The Labour Relations Board
Saskatchewan

RAYMOND CHAD DICKERSON, Applicant v. UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 179, Respondent and BFI CONSTRUCTORS LTD, Employer

LRB File No. 040-10; October 20, 2010
Single Panel: Kenneth G. Love, Q.C., Chairperson

The Applicant:	Raymond Chad Dickerson
For the Respondent Union:	Rick Engel, Q.C.
For the Respondent Employer:	No one appearing

Duty of Fair Representation – Scope of Duty – Union acted on basis of previous decision by arbitrator dealing with similar facts and which interpreted the provisions of the Collective Agreement in respect of which the Applicant says the Union failed to properly represent him – Board finds that reliance upon previous arbitration award reasonable.

Duty of Fair Representation – Scope of Duty – Board finds that Union overlooked some aspects of the application. No evidence that Union considered other provisions of the grievance to determine their merit. Board returns matters to Union for investigation and report to Applicant.

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

REASONS FOR DECISION

Background:

[1] Chad Dickerson (the "Applicant") brings this application under s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") based upon his assertion that the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179 (the "Union") had refused to process a grievance on his behalf in respect of his lay off from his employment with the BFI Constructors Ltd. (the "Employer"). This matter was heard by the Chairperson of the Board sitting alone in accordance with the provisions of s. 4(2.2) of the *Act*.

Facts:

[2] The Applicant is a member of Local 254 of the Union, which Local is situated in Winnipeg, Manitoba. As a result of a request from the Employer for workers, the Applicant applied for and was granted a "travel card" from Local 179 of the Union to permit him to work for the Employer at its project in Saskatoon, Saskatchewan. The Applicant was dispatched to the Employer's worksite on March 22, 2010.

[3] The Employer is covered by the Collective Bargaining Agreement for Industrial Construction in the Province of Saskatchewan (the "Collective Agreement").

[4] The Applicant traveled from his home in Manitoba to the Employer's job site in Saskatoon, Saskatchewan. He reported to the job site on Monday, March 22, 2010. He undertook a drug and alcohol test, and took safety training to commence working on the night shift for the Employer. The Applicant's understanding when he commenced work was that he would be employed from March 22, 2010 to mid April, 2010.

[5] On Tuesday, March 22, 2010, the Applicant became aware that he would not be paid for his travel costs from his dispatch point (Regina, Saskatchewan) to the job site. It was his interpretation of the Collective Agreement that travel cost should be paid. He was advised by his shop steward, Mr. Diedrich, that there was a site specific agreement that precluded the payment of travel costs. His evidence was that he asked the shop steward to provide a copy of that site specific agreement.

[6] He obtained a copy of the Collective Agreement from the shop steward on Wednesday, March 23, 2010. He was also advised by the shop steward that no subsistence payment would be paid, nor would other payments which he anticipated being paid would be paid because there was a free zone around Saskatoon in which such payments were not required to be made.

[7] The Applicant was advised by his shop steward on Thursday, March 24, 2010 that he would not be required to work on Friday, April 2, 2010 (which was Good Friday) nor on the following Monday, which was Easter Monday. He reviewed the Collective Agreement and found that pursuant to the Collective Agreement that Good Friday was a recognized holiday but that Easter Monday was not. He advised the shop steward of this. He was later advised that day by

the Shop Steward that the Employer would be giving employees a choice if they wanted to work Monday or not and, if they chose to work on Monday, they would be paid a regular rate for work on that day.

[8] On leaving work on Sunday, March 28, 2010, the Applicant noticed that he had a call on his phone from a Saskatchewan telephone number. He returned that call and reached Mr. Dean Arnell, the dayshift supervisor of the Employer. During that telephone conversation, he was advised that he was being laid off due to shortage of work. He was also advised that there was no need for him to return to the job site to pick up his gear as it would be forwarded to his Union hall in Manitoba. Another employee from the Manitoba Local was also laid off the following evening when he returned to the job site.

[9] On Monday, March 29, 2010, the Applicant and the other laid off person from Manitoba traveled to Regina. They attended to the business office of the Union. At the Union office, they met with Mr. Bill Peters, the Business Agent – Industrial Sector for the Union. In the meeting with Mr. Peters, the Applicant advised Mr. Peters that and his companion had just been laid off at the BFI job site in Saskatoon. Mr. Peters initial response in respect to their having been laid off was to advise them that he could have them re-employed that day at the Co-op Upgrader site in Regina as he had had a request for personnel that he was attempting to fill for that project. The Applicant did not want to discuss re-employment, but raised two concerns with Mr. Peters. The first was that he had not received payment for travel from Regina to Saskatoon as he expected under the Collective Agreement, and secondly, he had not received a subsistence allowance while employed at the Saskatoon job site.

[10] Mr. Peter's evidence was that he tried several times during the conversation with the Applicant to explain to him and his companion that the Collective Agreement provided that Saskatoon is a travel and subsistence free zone and therefore there was no requirement for the employer to make these payments. He testified that he advised the Applicant that the provisions of the Collective Agreement were clear and that he had no basis to file a grievance on these issues. He also testified that he pointed out to the Applicant that the Union had recently taken a grievance on these issues to arbitration and had lost that arbitration. A copy of the arbitration award made by Francine Chad Smith, Q.C. dated January 9, 2009 was filed as Exhibit U-8, by the Union in this proceeding (the "Chad Smith Arbitration").

[11] After speaking to Mr. Peters for about five minutes, the Applicant and his companion left the Union office.

[12] On Wednesday, October 30, 2010, the Employer issued a Record of Employment ("ROE") to the Applicant. The ROE states the reason for issuance of the ROE as being "[S]hortage of Work/End of contract or season." The Notice of Termination provided to the Applicant by the Employer on March 28, 2010, also states "Shortage of Work" as the reason for his termination. A final pay cheque was issued to the Applicant by the Employer on April 1, 2010.

[13] On March 31, 2010, the Applicant contacted Mr. Robert Kinsey, the U.A. International Representative for Western Canada/Mainline Pipeline for Canada by email. In his email, he requested advice as to how to go about filing a grievance regarding his lay off in Saskatoon. In his email, he complained that "[I] have spoken to the business agent and he refuses to assist me (or even listen to my complaint) in going forward with a grievance."

[14] Mr. Kinsey responded to the email on April 1, 2010 advising that the grievance should be forwarded to "the Local Union Business Representative that normally services the jobsite that you were employed on." On April 2, 2010, the Applicant forwarded the grievance both to the Union and the Employer. That date was Good Friday. On Monday, April 5, 2010 (Easter Monday), he received a telephone call from Mr. Randy Nichols, the Union's business manager who advised the Applicant that he was unable to accept his grievance. Mr. Nichols wrote to the Applicant following that telephone conversation to provide further clarification. That letter read, in part, as follows:

> *I have reviewed your letter with your grievance concerns. The clauses you have requested grievance procedures to proceed on are unfounded.*
>
> *The Bio-Exx Project you were dispatched to is in the City of Saskatoon. Saskatoon is a travel and subsistence free zone.*
>
> *BFI Constructors, with mutual agreement of Local 179, has agreed to pay a living allowance "Subsidy" to employees of $110.00 on a per day worked schedule as per Article 14.03 (a)*
>
> > *In exceptional circumstances, a living allowance subsidy may be paid to an Employee by mutual agreement between the Employer and the Union on projects within one hundred (100) kilometers of the City Halls of Regina or Saskatoon, subject to the concurrence of the Project Owner.*

> *Your issues concerning travel and subsistence are not grievable as required by the Collective Bargaining Agreement for Industrial Construction in the Province of Saskatchewan.*

[15] In his testimony, Mr. Nichols explained that the matter had been determined by the Chad Smith Arbitration, which had determined the interpretation to be placed upon the provisions of the collective agreement which the Applicant was complaining about. His final pay cheque shows that he was paid the $110.00 subsidy which the Employer had voluntarily agreed to pay for the six (6) days which he worked at the Saskatoon job site.

[16] Not satisfied with the response from Mr. Nichols, the Applicant again contacted Mr. Kinsey by email on April 7, 2010 to advise him that he did not believe that he could resolve the issues concerning his grievance with Local 179. In that email he commented as follows:

> *Mr. Nichols would not let me get a word in during our conversation, and if he did I would have reminded him that my grievance was for wrongful dismissal and contained many different violations that were committed against me and the Collective Agreement of Local 179. Mr. Nichols also repetedly [sic] mentioned that he negotiated the agreement and that the UA Standards of Excellence and the Constitution play no part in the Collective Agreement of Local 179.*

[17] At the heart of this matter, was the fact that the Applicant felt he had been laid off because of his challenges to the Union's interpretation of the Collective Agreement. However, he was unable to provide any proof regarding this allegation. He did acknowledge in his testimony that he understood that he was paid not "subsistence" in accordance with the Collective Agreement, but rather a subsidy in accordance with the provisions of Article 14:03(a) of the Collective Agreement.

[18] In his testimony, the Applicant repeatedly referenced the UA Standards of Excellence which was a standard established by the Union in respect of Discipline of Members and Operating Rules and Regulations accepted by the Unionized Contractors Association. While this standard had been adopted by the Union in 2009, it had not, as yet, found its way to be included within the Collective Agreement, the term of which spanned the time in which the standard was adopted (July 29, 2007 – April 30, 2010).

[19] In addition to his concerns about travel payments and subsistence allowances, the Applicant also cited other provisions of the Collective Agreement which had been violated in

respect of his lay off. He claimed that he had not been paid, upon layoff, in accordance with clauses 3:08 (c) and (d) of the Collective Agreement. Those provisions read as follows:

> *3:08(c)* ***Pay on Termination***
>
> *When an Employee is laid off, payment of all monies owing shall be made immediately. When there is no payroll office on site, payment of all monies owing shall be made, or mailed by registered mail, to his last known address within three (3) regular working days of layoff. If an Employee has not received his first weeks pay then he shall receive seventy-five percent (75%) of his gross earnings before leaving the site.*
>
> *3:08(d)* ***Penalty***
>
> *Should the above not be adhered to, the Employer shall pay a penalty of four (4) hours per regular working day at straight time rates until payment is made.*

[20] The Applicant also included a complaint regarding Appendix A, Item #7 to the Collective Agreement in respect of a paragraph which provided that a laid off employee is to be provided one (1) hour to "clear the tool crib, obtain tool crib clearance, and finalize employment before leaving the jobsite." He maintains that he was not provided this opportunity in contravention of the policy.

[21] There was no evidence that the Union considered those portions of the proposed grievance set out in paragraphs [19] and [20].

Relevant statutory provision:

[22] Relevant provisions of the *Act* are 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 and Decision:

[23] The Applicant bears the onus of proof in the present application.

[24] The case law that the Board consistently follows with respect to the duty of fair representation owed by the Union to the Applicant as set out in s. 25.1 of the *Act* was recently

extensively reviewed in *Dwayne Lucyshyn and Amalgamated Transit Union, Local 615*.[1] It is unnecessary to repeat that review here.

[25] In the present case, the Applicant argues that the Union failed to properly represent him, insofar as the Union refused to accept and process a grievance he had filed regarding his lay off.

[26] However, the evidence from the Union showed that the Union had previously taken a grievance to arbitration (the Chad Smith Arbitration). Based upon the results in that arbitration, it was clear to the Union that the position advanced by the Applicant was so similar in fact that the results would have been the same. In so doing, the Union did not act discriminatorily, arbitrarily, or in bad faith, as those concepts were explained by this Board in *Glynna Ward v. Saskatchewan Union of Nurses*[2].

[27] As pointed out in *Chabot v. C.U.P.E. Local 477*[3] [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.*

[28] The Applicant is requesting that this Board second guess both the Union's determination of the likelihood of success of this grievance as well as second guessing the decision of the arbitration relied upon by the Union as the basis for their decision. This we cannot do. So long as the actions of the Union are not discriminatory, arbitrary or in bad faith, we cannot interfere with that judgment by the Union.

[29] However, the Board's reluctance to interfere in decisions made by a trade union in the processing of grievances must be based upon an objective standard. As noted in *Lucyshyn*[4], 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.

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[1] [2010] S.L.R.B.R. No. 6, 178 C.LR.B.R. (2d) 96, LRB File No. 035-09
[2] [1988] Winter Sask. Labour Rep. 44, LRB File No. 031-88 at 47
[3] [2007] Sask. L.R.B.R. 401, LRB File No. 158-06 at para. 71

[30] For the Applicant to be successful, it is necessary for him to show that the Union's representation of him, and the refusal to accept his grievance was "arbitrary, discriminatory, or in bad faith."

[31] Insofar as the issues concerning travel and sustenance, the Applicant failed to provide any evidence to the Board that the actions of the Union were discriminatory, arbitrary or in bad faith. The Union made it clear to the Applicant that they had already had a decision concerning those provisions of the collective agreement and that they had no grounds to proceed with another grievance. The Union had already expended considerable monies to obtain an interpretation of the Collective Agreement in these areas and could not change the outcome of that determination at the request of this member. Reliance by the Union on this previous arbitration decision was reasonable.

[32] There was, however, no evidence presented that the decision to refuse to process the grievance with respect to the other provisions of the Collective Agreement which the Applicant claimed had not been properly followed had been considered fully by the Union. The evidence was clear that those matters were possibly overlooked by the Union in its focus upon the larger issues of travel pay and sustenance. While relatively minor in the circumstances, there was no evidence provided that these had been seriously considered by the Union.

[33] As was the case in *Lucyshyn*, *supra*, it would appear to be appropriate to refer those matters back to the Union for its consideration and determination if a grievance is necessary or if the issue can be dealt with through discussion with the employer, if, indeed there is, in the opinion of the Union a basis for a claim under Article 3:08 (c) and (d) and the provisions of Schedule "A", Item 7 with respect to time to clear the tool crib. We make no determination on these issues other than a direction that the Union direct its mind to those issues and determine if a grievance is necessary in order to insure the terms of the Collective Agreement are uniformly applied.

Conclusion:

[34] The application with respect to the complaint regarding Articles 13:05, 14:03(a), (d) and (e) of the Collective Agreement is dismissed.

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[4] *Supra* footnote 1 at paragraph 32 -36.

[35] The application with respect to Articles 3:08 (c) & (d) and Appendix "A", Item #7 regarding time to clear the "tool crib" is allowed and referred back to the Union as follows:

(a) to conduct an investigation with respect to the facts of this case to determine if a breach of the collective agreement has been committed by the Employer within twenty (20) business days of the receipt of this decision; and

(b) to advise the Applicant, in writing, of the results of that investigation within five (5) business days of completion of its investigation; and

(c) if their investigation reveals a probable breach of the collective agreement, to file a grievance with respect of that breach on behalf of the Applicant if the matter cannot be resolved by discussion with the Employer; and

(d) should it be necessary to file a grievance on behalf of the Applicant, the time limitations provided for in Article 6 of the Collective Agreement are hereby waived provided that any necessary grievance shall be filed in accordance with the provisions of Article 6 on or before December 31, 2010.

DATED at Regina, Saskatchewan, this **20th** day of **October, 2010.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson