The Labour Relations Board
Saskatchewan

DWAYNE LUCYSHYN, Applicant v. AMALGAMATED TRANSIT UNION, LOCAL 615, Respondent

LRB File No. 035-09; April 8, 2010
Chairperson, Kenneth G. Love, Q.C.

The Applicant:	Mr. Dwayne Lucyshyn
For the Respondent Union:	Mr. Greg Winkenweder and Mr. Craig Dunlop

Duty of Fair Representation – Board reaffirms factors to be considered in applications brought under s. 25.1.

Duty of Fair Representation – Board outlines process and procedures that Union should follow to avoid claims that process was arbitrary.

Duty of Fair Representation – Board finds lack of process and procedure to deal with complaints under s. 25.1 is arbitrary. Finds breach of s. 25.1 duty of fair representation by Union.

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*.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love Q.C., Chairperson:** Dwayne Lucyshyn, the ("Applicant") applied to the Board on April 1, 2009 alleging that the Amalgamated Transit Union, Local 615 (the "Respondent Union") denied the Applicant fair representation under *The Trade Union Act*, R.S.S. 1978, c. T-17 (the *"Act*") within the meaning of Section 25.1 of the *Act*.

[2] The Respondent Union denied any and all of the allegations contained within the application.

[3] No reply was filed by the City of Saskatoon (the "Employer") and the Employer did not participate in the hearing of this matter.

[4] This matter was heard by the Chairperson of the Board sitting alone pursuant to s. 4(2.2) of the *Act*. The Board heard considerable evidence from the parties, most of which was irrelevant to a violation of s. 25.1 of the *Act*. The parties had to repeatedly be reminded that the Board was not empowered to review the merits of the grievances, but had a limited scope to its inquiry under s. 25.1 as to whether or not the Applicant had been properly represented by the Respondent Union with respect to grievance or rights arbitration proceedings under a collective bargaining agreement.

[5] The hearing of this matter commenced on August 10, 2009. At the conclusion of that day of hearing, the matter was adjourned *sine die* to allow the parties to work through the various grievances (or at least communicate with one another as to the status of those grievances) with the instruction that the hearing would be scheduled for a date six months hence to "either continue the hearing or to discuss what progress has been made with respect to the grievances."

[6] The hearing resumed on February 1, 2010 with the parties reporting that no progress had been made in sorting out the various grievances Several more witnesses were heard on that date, but the hearing did not conclude. It resumed on March 18, 2010 and was concluded on that date.

[7] During the course of the hearing, the Board heard from six witnesses for the Applicant and four witnesses for the Respondent Union. Mr. Greg Winkenweder was called by both the Applicant and the Respondent.

[8] As noted above, both parties brought forward considerable evidence which was irrelevant to the matters under s. 25.1 of the *Act*. They were given considerable latitude by the Board because neither party was represented by counsel. As a result, the Board has distilled the evidence given by the parties to include only that evidence which is relevant to the matters at issue under s. 25.1 of the *Act*.

Facts:

[9] The Applicant was a transit operator with the City of Saskatoon Transit Department. As a result of an injury he suffered while driving a transit vehicle, he was assigned to other duties and, at the time of the alleged failure to properly represent him, he was the

Charter Coordinator for the Transit Department. He is a member of Local 615 of the Amalgamated Transit Union.

[10] The Applicant testified that he had filed five grievances through the Respondent Union against the Employer related to various alleged breaches of the collective agreement between the Employer and the Respondent Union. There was a great deal of confusion in the evidence as to which grievances had been filed, which grievances had been processed and which grievances had been concluded. The Board has attempted to sort through the testimony from the various witnesses to identify which grievances were the subject of this application.

[11] In his application, the Applicant made reference to three specific events. These were as follows:

> *The applicant alleges that an unfair labour practice (or a violation of the Act) has been and/or is being engaged in by the said Amalgamated Transit Union 615 by reason of the following facts:*
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> *1. Amalgamated Transit Union 615 denied fair representation to file grievance for an ATU 615 pertaining to a job posting of Schedules Clerk in 2002.*
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> *2. Amalgamated Transit Union denied fair representation to uphold ATU 615 Collective Agreement, Grievance procedure, Article E3 Overtime and Article A18 – Saskatoon Transit Management working an ATU 615 position, recorded as far back as October 29, 2003 – estimate working hours of 1430 hrs.*
>
> *3. Amalgamated Transit Union denied fair representation to uphold ATU 615 Collective Agreement, Overtime Grievance procedure, Article E3 Overtime and Article E3 Overtime – Full Time Customer Service Representatives working the position of Charter Coordinator outside the guidelines of "Draft of Letter of Understanding" signed January 25, 2006. Duties recorded as far back as October 29, 2003 – estimate working hours of 1391 hrs.*

[12] In its Reply, the Respondent Union referenced four grievances which it suggested had been resolved at the first stage of the grievance process. These were as follows:

1. A grievance dated July 9, 2007 (which related to an alleged incident on August 31, 2008) wherein the Applicant claimed a violation of Article E-3 of the Collective Agreement regarding payment of overtime on call-in. The grievance alleged that a similar grievance filed on March 7, 2008 had been approved by the Employer. This grievance was confusing insofar as it was dated 2008/07/09 (July 9, 2008) but appeared to relate to an event which occurred on 2008/08/31 (August 31,

2008). Either the drafter of the grievance was blessed with prescience, or the grievance was improperly dated. The Board has concluded that it was improperly dated. Nor, did it assist the Board that when the grievance was filed, it had been photocopied after someone had applied a highlighter to the date, which rendered the date almost illegible.

2. That grievance appears to have been dealt with by the Employer following a meeting between Mr. Al Holmes of the Respondent Union and the Applicant. By letter dated November 4, 2008, Mr. Rob Heusdens, the Terminal Supervisor of the Employer, advised the grievance was denied.

3. Two grievances dated July 7, 2008 which related to incidents which allegedly occurred on July 5 and 6, 2008. These grievance also alleged a violation of Article E-3 of the collective agreement regarding another employee in the bargaining unit doing the work of the Applicant.

4. These grievances were also considered at a meeting involving Mr. Al Holmes of the Respondent Union and the Applicant with Mr. Huesdens of the Employer. By letter dated November 4, 2008, these grievances were also denied by the Employer.

5. A grievance dated August 18, 2008 regarding incidents which occurred on August 5 – 8, 2008. This grievance related to the Applicant working while on his annual holidays. This grievance was also the subject of a meeting involving Mr. Al Holmes and the Applicant with Mr. Heusdens. By letter dated November 4, 2008, the grievance was denied. There was consistent testimony from various witnesses, including Mr. Mitch Riabko, the Transit Manager, who testified that that grievance had been elevated to the next stage in the grievance procedure and had been resolved and paid out. The Applicant seemed to be unaware of the fact that this grievance had been resolved and paid out, but based on the testimony which was provided, the Board is satisfied that the grievance was resolved and the payment made.

6. Grievances dated August 4 and 7, 2008 related to incidents on June 30, July 1 and July 4, 2008 where bus charters were allegedly booked on an emergency basis by other employees. These grievance were also considered at a meeting involving Mr. Al Holmes and the Applicant with Mr. Heusdens. By letter dated November 4, 2008, the grievances were denied.

[13] To highlight the confusion regarding the various grievances, the first grievance which the Applicant alleged in his application that the Respondent Union had not properly represented him, was not dealt with by the Respondent Union in their Reply. Nor was a grievance dated July 4, 2008, which the Applicant filed as Exhibit E-1 in his testimony dealt with by the Respondent Union in its Reply. On the other hand, the Applicant failed to provide some of the grievances referenced by the Respondent Union in its Reply (*i.e.*: the grievance dated July 7, 2008 referenced in point 6 above).

[14] To summarize, however, the following evidence established that the following grievances remained relevant to these proceedings.

1. The grievance referenced in the Applicant's application pertaining to a job posting for a Schedule's Clerk in 2002 (hereinafter referred to as Grievance "A");

2. The grievance dated July 4, 2008 filed by the Applicant as Exhibit E-1 in these proceedings regarding violations of the collective agreement regarding overtime and the call-in procedure (hereinafter referred to as Grievance "B");

3. The grievance dated July 7, 2008 which related to a failure to observe the call-in procedures and Article E-3 on July 5, 2008, filed by the Applicant as Exhibit E-2 in these proceedings (hereinafter referred to as Grievance "C");

4. The grievance dated July 7, 2008 which related to a failure to observe the call-in procedures and Article E-3 on July 6, 2008 and filed by the Applicant as Exhibit E-3 in these proceedings (hereinafter referred to as Grievance "D");

5. The grievance dated July 4, 2008 regarding Time Clerks entering Charter service in violation of Article E-3 of the collective agreement and filed by the Applicant as Exhibit E-5 in these proceedings (hereinafter referred to as Grievance "E"); and

6. The grievance dated April 13, 2008 regarding a failure to observe the call-in procedures and Article E-3 on or about April 13, 2008 filed by the Applicant as Exhibit E-6 in these proceedings (hereinafter referred to as Grievance "F").

[15] None of these grievances, save Grievance "A", formed any part of the application which the Applicant filed with the Board. Nor did the Reply from the Respondent Union reference any of the grievances referred to in respect of which the Applicant claimed that he had been improperly represented by the Respondent Union. Nevertheless, the hearing proceeding on the basis that the Respondent Union had failed to properly represent the Applicant in relation to Grievances "A" – "F".

[16] No evidence was brought forward at the hearing with respect to Grievance "A".

[17] Little evidence was brought forward at the hearing with respect to Grievance "B". The copy of the grievance provided by the Applicant was not signed either by himself or a Union representative as required. However, the Respondent Union acknowledged at the hearing that they had a copy of this grievance. In his testimony, Mr. Alan Holmes, who was the shop steward responsible for the filing of the grievances, claimed never to have seen this grievance. However, the reliability of his testimony is suspect insofar as he also claimed not to have seen any of the other grievances, including those which the Respondent Union attached to its Reply and which appeared to have been signed by him and in respect of which he apparently met with Mr. Huesdens to discuss. The Applicant's testimony was that this grievance had been denied at the pre-hearing (first stage) of the grievance procedure and had not proceeded further.

[18] Mr. Winkenweder, in his testimony on behalf of the Respondent Union, testified that a letter dated November 4, 2008 which was tendered as Exhibit U-6 was a response from Mr. Heusdens in respect of this grievance. That letter references *inter alia* this grievance. This

corresponds with the Applicant's testimony regarding this grievance, that it was denied at the pre-hearing stage of the grievance by Mr. Heusdens.

[19] The evidence concerning Grievances "C" and "D" was similar to the evidence provided with respect to Grievance "B". The only difference was that these grievances were dealt with by Mr. Heusdens in a letter dated November 4, 2008 filed as Exhibit U-8. Those grievances were also denied.

[20] The evidence concerning Grievance "E" was similar to the evidence regarding the other grievances. The only difference was that these grievances were dealt with by Mr. Heusdens in a letter dated November 4, 2008 filed as Exhibit U-9. Those grievances were also denied.

[21] The evidence concerning Grievance "F" was also similar to the evidence regarding the other grievances. However, neither the Applicant nor the Respondent Union produced any evidence that the grievance had been dealt with in any way.

[22] As the Board has noted above, there was considerable confusion over what grievances had been filed, where the grievances stood, and what steps had been taken regarding those grievances. At one point, the Respondent Union acknowledged that it could not find the copies of the grievances which had been filed and that they had to obtain copies from the City of Saskatoon Administration office. There was also evidence that the grievances had been treated as "hot potatoes", that is that they were dropped on various members of the Executive's desks without any discussion or communication concerning them.

[23] Various members of the Respondent Union executive testified at the hearing. There was no continuity in their testimony and none seemed to have a handle on the grievances or who was responsible for their processing. It seems that they went through many hands and the Applicant sought assistance from many members of the Executive to determine their status.

[24] The Applicant filed with the Board numerous emails directed to various members of the Executive concerning the status of his grievances. One of the emails disclosed that on January 9, 2009 at approximately 2:24 PM, the Applicant was advised that Mr. Winkenweder, the President of the Respondent Union, had withdrawn all of his grievances. No correspondence or

other notification that the grievances had been withdrawn was provided to the Board by way of evidence. The Respondent Union did submit an undated letter from Mr. Craig Dunlop, Acting President of the Union, presumably written to the Employer proposing resolution of a number of outstanding grievances, including those involving the Applicant. No response to that correspondence from the Employer was provided, but from the email referred to above, the Board has concluded that the offer to withdraw all of the Applicant's outstanding grievances was accepted and those grievances were withdrawn by the Respondent Union.

Relevant statutory provisions:

[25] Section 25.1 provides as follows:

> *25.1 Every employee has the right to be fairly represented in grievance or rights arbitration proceedings under a collective bargaining agreement by the trade union certified to represent his bargaining unit in a manner that is not arbitrary, discriminatory or in bad faith.*

Analysis & Decision:

Grievance "A"

[26] With respect to Grievance "A", the application is denied. No evidence was tendered by the Applicant concerning this grievance, and the Board has consistently denied applications with respect to grievances that are untimely[1]. This grievance relates to events which were claimed to have occurred in 2002. As such, this grievance falls well outside the limit for the timely advancing of claims under s. 25.1 of the *Act*.

Grievances "B" – "F"

[27] 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*

[1] See *Dishaw v. Canadian Office & Professional Employees Union, Local 397*, [2009] CanLII 507 (SK L.R.B.), LRB File No. 164-08.

> *obligation to represent all of those they represented in a way which was not arbitrary, discriminatory or in bad faith.*
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> *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.*

[28] 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."

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

[30] In *Hargrave, et al. 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:*
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> > *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:*
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> *(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.*
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> *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.*
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> *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:*
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> > *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.*
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> *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:*
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> > *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.*

[31] 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.*

[32] 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.

[33] The standard required by this Board in respect of s. 25.1 was referenced 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.

[34] Following the investigation by Mr. Zimmerman, the Union filed a grievance on the Applicant's 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.

[35] The Union's approach in the present case differed markedly from what occurred in the *Leblanc* case, *supra*. The question that the Board must determine is whether or not, on an objective standard, 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.

[36] This case, along with the other cases determined by the Board under s. 25.1, suggests a minimum standard of conduct by a Union in the handling of a grievance. There should be a clearly defined process followed by the Union which could include the following steps:

1. Upon a grievance being filed, there should be an investigation conducted by the Union to determine the merits or not of the facts and allegations giving rise to the grievance;

2. The investigation conducted must be done in an objective and fair manner, and as a minimum would include an interview with the complainant and any other employees involved;

3. A report of the investigation should go forward to the appropriate body or person charged with the conduct of the grievance process within the Union. A copy of that report should be provided to the complainant;

4. The Union, Grievance Committee, or person charged with the conduct of grievances, should determine if the grievance merits being advanced. Legal advice may be sought at this time to determine the prospects for success based on prior arbitral jurisprudence;

5. At this stage, the Union may determine to proceed or not proceed with the grievance. However, in making that determination, the Union must be cognizant of the duty imposed upon it by s. 25.1 of the *Act*;

6. At each stage of the grievance procedure, the Union will be required to make a determination as to whether to proceed with the grievance or not. Again, its decision to proceed or not must be made in accordance with the provisions of s. 25.1 of the *Act*; and

7. It must also be recognized that the Union has carriage of the grievance, not the grievor. There may be instances where the common good outweighs the individual grievor's interest in a matter. Where such a decision is made (*i.e.:* not to proceed with a grievance) which is not

arbitrary, discriminatory, or in bad faith, that decision will undoubtedly be supported by the Board.

[37] As noted in *Rousseau*, *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.*

[38] The Board finds the conduct of the Respondent Union in this case to be arbitrary. The evidence discloses that it did not conduct any meaningful investigation of the complaints alleged by the Applicant. Furthermore, it took a superficial or cursory view of the grievances filed. They maintained no record of the grievances (as demonstrated by their inability to even locate copies of the grievances). Furthermore, they failed to communicate with the Applicant concerning his grievances after the initial meetings with Mr. Heusdens, where the majority of the grievances were denied, following up on only one grievance, which was subsequently accepted and paid out. Arbitrariness was further demonstrated when the grievances were withdrawn by the Respondent Union without consultation or communication with the Applicant. Nor was the Applicant offered any opportunity to be heard in respect of the Respondent Union's decision to withdraw his grievances.

[39] Throughout the hearing of this matter, the Board was shocked by the apparent lack of any defined process or procedure to deal with grievances. They appeared to be handled in an offhand and disjointed manner. There was clearly a lack of any process as described in paragraph [36] above.

Decision:

[40] The Board finds that the Respondent Union has failed in its duty of fair representation of the Applicant as prescribed in s. 25.1 of the *Act*. For the reasons outlined above, that the Respondent Union has dealt with the Applicant's grievances in an arbitrary manner.

[41] The Board therefore orders:

1. The Application with respect to Grievance “A” is denied.

2. With respect to Grievances “B” – “E”, these matters are hereby remitted to the Union to be dealt with as follows:

a) The Respondent Union shall, within ten (10) business days of this decision conduct an investigation of the various complaints to be conducted by a person authorized by the Union for that purpose;

b) The person so appointed to conduct the investigation shall provide a written report of their findings in respect of each complaint. Such written report shall be submitted to the Applicant and the Respondent Union within thirty (30) business days of the date of their appointment;

c) The Applicant, the person appointed to conduct the investigation, and a member of the executive of the Respondent Union (other than the person conducting the investigation, if that person is a member of the Executive of the Respondent Union) shall meet within ten (10) business days for the purpose of reviewing the Investigator’s Report;

d) The Respondent Union shall review the report of the Investigator and the comments of the Applicant, as determined in the meeting referenced in c) above, at its next Executive meeting following the meeting referenced in c) above, and shall make a determination if it shall proceed with any of the Applicant’s grievances;

e) If the Executive of the Respondent Union determines not to proceed with any of the grievances, it shall advise the Applicant forthwith, in writing, as to the reasons why it has determined not to proceed with the grievances;

f) Upon receipt of the reasons why the Respondent Union has determined not to proceed with any of the Applicant’s grievances, the Applicant shall be permitted to appeal the decision of the Executive not to proceed with those

grievances in accordance with the Bylaws of Local 615 or the Constitution of the Amalgamated Transit Union;

g) If the Executive of the Respondent Union determines to proceed with any of the Applicant's grievances, then any time limits related to the grievance procedure in the Collective Agreement between the Respondent Union and the Employer are hereby waived and the grievance shall be taken to the next applicable step of the grievance procedure; and

h) The Board will remain seized of this matter and any matters that may arise with respect to the process set out above.

DATED at Regina, Saskatchewan, this **8th** day of **April, 2010.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson