated July 26, 2004. The Respondent was provided a copy of that letter.

The Respondent had also been present at the meetings held to discuss the matter on June 30, 2004 and July 19, 2004.

[9] The Applicant testified that he wanted to grieve the suspension, but testified that he was talked out of it by the Respondent. No grievance was filed with respect to this suspension. By letter dated August 3, 2004, the Respondent wrote to the Applicant regarding the suspension inviting him to contact them if he wished to discuss the contents of the letter.

[10] The Applicant did contact the Respondent by email on January 13, 2005 concerning the matter. The Respondent responded that it was probably too late to file a grievance due to the time limits in the Collective Agreement, however, they were prepared to assist to ensure that any deductions from the Applicant's pay for the period of the suspension were correct.

[11] On June 22, 2005, the Employer wrote to the Applicant regarding meetings held with him concerning storage of his personal property on the Employer's premises. The letter noted that he had been asked by email dated February 22, 2005 to remove his personal property by February 26, 2005. The Applicant did not comply with that email request, and he was asked again verbally on April 29, 2005 to remove his personal property. The letter goes on to note that on a visit to North Battleford on June 20, 2005, the writer found the personal property had not been removed. The letter indicated that this would be the final opportunity to have the personal property removed by June 29, 2005, after which date the Employer advised the property would be removed and disposed of. The Applicant testified that he did remove the personal property prior to June 29, 2005.

[12] There were two (2) other incidents referred in cross examination of the Applicant. These were a complaint regarding the Applicant using the Employer's premises and its materials to construct a trailer. The Applicant acknowledged the incident, but testified that he only used some "scrap" aluminum in the project. The second complaint was with respect to the Applicant having changed the lock on a shed at the workplace. The Applicant denied having done so.

[13] By letter dated August 30, 2005, the Employer gave the Applicant a written reprimand with respect to verbal abuse of a co-worker by the Applicant. The matter had started

some time prior to that and a meeting had been held on February 7, 2005. Between that date and the date of the letter, the writer, the Provincial Sign Manager notes that he had been investigating the matter and found support for the allegations. The Respondent was a participant in the meeting in February.

[14] On September 7, 2005, the Respondent wrote to the Applicant regarding the imposition of the discipline, again inviting the Applicant to contact them if he wished to discuss the letter. However, while the matter of a grievance was being considered by the Applicant, he was called to a meeting on September 28, 2005 in Saskatoon with the Provincial Sign Manager and others, including a union shop steward.

[15] Notes from that meeting which were placed in evidence by the Applicant, identify the issue to be discussed at the meeting as "Behaviour of Mr. Koop towards co-workers and supervisor. Co-worker – Joe Sadlowski, equipment operator, North Battleford. Supervisor – Jeff McSween." The notes outline the issue with respect to the verbal abuse of a co-worker, the subject of the August 30, 2005 letter, as well as the earlier incident regarding the unauthorized use of the cell phone and the threat of physical harm to Mr. McSween. The notes also reveal a more recent threat to Mr. McSween on August 3, 2005, where it is alleged that the Applicant threatened Mr. McSween with a shovel. The notes go on to state, "Stewart [the Applicant] gets extremely angry and storms out of meetings – the Department is concerned with that kind of behaviour."

[16] At that meeting, the Applicant was asked by the Employer to undergo a psychological assessment. He was provided with a letter directed to the psychologist giving him a history of the incidents alleged by the Employer. The Applicant was provided with a letter of consent to the evaluation. He was asked not to return to work until the assessment had been completed, but would be afforded his full pay.

[17] An appointment was made for a consultation and the Applicant received a letter from the psychologist advising that the appointment had been set for October 26, 2006. Some issue was made about the date of the appointment actually being October 26, 2005, but the Applicant, in cross-examination confirmed that it did not matter, he would not have attended the appointment in any event.

[18] The Applicant refused the Employer's request to visit the psychologist and did not attend the scheduled appointment. In the interim, however, he did prepare and file a grievance regarding the letter of August 30, 2005, which imposed a reprimand with respect to the alleged abuse of his co-worker. The grievance sought as a remedy the "removal of document from file."

[19] When this grievance was prepared, the Applicant's spouse added to the grievance form provided by the Respondent; a reference to the letter from the Employer to the psychologist referring the Applicant to him. That reference was removed by the Respondent and the grievance filed without it as explained in a letter dated October 13, 2005 wherein the Respondent advised that "as per Article 20.1 (a) of the Collective Agreement it [the letter] can not be used for discipline."

[20] The grievance was processed to step one of the grievance procedure and, on October 24, 2005, the Employer wrote to the Respondent to advise that the grievance was being denied at that step.

[21] On November 4, 2005, the Applicant was advised that he would no longer be maintained on leave with pay due to his choice "not to participate in a psychological assessment." He was advised that he would be placed on leave without pay starting on October 30, 2005. He was invited by the Employer to respond "either by way of resignation or by way of personal commitment to cooperate with the Department."

[22] By letter dated November 28, 2005, the Applicant's employment was terminated by the Employer. That letter read, in part:

> *Further to Phil Kimberley's letter to you of November 4, 2005, you had chosen not to attend on October 26, 2005 or set and acceptable alternative appointment with Dr. James Arnold. As of November 28th, 2005 you have not visited nor scheduled to visit with Dr. Arnold. The department has interpreted this lack of co-operation with the department and your continued inaction as evidence for the Department of Highways and Transportation to deem this inactivity as your notice to resign.*
>
> *We will prepare and mail your Record of Employment to you as soon as possible.*

[23] On December 9, 2005, the Respondent forwarded a grievance form to the Applicant regarding his termination. Coinciding with that letter, the Respondent also put the

Employer on notice that a grievance concerning the termination would be forthcoming. The Respondent also provided the Applicant with a letter directed to Employment Insurance Canada regarding the termination, the filing of the grievance, and outlining their view that:

> *[I]t is our expectation, based on the facts of the case, that Mr. Koop will be exonerated of all allegations against him, and restored to his employment status with Saskatchewan Highways and Transportation with all back pay, seniority and benefits.*

[24] By letter dated December 28, 2005, the Employer denied the Applicant's grievance of his termination at Step One of the grievance procedure. In accordance with the Collective Agreement, the grievance was moved to Step Two by letter dated January 4, 2006 directed to Clare Isman, Chair of the Public Service Commission of Saskatchewan. A letter dated January 4, 2006 was also sent to Mr. John Law, Deputy Minister of the Department of Highways and Transportation moving the grievance to Step Two.

[25] The Respondent arranged to meet with the Applicant to discuss both of his grievances in Saskatoon on March 21, 2006. Notes not identified by either witness at the proceeding, which are labeled "H:\Buss\PSGE\Highways|Koop Facts.doc" were entered as part of the Exhibits at the hearing. From the markings, I have taken them as being facts collected by Ms. Diane Bussiere, an Agreement Administration Advisor for the Respondent, either at the meeting with the Applicant, or at some time during the investigation of the two grievances.

[26] On June 29, 2006, the Respondent wrote to Ms. Isman, Chair of the Public Service Commission to request that both grievances by the Applicant be referred to arbitration. However, the Respondent also advised that it was "placing these grievances into abeyance until the Respondents internal review process has been completed". The Applicant was copied with this correspondence. On July 11, 2006, the Public Service Commission acknowledged the grievance being in abeyance. For some reason, this process (of placing the dismissal grievance in abeyance) was repeated by the Respondent on December 13, 2006.

[27] The Respondent's Collective Agreement with the Employer expired on September 30, 2006. Negotiations proceeded through October, November and into December of 2006. The Respondent served strike notice on December 13, 2006 and took strike action throughout the Province between January 5 and 12, 2007. As a result of the job action, the Respondent and the Employer agreed to refer outstanding matters to Mr. Vince Ready, a well

respected labour arbitrator and mediator. On January 27, 2007, he put forward his recommendations for settlement, which were accepted by both the Respondent and the Employer.

[28] One of those recommendations dealt with a backlog of some 700 unresolved grievances, including those of the Applicant. The recommendation, which was accepted by the parties, was that those grievances be resolved through a form of expedited arbitration by either Mr. Ready or his partner, Mr. Taylor. The process, upon acceptance by the parties, became a part of the Collective Agreement and superseded the former provisions of the Collective Agreement dealing with referral to arbitration.

[29] Some discussions were held with the Applicant concerning settlement of the grievance. Both the Applicant and his wife testified that they would have preferred to have received a monetary settlement of the grievance. On May 24, 2007, the Respondent wrote to the Applicant to confirm the terms of a proposed severance package. The package included:

1. *One (1) month's pay for each year of service;*
2. *A pension adjustment to compensator [sic] for lost pension; and*
3. *Damages*

[30] On October 1, 2007, Respondent representatives met with Mr. Ready and Mr. Taylor concerning the Applicant's termination grievance. It was agreed that this case would be subjected to the expedited arbitration process. That process limited the materials to be presented to the arbitrator. No witnesses would be called unless the Arbitrator felt it was necessary to hear from a witness.

[31] However, the arbitration was delayed because of a lock-out of its employees by the Respondent. That lock-out was resolved in early March of 2008. There was an exchange of emails between the Respondent and the Applicant regarding the postponement of the arbitration. The Applicant and his wife took the view that the Respondent, by these emails, and at face to face meetings, had committed to meet with them and get their input prior to submitting its arguments to the expedited arbitration. This resulted in an email on July 22, 2008 to the Respondent from the Applicant which read:

> *I would like an update as to what is going on with my case. I have been instructed by a lawyer of the importance of being prepared, and there is a lot of preparing to be done.*
>
> *I would also like to know if the legal issues in this case should be investigated before arbitration, or will this be part of the proceedings.*

[32] A response was received from the Respondent within thirty minutes. It said:

> *Hi Stewart, Larry Dawson of our office held a case management meeting on your grievance with the Arbitrator, Vince Ready, and the Employer while I was on vacation in May. The purpose of a case management meeting is to allow the Arbitrator to become appraised of the facts of a particular case and make a determination whether a full hearing needs to be held or he can make a decision based on the facts as laid out to him by the parties. At the time Larry went on holidays two weeks ago we had not recived [sic] any decision from Mr. Ready. Larry or I will contact you as soon as we hear anything. I apologize for not contacting you sooner I thought this was done while I was away.*

[33] Based on a date noted on the submission by the Employer tendered as part of the documents filed by the Applicant, it appears the parties' submissions were filed with Mr. Ready on or about April 24, 2008.

[34] On August 15, 2008, the Arbitrator ruled in favour of the Applicant. He was reinstated to his position with the Employer on the following terms:

- *The grievor is directed to undergo a psychological assessment by an appropriate specialist of the employee's choosing*
- *The results of the psychological assessment will be provided to the Employer*
- *The Employer retains the right to follow up, if and as necessary, to ensure sufficiency of the information provided*
- *Medical information will be treated in the strictest confidence by all*
- *The period from November 28, 2005 to the date of the assessment will be treated as an unpaid suspension.*

[35] The decision of the Arbitrator was made known to the Applicant by the Respondent by letter dated August 21, 2008. In accordance with the decision, the Respondent recommended "that you arrange for such an appointment as soon as possible." Also, in accordance with a request made by the Applicant, on September 19, 2008 the Respondent

forwarded a copy of the submissions made by the Respondent and the Employer to Arbitrator Ready.

[36] Rather than obtain a psychological assessment as called for in the Arbitration Award, the Applicant first attempted to obtain a letter from his family physician attesting to his "excellent mental health." That letter was not accepted by the Employer. The Applicant was advised by the Respondent that there was no ability to challenge the requirement that the assessment be done by a psychologist. He was advised that his unpaid suspension would continue until he provided the required assessment from a psychologist.

[37] Again, on October 17, 2008, the Respondent wrote to the Applicant requesting that he take the steps necessary to obtain an assessment. On January 12, 2009, the Applicant complied with the terms of the Award and obtained a psychological assessment. He was placed back on the payroll, but was not assigned any duties.

[38] On March 27, 2009, the Respondent, acting on a request from the Applicant, contacted the Employer about the possibility of a severance payment versus a reinstatement. That proposal was rejected by the Employer and no counterproposal was made. A meeting was held on May 21, 2009 attended by Employer representatives, the Applicant, and a Respondent representative. At that meeting, the Applicant was directed to report for work as follows:

> *a) to report for work at 7:00 a.m. on Monday May 25, 2009, intending to arrive at the Saskatoon West Maintenance Shop on 71st Street, Saskatoon at about 8:30 a.m.*
>
> *b) Mr. Koop was advised he would be expected to live overnight with expenses paid in Saskatoon, reporting for work at 7:00 a.m. daily or at his option and own expense to return to North Battleford should he wish to stay overnight at his principal residence in North Battleford.*
>
> *c) Hours of work were from 7:00 a.m. to 5:30 p.m., Monday to Thursday.*
>
> *d) Mr. Koop was considered to be headquartered in North Battleford, but not employed at this site, rather he would report to a Saskatoon Supervisor, Mr. Steve Rosvold, Level 8 and a Saskatoon reporting structure, which included Mr. Gilkinson, Signing Manager and ms. [sic] Breigh McDavid, HR Consultant, in event there were any concerns.*

[39] In a email from the Respondent to the Employer, which was copied to the Applicant's wife, the Respondent requested confirmation from Ms. Briegh McDavid, the Employer's HR Consultant that "Mr. Koop's Personnel File has been cleansed and that any references to the dismissal and any disciplinary action that may have been placed on his file, has been removed from his Personnel file." By way of comment to that email, Ms. McDavid responded "[T]he Ready Award does not call for a cleansing of Mr. Koop's personnel file. However, the employer will remove any disciplinary or disciplinary related documents. These documents will be sent to Mr. Koop imminently." Ms. McDavid confirmed that she had pulled any disciplinary documents from the Applicant's personnel file by an email dated August 18, 2009. The Applicant acknowledged he had received materials which he had not, as of the date of the hearing, reviewed.

[40] On August 31, 2009 the Respondent filed a grievance with respect to this reinstatement. However, that grievance and its handling by the Respondent was not the subject of the application in this case.

[41] The Applicant's wife testified primarily with respect to documents she faxed or emailed from her place of employment or in respect of faxes or emails received by her. She also described a meeting with the Respondent in Saskatoon on March 21, 2006. Her testimony was that the meeting went badly. She testified that it appeared to her that one of the Respondent reps, Diane Bussiere did not like her husband based upon her observations of Ms. Bussiere's body language.

[42] She also noted at that same meeting she overheard a comment from Ms. Bussiere, when Ms. Bussiere was returning from lunch to the effect that "I don't know why we're helping him [the Applicant], he won't even help himself." She took this comment as suggesting that the Respondent was not really interested in assisting her husband in his pursuit of the grievances.

[43] She also described two (2) meetings held with another Respondent rep, Mr. Greg Eyre, at Humpty's Restaurant in North Battleford. She seemed much happier with the approach taken by Mr. Eyre (who had taken over carriage of the grievances from Ms. Bussiere). She emphasized that Mr. Eyre promised to get more details concerning the grievances from the

Applicant and herself closer to the time the grievances were being processed. However, she commented that this never occurred and the arbitration proceeded without their input, including potential testimony from two (2) witnesses she refused to name.

[44] At the conclusion of the Applicant's case, the Employer's counsel made an application for non-suit, which application was joined by the counsel for the Respondent.

Argument for Non-Suit:

[45] Counsel on behalf of the Employer and the Respondent argued that, having regard to all of the evidence that was tendered by the Applicant, there was no evidence constituting a *prima facie* case of any violation of either ss. 25.1 of the *Act* on the part of the Respondent.

[46] The Respondent also raised the arguments it had advanced for summary dismissal of the Applicant's application. Those were that the Applicant's case must raise concerns that the Respondent represented the Applicant in a manner which was in bad faith, arbitrary, or discriminatory, as set out in s. 25.1 of the *Act*. The Respondent further argued that if there was some evidence of error(s) on the part of the Respondent, such evidence was insufficient to constitute a violation of the *Act*.

[47] In its argument for summary dismissal, the Respondent addressed each of the Applicant's concerns as set out in paragraph 2 hereof and provided case authority in support of its position.

Statutory Provisions:

[48] The relevant provisions of the *Act* provide 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.*
>
> . . .
>
> *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 and Decisions:

[49] 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.*

[50] The Board has recognized that a trade union does not breach its duty of fair representation by settling a grievance without the grievor's consent, even if it does so over the objection of the grievor, unless it acts in a manner that is seriously negligent, arbitrary, capricious, discriminatory or wrongful. See: *Gibson v. Communications, Energy and Paperworkers Union of Canada, Local 650 and Fantastic Cleaning Inc.*, [2002] Sask. L.R.B.R. 574, LRB File No. 089-02.

[51] Furthermore, the Board has held that there is no breach of the duty of fair representation where a trade union withdraws a grievance after consulting with legal counsel, if it took a reasonable view of the circumstances and if it made a "thoughtful decision" not to advance the grievance. See: *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.

[52] The Board also confirmed that it does not "sit on appeal" of a trade union's decision not to advance a grievance and, in particular, will not decide if a union's conclusion as to the likelihood of success of a grievance was correct. See: *Cabot v. Canadian Union of Public Employees, Local 4777 and Prince Albert Parkland Health Region*, [2007] Sask. L.R.B.R. 401, LRB File No. 158-06.

[53] Upon examination of all the evidence tendered by the Applicant and his wife, both oral and over an inch of documentary evidence, the Board saw no evidence of a failure on the part of the Respondent to fairly represent the Applicant in his grievances under the Collective Agreement and certainly no evidence that the Respondent conducted itself in any of these proceedings in a manner that was arbitrary, discriminatory, or in bad faith toward the Applicant within the meaning of s. 25.1 of the *Act*.

[54] The Board finds no violation of the *Act* in the Respondent's decision to not get further information from the Applicant in respect of the expedited arbitration process nor in not contacting him for instructions with respect to the conduct of his grievance proceedings. Grievances are the property of the Respondent and not individual members, even if such members are directly and significantly affected by the outcome of that grievance. See: *Berry v. SGEU, supra*.

[55] With respect to the impugned conduct of Ms. Bussiere, the Board found no evidence that Ms. Bussiere's personal views (if she had such views) affected the Respondent's representation of him.

[56] Now with the benefit of hindsight, the Applicant believes that the Respondent should have tendered additional evidence or evidence from witnesses they refused to name. However, there was no evidence to suggest that the Respondent was in any way in breach of s. 25.1 in failing to do so. The process of expedited arbitration was, of necessity, a summary process in order to deal with the backlog of grievances between the parties. That process had a beneficial outcome for the Applicant, *i.e.* the return of his job The Board will not even, with the benefit of hindsight, sit "on appeal" of a trade union's decision on how it should have conduct its arbitration, including which witness should have been called and/or what evidence should have been tendered and/or what arguments to advance or abandon, as the case may be. See: *Hildebaugh v. Saskatchewan Government and General Employees' Union and Saskatchewan*

Institute of Applied Science and Technology, [2003] Sask. L.R.B.R. 272, LRB File No. 097-02 and *Sheldon Mercer v. Communication, Energy and Paperworkers Union, Local 922 and PSC Mining LTD*, [2003] Sask. L.R.B.R. 458, L.R.B. No. 007-02.

[57] Simply put, the Applicant appeared to take the position that the Respondent was negligent in representation of him in that they were unable to achieve his goal, which was to achieve a negotiated settlement with the Employer, that is, a severance package rather than a reinstatement. His unhappiness with the result does not in any way suggest that the Respondent acted in any manner contrary to s. 25.1 of the *Act*. The Board's supervisory duty pursuant to s. 25.1 is not to ensure that any particular member achieves his/her desired result; but rather is to ensure that, in exercising its representative duty, the Respondent does not act arbitrarily or in a discriminatory fashion or in bad faith.

[58] Finally, with respect to the Applicant's allegations that the Respondent violated s. 36.1 of the *Act*, the Board's approach to such allegations was summarized in *Nadine Schreiner v. Canadian Union of Public Employees, Local 59 and City of Saskatoon*, [2005] Sask. L.R.B.R. 523, LRB File No. 175-04, as follows:

> *Section 36.1(1) of the Act confines the Board's supervision to disputes between union members and a union relating to matters in the union's constitution and the member's membership therein or discipline thereunder. The Board's supervision of those matters is further confined to determining whether the member has been afforded the right to the application of the principles of natural justice, as opposed to considering the merits or perceived correctness of the decision by the union. In McNairn, supra, the Saskatchewan Court of Appeal held that for the Board to assume jurisdiction pursuant to either s. 36.1 or s. 25.1 of the Act, the "essential character of the dispute" must fall within the subject matter of the provision. The Court stated as follows, at 370:*
>
> > *Thus sub-section 36.1(1) imposes a duty upon a union (again correlative to the right thereby conferred upon an employee), to abide by the principles of natural justice in disputes between the union and the employee involving the constitution of the trade union and the employee's membership therein or discipline thereunder. As such, the subsection embraces what may be characterized as "internal disputes" between a union and an employee belonging to the union, but it does not embrace all manner of internal dispute. For the subsection to apply, the dispute must encompass the constitution of the union and the employee's membership therein or discipline thereunder.*

[59] The Board saw no evidence that the Applicant's right to the application of the principles of natural justice within the meaning of s. 36.1 of the *Act* was violated by the

Respondent. In this respect, the Board agrees with the Respondent that the Applicant appeared to hold an incorrect assumption as to the scope of the duty imposed on the Respondent by s. 36.1 of the *Act*; presumably based on the Applicant's research as to the meaning of "natural justice" in other contexts. In the present case, the Board saw no evidence the Applicant was denied the application of his rights as set forth in the Constitution of the Union, or was denied membership therein or was disciplined thereunder. To the contrary, when the Respondent declined to seek judicial review of Arbitrator Pelton's decision, the Applicant was appropriately afforded the opportunity to speak directly to the membership and explain his desire that judicial review be sought. The fact that the membership denied his appeal is not indicative of a breach of natural justice; but rather the membership's right to decide how best to allocate the Respondent's resources.

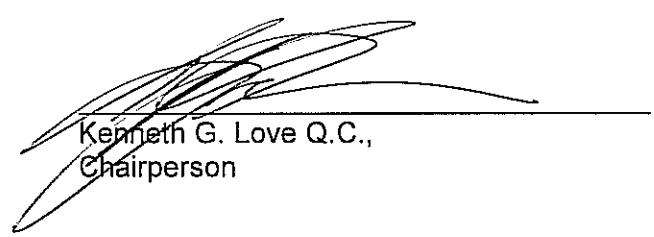
Conclusion:

[60] In conclusion, having regard to all of the evidence that was tendered by the Applicant, including both oral and documentary evidence, the Board finds that there was no evidence constituting a *prima facie* case of any violation of s. 25.1 of the *Act* on the part of the Respondent.

[61] The application for non-suit is granted. This application is dismissed.

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

LABOUR RELATIONS BOARD



Kenneth G. Love Q.C.,
Chairperson

APPENDIX "A"

LRB #192-08

LABOUR RELATIONS BOARD OF SASKATCHEWAN
SASKATOON, SASKATCHEWAN

BETWEEN:

Stewart Koop, employee, North Battleford,
APPLICANT

- AND -

Saskatchewan Government & General Employees,

RESPONDENT

RECORD OF EVIDENCE
(transcript of a tape recording)

ORAL JUDGMENT

HELD at SASKATOON, SASKATCHEWAN, ON the
9 & 10 DAYS of SEPTEMBER, A.D. 2009

HEARING PANEL: Mr. K. Love, Q.C.

Ms. A. Giroux, Mr. S. Seiferling — McDougall Gauley
Barristers & Solicitors
Saskatoon, Saskatchewan
(On behalf of the Applicant)

Ms. J. Saxberg — Gerrand Rath Johnson
Barristers & Solicitors
Regina, Saskatchewan
(On behalf of the Respondent)

Mr. C. Talbot — Saskatchewan Justice, Civil Law Div.
Barristers & Solicitors
Regina, Saskatchewan
(On behalf of an Interested Party)

Valerie J. McPherson, C.S.R.
2714 Louise Street
Saskatoon, Saskatchewan
S7J 0P4 (306) 665-2165
EMAIL: valmcpherson@sasktel.net

SEPTEMBER 10, 2009

THE CHAIR: Thank you for the time. I have had the opportunity to review your submissions, some of the notes that I've made of the hearing yesterday, and also the most recent Board decision with respect to an application for non-suit, which for your reference is the case of D.M. versus the Canadian Union of Public Employees, it was decided in January of this year, and it's Labour Relations Board file 110-08, 157-08. That case bore some similarity to the current case insofar as the applicant seemed to feel that the union had not properly represented him, it had not achieved a desired result which he had sought. The Labour Relations Board has clearly set out that it's up to the union to settle a grievance with or without the grievor's consent, that was in Gibson versus the Canadian Energy & Paper Workers Union Local 650, 2002 Labour Relations Board report 57, Labour Relations Board file 089-02. Also, as I think the parties correctly pointed out yesterday, the Board does not sit in appeal of a grievance decision and that was determined by the Board in Chabot versus CUPE Local 4777 and P.A.

Parkland Health Region, 207 Saskatchewan Labour Relations Board Reports at 401. In the D.M. case that I spoke about earlier, the Board at paragraph 105 had this to say, and this is just a portion of that paragraph, it said "simply put the Applicant appeared to take the position that the union was negligent in its dealings with the employer. The exclusive right to represent a unit of employees brings with it many responsibilities for a trade union but guaranteeing the desired outcome of each individual member in his/her dealings with the employer is not one of those responsibilities". I was troubled yesterday by the nature of the evidence that was presented. I was troubled insofar as it didn't clearly establish what I thought was necessary for the Applicant to show that there had been a breach of section 25.1 of the Act. Those requirements are fairly stringent insofar as they must show that the union has been arbitrary, been discriminatory or has acted in bad faith. In the evidence I heard there appeared to be nothing in that except the assertion by Mrs. Koop that indeed there was some hostility on the part of one of the triple A representatives who

was exhibiting body language that she felt showed that there was some form of dislike about her husband, and the one comment that was mentioned with respect to what she overheard when the two representatives were coming up the stairs after lunch, but that doesn't necessarily establish a discriminatory finding on the part of the union, that somehow they were not acting in a fashion that would be in the best interests of the Applicant. There appeared to be no evidence of bad faith that was shown, and as for arbitrariness, I think that counsel for the union properly pointed out that arbitrariness must be in the nature of negligence, and that negligence has been shown by the Board to be gross negligence, that is, that in the normal case mistakes will happen but they don't always cause the Board to find that they were so neglectful in their pursuit of the Applicant's grievance that that amounted to arbitrariness on their part.

Now, that all having been said, there is a couple of other points that I need to make. The first is that, like the counsel for the Applicant, I was surprised that Mr. Talbot

would make this application, notwithstanding its support by counsel for the union. Generally employer counsel would not take such a I guess strong approach in most of these situations, but I understand that there seems to be a good deal at stake given the history and background of this application and the process which it went through. I think it's disappointing for everyone, both the union and the Government, to have had an outstanding number of some 700 grievances that had backed up waiting for arbitration that required the intervention of Arbiter Ready to finally get a process established that would allow those grievances to be dealt with, but that was a unique situation and the recommendations of Arbiter Ready in that case formed the basis of a collective agreement. That effectively modified the provisions of the grievance procedure that had been agreed in the previous contract that was tendered under tab 3, with the result that this new expedited process that was put forward as an agreement between the parties, it was ratified by both parties, that process provided that the 700 grievances would be dealt with in a more

expeditious process, and as Arbitrator Ready said in his decision, "grievances do not age well, left unresolved they may be disrepute to the process of grievance arbitration, and worse, lead to cynicism". I think that's been the underlying problem with this whole situation insofar as the timeliness of this application, the timeliness of the processing of this grievance was not good. The process by which the union went through, although I don't find any particular problem with it, took way too long. Now, yes, there was a strike of members of the union, a lockout by their employer, but nonetheless, whether it's the workload of the parties or what the particular problem was, there seems to be a difficulty in the two parties processing grievances in a timely fashion, or at least there was, I don't know what the current situation is.

Those thoughts before me, I looked at the Applicant's application which was filed with the Board. On the final page of that, well, I guess the second last page of that application and the final page, the Applicant summarized the points under concern. The first

was that the SGEU failed to notify the Applicant of the April 21, 2008 hearing. With respect, there was no requirement for that to occur under the terms of the settlement that Mr. Ready, through the arbitrated process, established. While that was outside the control of the Applicant, that was the subject of collective agreement between the parties by virtue of the Arbitrator's award that was agreed by both parties. The failure to conduct a full and fair investigation I think is also unfounded, there was no evidence that suggested that there was not a thorough investigation, other than the comments with respect to 'we'll get that detail later' in the two anonymous witnesses. Had there been full disclosure of that evidence, had there been full disclosure of the letters that had been provided, those should have been -- I don't think they would have made any difference in the outcome, that's speculative on my part but I'm not convinced that there would have been any difference in the outcome if the Arbitrator would have allowed. The failure to make full representations, again it's not the Applicant's grievance, it's the union's

grievance, and if they fail to take proper steps that's what section 25.1 is all about. In this case I find no evidence that there was any failure on the part of the Applicant to make proper representations, again under the process that Arbitrator Ready imposed on the parties. Similarly, the failure to receive evidence from the Applicant, the comments I made earlier can be made applicable to that point as well. Point six was that the SGEU violated the collective agreement by agreeing to the two page two citation limit, that point is something outside the jurisdiction of this Board, if there was a breach of the collective agreement that breach is to be taken to arbitration under the provisions of the agreement, and they are to go back to the Arbitrators who, as a part of their mandate, clearly stated that "Messrs. Ready and Taylor will determine their own procedures in consultation with the parties and will schedule hearings in a timely manner so as to clear up any backlog of grievances", that was what was agreed by the parties as a result of their arbitration process. Point seven was that SGEU breached the duty of

fair representation by agreeing not to judicial review, (inaudible) the decisions of the arbitrator on the outstanding grievances including the Applicant's grievance. There is nothing in Mr. Ready's recommendations that suggest that there will be no review of those awards, but notwithstanding that, it's certainly up to the union to resolve, with or without the grievor's consent, an arbitration, and they have no obligation to take it further if they feel that it's unwarranted. Again, there was no evidence presented that suggested that there was anything in that decision not to take the grievance forward to judicial review, that it was in any way arbitrary, discriminatory or in bad faith. Point eight was that SGEU refused and continues to refuse to file an application for judicial review of the Arbitrator's decision in direct contrast with the wishes of the Applicant. Again, as I pointed out earlier, the wishes of the Applicant are somewhat immaterial insofar as it's not up to the union to determine any particular or guarantee any particular outcome to any grievor in the process, and they have the right to, if they make

the decision in a proper fashion, again there was no evidence that that decision was not taken in a proper fashion, not to proceed with a grievance or proceed with any stage of a grievance, the grievance is solely in their hands to be processed, so provided they do so without an arbitrariness, discriminatory or in bad faith.

So that having been said, and I will give the parties more complete reasons, written reasons in due course, but for that reason the application for summary dismissal will be allowed and the application is dismissed. Thank you for your time.

(HEARING ADJOURNED)

COURT REPORTER'S CERTIFICATE:

I, VALERIE J. MCPHERSON, HEREBY CERTIFY THAT the transcript of evidence as written on the foregoing pages (numbered 1 to 11) inclusive, contains, to the best of my knowledge and belief, a true and correct transcription of the tape recording herein.

(LRB 192-08)

Valerie J. McPherson, C.S.R.
Valerie's Verbatim Reporting
Saskatoon, Saskatchewan