The Labour Relations Board
Saskatchewan

FRANK KASPER and DARRELL OLBRICH, Applicants v. THE SASKATCHEWAN GOVERNMENT and GENERAL EMPLOYEES' UNION and THE GOVERNMENT OF SASKATCHEWAN, Respondents

LRB File Nos. 061-09 & 070-09; May 6, 2010
Vice-Chairperson, Steven Schiefner; Members: Donna Ottenson and Kendra Cruson

The Applicants:	Mr. Frank Kasper and Mr. Darrell Olbrich
For Respondent Union:	Ms. Julianna K.J. Saxberg
For Respondent Employer:	Mr. Curtis W. Talbot

Practice and Procedure – Non-Suit application – Applicants alleged trade union failed to fairly represent them in grievance proceedings – at close of Applicants' case, trade union makes application for non-suit – Board not prepared to exercise discretion to permit trade union to bring non-suit application without making election as to call of evidence – Employer makes non-suit application electing to call no evidence - Board grants Employer's non-suit application and dismisses Applicants' applications – Board concludes Applicants tendered insufficient evidence to establish a *prima facia* case of a violation of *The Trade Union Act*..

Duty of Fair Representation – Applicants each a member of small groups of employees that alleged Employer failed to consistently provide rest breaks in accordance with collective agreement – trade union takes grievances to arbitration and successfully obtains determination but no specific remedy – trade union identifies other members of bargaining unit whom it believes were also affected by Employer's non-compliance – trade union files additional grievances on behalf of other affected members and negotiates global settlement agreement with Employer – trade union puts global settlement agreement to ratification vote of affected members – Applicants alleged trade union weakened their cases by adding other grievors and that they would have received more compensation had trade union settled their grievances first or taken their grievances back to arbitrator for remedy before adding other grievors – Applicants also alleged ratification vote was flawed or illegal – Board not satisfied that trade union's decisions to add additional grievances or to pursue global settlement were arbitrary, discriminatory or indicative of bad faith - Board not satisfied that ratification vote was illegal or flawed.

The Trade Union Act, s. 25.1

REASONS FOR DECISION

Background:

[1] **Steven D. Schiefner, Vice-Chairperson**: The Saskatchewan Government and General Employees' Union (the "Union") represents a unit of employees working in various provincial correctional facilities operated by the Government of Saskatchewan (the "Employer"). At all material times, both Mr. Kasper and Mr. Olbrich worked at the Regina Provincial Correctional Centre and, as such, were employees of the Employer and members of the unit of employees represented by the Union.

[2] On June 12, 2009, Mr. Kasper filed an application[1] with the Saskatchewan Labour Relations Board (the "Board") alleging the Union failed to fairly represent him in relation to grievance proceedings involving the Employer in contravention of s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c.T-17 (the "*Act*"). Mr. Kasper's specific allegations relate to the settlement of a large number of grievances related to the failure of the Employer to provide rest breaks (i.e. coffee breaks) following an arbitration award involving a small number of grievances dealing with that same topic. Mr. Kasper challenged both the substance of the settlement negotiated by the Union with the Employer and the procedure used by the Union to obtain approval for that settlement from affected members.

[3] On June 25, 2009, Mr. Olbrich filed an application[2] with the Board alleging the Union failed to fairly represent him. The allegations advanced by Mr. Kasper regarding the Union were similar to the allegations advanced by Mr. Kasper in his application.

[4] With the agreement of the parties, the two (2) applications were heard concurrently. The hearing was conducted on March 22, 23 and 24, 2010 in Regina, Saskatchewan. Finally, it should be noted that, as Mr. Olbrich's application to the Board appeared to also allege an unfair labour practice (i.e. a violation other than ss. 25.1 or 36.1 of the *Act*), the Board was constituted as a full panel (as opposed to the Board's usual practice of constituting a single member panel composed of either the Chairperson or a Vice-Chairperson). Although Mr. Olbrich clarified at the outset of the hearing that he would not be asserting any violation of the *Act* other than s. 25.1, the panel continued as originally constituted.

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1 LRB File No. 061-09.
2 LRB File No. 070-09.

[5] Both Mr. Kasper and Mr. Olbrich testified in support of their applications and elected to call no further evidence. At the close of the Applicants' cases on March 23, 2010, the Union brought an application for non-suit, without making an election (i.e. seeking to reserve the right to call further evidence if so desired). The Union asked the Board to dismiss both applications on the basis that the Applicants had tendered no evidence of a potential violation of the *Act*. In support of its application, the Union pointed, *inter alia*, to this Board's jurisprudence regarding the narrow scope of the Board's supervisory responsibility pursuant to s. 25.1 of the *Act*. After a brief recess, the Board orally dismissed the Union's application at that time without hearing from the other parties. Simply put, the Board was not prepared to exercise its discretion to permit the Union to bring an application for non-suit without making an election as to the call of evidence. In doing so, the Board relied on its decision in *Saskatoon (City of) v. Canadian Union of Public Employees, Local 59,* 2009 CanLII 67430, LRB File No. 186-08 and *Saskatchewan Government and General Employees' Union v. Mitchell's Gourmet Foods Inc.,* [1999] Sask. L.R.B.R. 577, LRB File Nos. 115-98 & 151-98.

[6] At the recommencement of the hearing on March 24, 2010, the Employer brought an application for non-suit, electing to call no evidence. In support of the Employer's right to bring an application for non-suit in a proceeding alleging a dispute between the Union and its members, the Employer argued that it had a substantial interest in the outcome of that dispute on the basis that any remedy that could be awarded by the Board could affect the validity of agreements freely negotiated between the Union and the Employer in settlement of numerous grievances with a total monetary value in the neighborhood of $3.0 million dollars. The Board granted the Employer leave to bring its application for non-suit and heard argument from the parties on that application. These Reasons for Decision deal with the Employer's non-suit application.

Facts:

[7] Mr. Kasper was a former correction worker[3], who, for a sixteen (16) year period prior to June of 2004, had been an in-scope Shop Supervisor working in the automotive and welding shops at the Regina Correctional Centre. The automotive and welding shops were

[3] In these Reasons for Decision, the term "correction worker" has been used in the broad sense of employees working in a correctional facility. As did Arbitrator Pelton, the Board has used the term "correction workers" to include both correction workers working with inmates in the prison and shop supervisors working with inmates in both the wood working and automotive shops.

operated by the Employer in conjunction with the Regina Correction Centre under the business name of “Prism Industries”.

[8] Mr. Olbrich was a Correction Worker, having worked at the Regina Correctional Centre for approximately twenty-three (23) years.

[9] Between December 1998 and May 2003, the Union filed five (5) group grievances on behalf of various members working in Provincial Correctional facilities. Although many of the grievances raised other issues, one common feature of these grievances was the allegation that the respective groups of grievors had not received rest breaks (i.e. coffee breaks) in accordance with the requirements of the relevant collective agreements in place at the time between the Union and the Employer. Both Mr. Kasper and Mr. Olbrich were affected members in these grievances. A grievance was filed on behalf of Mr. Olbrich (and other employees at the Regina Correctional Centre) on December 10, 1998 (the “Olbrich grievance”) and Mr. Kasper was the lead grievor in a grievance filed on May 6, 2003 on behalf of in-scope staff of Prism Industries employed at the Regina Correctional Centre (the “Prism Industries grievances”).

[10] The Union advanced these grievances to arbitration, which was conducted before Arbitrator Pelton in 2005. Arbitrator Pelton’s decision was rendered on January 16, 2006 (the “Preliminary Award”). In this decision, Mr. Pelton came to the following conclusions:

> 1. THAT the relevant collective agreement in place at the time imposed a positive obligation on the Employer to provide correction workers with work-free rest periods; that is periods during which correction workers would be free of inmate supervisory responsibilities.[4]
> 2. THAT the Employer had not consistently satisfied its obligations under the collective agreement regarding the provision of rest breaks for correction workers.
> 3. THAT, contrary to the Employer’s position, the Employer’s practice of allowing correction workers to have coffee at their posts did not satisfy the

[4] See: Page 36 and 44 of Arbitrator Pelton’s Preliminary Award.

obligation to provide a "work-free" rest period (with the exception of a coffee break taken during a lock-up or lock-down period).[5]

4. THAT, contrary to the Union's position, correction workers were not necessarily entitled to take their rest breaks away from their work station (i.e. their post), so long as they were provided with a "work free" rest period (i.e. free from inmate supervisory responsibilities).[6]

5. THAT correction workers who were not able to take and/or not provided with their rest breaks should either receive compensation or time in lieu calculated at the workers' hourly rate.[7]

6. THAT the calculation of the amounts owing for missed rest periods and to whom it was owing should be left to the Parties to be negotiated in the first instance, with Arbitrator Pelton reserving jurisdiction.[8]

[11] While not winning on all grounds asserted by the Union, it would be sufficient to say that Mr. Kasper and Mr. Olbrich viewed the decision of Arbitrator Pelton as a victory, as did the Union. However, it does not appear that there was complete agreement within the Union as to the scope of the victory. Mr. Kasper testified that, in his opinion, Arbitrator Pelton had said that he was entitled to compensation for sixteen (16) years worth of missed coffee breaks dating back to the date of first infraction; which for him was 1988 (when he first started working). Mr. Olbrich similarly believed that, on the basis of Arbitrator Pelton's Preliminary Award, he was entitled to a very significant amount of compensation (which Mr. Olbrich estimated to be approximately $25,000). The documentary evidence however, demonstrates that Union officials, including Mr. Henry (Hank) Lashta and others, were more pragmatic in their assessment of the scope of the victory. While the Union recognized that the decision represented a significant financial liability for the Employer, the Union also recognized that Arbitrator Pelton's Preliminary Award had not defined the compensation available to correction workers for missed coffee breaks. The Preliminary Award did not define how many coffee breaks were missed by any of the grievors and left open the question of which correction workers qualified for compensation for missed coffee breaks.

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5 See: Page 36 and 44 of Arbitrator Pelton's Preliminary Award.
6 See: Page 38 and 45 of Arbitrator Pelton's Preliminary Award.
7 See: Page 41 and 45 of Arbitrator Pelton's Preliminary Award.
8 See: Page 41 and 45 of Arbitrator Pelton's Preliminary Award.

[12] Simply put, the remedies flowing out of Preliminary Award were left to the parties, who had a number of difficult issues yet to resolve. As suggested by Arbitrator Pelton, the Union and the Employer entered into negotiations with a view to resolving these issues. During these negotiations, the Union took the position that compensation should be paid to all correction workers affected by the Employer's breach of the collective agreement (not just the grievors named in the group grievances advanced before Arbitrator Pelton); and that compensation should be paid for all missed rest breaks dating back to the date of first infraction. On the other hand, the Employer took the position that the scope of the Employer's obligation to pay retroactive compensation to affected employees was much more limited than that suggested by the Union, based on a number of theories. In addition, the Employer was also ruminating on the potential of seeking judicial review of Arbitrator Pelton's Preliminary Award.

[13] The Union and the Employer began discussions around the potential of a global settlement; a settlement intended to resolve not only the original grievances named in the Preliminary Award (including the Olbrich and Prism Industries grievance) but also other potential grievances for other members who missed rest breaks but were not included in the original grievances. A global settlement would avoid the necessity of individually proving how many coffee breaks were missed by each affected member and was thus attractive to the Union. While the Employer was prepared to consider a global settlement, it pointed to a number of factors that the Employer believed needed to be taken into consideration in determining the nature of that compensation, including the lack of official records on rest breaks taken; the different practices in place between different facilities; the movement of staff between facilities; and the lack of agreement between the parties on methodology of determining who is entitled to what.

[14] The documentary evidence discloses that during negotiations with the Employer, the Union proposed a global settlement involving compensation being paid to all affected correction workers based on the assumption that a specified percentage (i.e. 50%) of rest breaks were missed each year that they worked. This offer was not accepted by the Employer and negotiations continued. As part of the negotiation process, the Employer made its own offer to the Union. For example, on March 21, 2007, the Employer made an offer of settlement as follows:

> *To employees in the four Adult Correctional Institutions with responsibility for the continuous direct supervision of offenders (i.e. L8 Corrections Workers, Shop Supervisors, and maintenance supervising outside gangs).*
>
> > *75 hours to be placed in each individual employee's time in lieu bank subject to local agreement regarding thresholds in article 11.6.*
>
> *Or at their discretion,*
>
> > *A $2000 cash payout subject to normal deductions.*
>
> *These amounts would be prorated for eligible employees on staff the date of the signing of the settlement based on periods with the responsibility for the continuous direct supervision of offenders during the timeframe from December 11, 1997 to April 30, 2005.*
>
> *This offer is made as a complete and final settlement of all grievances cited at the beginning of this letter.*

[15] The Employer's offers were rejected by the Union, as were all offers from the Union by the Employer; the Union believing the Employer's offers were too low and the Employer believing the Union's offers were too high.

[16] During this period (while negotiations were taking place with the Employer), affected employees in the original grievances began contacting the Union expressing their concern about expanding the scope of the correction workers eligible for compensation for missed rest breaks. Of particular significance, Mr. Kasper contacted Mr. Lashta of the Union and expressed his concerns regarding negotiations between the Employer and the Union and the potential settlement of the Prism Industries grievance as part of global settlement discussions. Mr. Kasper's concerns were contained in an email to Mr. Lashta dated June 12, 2007:

> *Greetings Hank:*
> *I saw your name on an email that was dealing with the corrections grievances so I thought I would contact you and see what the status was for the settling of these disputes. My specific grievance was the rest break for the Prism staff. The arbitrator ruled in our favor and we won this completely, and now I noticed that these grievances are being lumped together. It is my belief that my grievance is being held up because of the status of other grievances in corrections. Can you please shed some light on the status of my grievance and a time when one could see an outcome from government?*
> *According to my understanding at the hearing for the Prism grievance, and the written document from the arbitrator following this, there should not have been much issue there since it was pretty cut and dried. I was in contact with Susan S. but it seems like her schedule is extremely busy at this time, and I am also not sure if she is the person I should be contacting in this regard.*
> *Thanks Hank for your attention into this matter and I look forward to hearing from you.*
> *Frank Kasper*

[17] Similar correspondence was set by Mr. Kasper to the Union in August of 2007. The Union responded to Mr. Kasper and identified the Union's concerns with the Arbitrator Pelton's Preliminary Award, as well as the Union's strategy regarding the issue of compensation for affected members. For example, the documentary evidence reveals that on August 29, 2007 the Union's Mr. Lashta sent an email to Mr. Kasper explaining the Union's rationale for attempting to reach a comprehensive agreement with the Employer that would resolve the rest break pay issue for all correction workers:

> *Hello again Frank.*
> *The arbitrator dismissed the Saskatoon grievance only in part. He ruled that in so far as the CWs missed rest breaks in Saskatoon the award is similar to the Regina grievance awards and they are entitled to compensation. I understand the evidence from Regina centered around the dayshift in the new units and prism as having missed rest breaks. Both grievances were group grievances and referenced all staff in those centers. Also the arbitrator ruled on the principal of what a rest break is in corrections which has a wider application. We are trying to negotiate a global resolution like we did with the Lefreniere arbitration award a few years ago. You guys in Regina called them Lazy Guard days I think. We are not dismissing anyone nor trying to change any rules we are trying to negotiate a remedy that will resolve all current and future claims. This may not be possible as while the PSC entered into these negotiations their settlement offer is far too low and we may have to go the route of filing grievances from all the various groups/areas not mentioned in the award using the award and the resulting settlement as a precedent. (Hence my reference to developing strategies and it taking years to resolve). I don't see anything as being lost as the arbitrator retains jurisdiction for remedy and if there is no negotiated global remedy agreed to we will be before him to award remedy in the situations he ruled on or negotiate a remedy satisfactory to the smaller group of grievors he ruled on. Up until December of 06 the employer's position was that they would take the issue to judicial review. As for Grievances won we may well be before the arbitrator shortly. As for a total win on a grievance the arbitrator ruled if I recall correctly that some rest breaks were missed in some areas and left it up to the parties to determine remedy and he indicated that it is up to the Union to prove which ones were missed. So If you have any other questions feel free to contact me.*
> *H. Lashta*

[18] After several months of negotiations, the Employer and the Union were unable to agree on the terms of a global settlement and, in July of 2007, they asked Arbitrator Pelton to make determinations with respect to a number of issues flowing from his Preliminary Award. These questions were summarized by Arbitrator Pelton, in part, as follows[9]:

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[9] See: Arbitrator Pelton's "Award with Respect to Preliminary Issues" dated November 18, 2008.

1) *The scope of my jurisdiction – that is, who is entitled to claim monetary damages arising out of the Award? Will the Award potentially affect all Provincial Corrections Workers within the province as contended by SGEU, or will my Award be limited to those affected by the Olbrich, Hrynchak, PRISM Industry and Hospital Duties Grievances as contended by the Public Service Commission?*

2) *Retroactivity – is my monetary Award to be retroactive to the date of first infraction as contended by SGEU, or will it date back only one year prior to each Grievance as contended by the Public Service Commission?*

[19] These matters were argued before Arbitrator Pelton on September 11, 2008, with his decision being rendered on November 18, 2008.

[20] With respect to jurisdiction and the scope of potential correction workers entitled to compensation as a result of his Preliminary Award, Arbitrator Pelton concluded that his jurisdiction was, by necessity, limited to the five (5) group grievances that were originally before him[10]. While Arbitrator Pelton acknowledged that his award may have application across the larger bargaining unit[11], his jurisdiction in the proceedings before him, were confined to the five (5) grievances for which he had been constituted as arbitrator to hear. Arbitrator Pelton acknowledged and commended the parties for attempting to negotiate a global settlement (a settlement for all affected parties not just those directly affected by the five (5) grievances from which his preliminary Award was based)[12]. Nonetheless, Arbitrator Pelton was not prepared to accept a broader jurisdiction for the purposes of defining to whom his Preliminary Award would apply[13].

[21] With respect to retroactivity, Arbitrator Pelton examined each of the group grievance before him and concluded, with respect to both the Olbrich and Prism Industries grievances, that there was no limitation in the collective agreement regarding retroactive compensation for missed rest periods. For these grievances, Arbitrator Pelton concluded that monetary compensation for these grievances should be available back to the date on which the Employer's infraction of the collective agreement first occurred (i.e. failing to provide rest breaks)[14].

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10 See: Paras. 110, 123 & 125 of Pelton Award, dated November 18, 2009.
11 See: Para. 114 of Pelton Award, dated November 18, 2009.
12 See: Paras. 122 & 123 of Pelton Award, dated November 18, 2009
13 See: Para. 123 of Pelton Award, dated November 18, 2009.
14 *See: Para. 150 of Pelton Award, dated November 18, 2009.*

[22] Finally, Arbitrator Pelton made the following observations (and/or came to the following conclusions) with respect to the determination of compensation (to whom and how much) for correction workers who did not receive rest breaks:

1. That the Employer had not failed in its obligation to provide rest breaks to all correction workers[15].

2. That, for those groups of employees for whom the Employer had failed in its obligation to provide rest breaks, the Employer had not failed to provide rest breaks all the time.

3. That the onus with respect to proving damages (i.e. of proving which rest periods were missed) would be on the Union[16]. Furthermore, because of how far back the violations were alleged to have occurred (i.e. in some cases, up to 10 to 13 years – at that time), the evidentiary difficulties (for the Union) would be significant.[17]

4. That, because of the evidentiary and other difficulties facing the Union, a collective or blanket remedy (i.e. an award provided to all affected corrections workers) may be appropriate.[18]

5. That, because of the limits in Arbitrator Pelton's jurisdiction, he was not prepared to grant a collective or blanket remedy.[19]

6. That the Parties should renew their attempts to reach a negotiated settlement.[20]

[23] Following Arbitrator Pelton's November 18, 2008 Award, the documentary evidence reveals that the Union filed thirty-one (31) additional grievances alleging violations by the Employer related to missed rest breaks based on the criteria enumerated by Arbitrator Pelton. These grievances included all other correction workers believed by the Union to be eligible for compensation for missed coffee breaks who were not included in the original grievances before Arbitrator Pelton. These additional grievances increased the number of

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15 *See: Para. 153 of Pelton Award, dated November 18, 2009.*
16 *See: Para. 155 of Pelton Award, dated November 18, 2009.*
17 *See: Paras. 156 & 157 of Pelton Award, dated November 18, 2009.*
18 *See: Para. 155 of Pelton Award, dated November 18, 2009.*
19 *See: Para. 153 of Pelton Award, dated November 18, 2009.*
20 *See: Para. 194 of Pelton Award, dated November 18, 2009*

affected members from small groups of correction workers (approximately thirty-six (36) Correction Workers in the case of the Olbrich grievance and approximately fourteen (14) Shop Supervisors in the case of the Prism Industries grievance) to over 900 correction workers.

[24] Both Mr. Kasper and Mr. Olbrich disagreed with the Union's strategy of adding other grievors and pursuing a global settlement with the Employer. Both Mr. Kasper and Mr. Olbrich believed that a better strategy would be for the Union to settle their individual grievances first and use these settlements as precedents for the settlement of the other grievances (i.e. for other affected units/groups of employees). Both Mr. Kasper and Mr. Olbrich believed that the evidence would be the easiest to produce for their grievances and that the members in their respective units had a stronger case (i.e. they had missed a greater percentage of their rest breaks than members in other units). Specifically, Mr. Kasper and Mr. Olbrich wanted the Union to settle their grievances first and, if unable to negotiate a satisfactory agreement with the Employer, then to take their respective grievances back to Mr. Pelton to determine the quantum of remedy to which they were entitled.

[25] The documentary evidence reveals that the Union considered the concerns of Mr. Kasper and Mr. Olbrich but disagreed. Simply put, the Union believed a better strategy was to pursue a global settlement involving all affected employees and to only proceed with individual remedy hearings before Arbitrator Pelton in the event a global settlement was unsuccessful. The documentary evidence reveals that the Union communicated its position and its strategy to both Mr. Kasper and Mr. Olbrich in late 2008 and early 2009. For example, on February 8, 2009, the Union's Mr. Lashta sent the following email to Mr. Olbrich:

> *Hello Darrell*
> *Please be advised that there will be a meeting between the parties on this matter on 12 February 2009. and I will know more detail after that. At this time the position of the Provincial Corrections committee has been and continues to negotiate a global settlement to the Rest break issue based upon the definition a Rest break as outlined in Mr. Pelton's original award. Mr. Pelton has clarified certain matters in his subsequent award such as retroactivity and inclusivity of the award which will have an effect upon the negotiations and has already triggered a number of grievances from other areas across the Province.*
>
> *The Provincial Corrections committee took the same position respecting the Training Rate Grievance commonly referred to as the Lefreniere grievance and successfully negotiated a settlement for affected employees across the Province even though the grievance was only filed by one center.*

> *It is possible (maybe even probable) that the employer will refuse to negotiate such a global settlement and will only deal with those named by Mr. Pelton in his subsequent award forcing the rest to a future arbitration. The employer knows full well that any settlement they agree to now will have an effect on any subsequent settlement and I do not expect they will be very generous in their offer either for the smaller group or globally.*
>
> *What we will end up doing will depend upon what the employer is prepared to offer and to whom. If nothing else Mr. Peltons subsequent award has clarified Retroactivity for Prism Industries and the Living Units included in his award, further back than they originally offered. I am copying Curtis Jerome with this e-mail as well as he will be representing Regina at these talks. If you have more questions feel free to contact me.*
> *H. Lashta*

[26] By March of 2009, the Employer and the Union had negotiated the terms of a tentative global settlement of all grievances related to the rest break issue, including the original five (5) grievances that were before Arbitrator Pelton and the additional thirty-one (31) grievances filed after his November 18, 2008 award. The terms of the global settlement were subsequently enumerated in a Memorandum of Settlement which provided as follows:

> ***Whereas*** *an Arbitration Award rendered January 16, 2006 by Robert Pelton, Q.C. in a matter involving the employer and the union that concerned five grievances filed by the union regarding appropriate rest breaks, three of which were allowed in part, left the issue of remedy to the parties.*
>
> ***And Whereas*** *following a further Award With Respect To Preliminary Issues rendered by the Arbitrator November18, 2008 the Union filed 37 related grievances. (List of Grievances attached as Appendix A)*
>
> ***And Whereas*** *the Arbitrator in his supplementary award also indicated and recommended that a negotiated collective remedy to all matters associated with this issue would be appropriate.*
>
> ***Now Therefore*** *the employer and the union agree* ***without prejudice and without precedent*** *that the following terms represent complete and final settlement of all matters related to these grievances and each will use their best effort to obtain ratification of these terms:*
>
> 1. *Affected employees employed in correctional facilities during the period January 1, 1996 to December 31, 2005 will receive a prorated portion of $3300 (112 hours as time off in lieu) compensation based on the number of regular hours paid to each affected individual compared to the regular annual hours of a full time equivalent employee in each respective occupation/level and hours of work category.*
>
>   *The equivalent of $3300 or 112 hours (as time off in lieu) compensation prorated is an all inclusive payment.*
>   *(e.g. there will be no additional claims for pension contributions, vacation and designated holiday pay, overtime, interest, etc.)*

An "affected employee" is an individual who worked as an in scope PS/GE bargaining unit employee in the following facilities during the above period:

- *Regina Provincial Correctional Centre*
- *Saskatoon Provincial Correctional Centre*
- *Prince Albert Provincial Correctional Centre*
- *Pinegrove Provincial Correctional Centre*
- *Besnard Lake Provincial Correctional Camp*
- *Buffalo Narrows Community Correctional Centre*
- *Battlefords Community Correctional Centre*
- *Regina Provincial Community Training Residence*
- *Saskatoon Provincial Community Training Residence*
- *Prince Albert Community Training Residence*
- *North Battleford Community Training Residence*
- *Saskatoon Urban Camp*
- *Waden Bay Provincial Corrections Camp*
- *White Gull Provincial Corrections Camp*

2. The term "affected" covers three groups:

(a) those who are still employees within the corrections facilities listed above as at the date of ratification;

(b) those who are no longer employed within those facilities listed but who are still employed with Executive Government; and

(c) those who are no longer employed within those facilities listed due to resignation, lay-off, retirement or death.

3. The individuals who fall within paragraph 2(a) that is those employees who are still employees in the listed correctional facilities (paragraph 1.) will have the option of:

(a) being paid out the appropriate prorated portion of earnings as per paragraph 1.; or

(b) taking time off in lieu of payment subject to the normal approval process with the time off in lieu being calculated at the rate of pay in place at the time the time off in lieu is taken; or

(c) a combination of pay out and time off in lieu of payment.

All pay outs shall be subject to normal deductions. For those employees who have not maximized their RRSP contributions the pay out, or portion thereof, can go directly to the employee's RRSP to the extent allowable upon the employee's request. Any time off in lieu placed in employee's banks as per this agreement must be used as such to have the amounts down to no more than 120 hours by March 31, 2010. Any amounts over 120 will be paid out at that time in accordance with article 11.6 of the Collective Agreement.

4. For greater clarity the Employer and the Union acknowledge that those individuals that fall within paragraphs 2(b) and 2(c) are not eligible for the time off in lieu option but are eligible for cash compensation based on time worked in the relevant timeframe outlined in paragraph 1. The employer will provide the Union with a list of the individuals who fall within paragraphs 2(b) and 2(c) and the Union with the employer's

> *assistance will use all reasonable efforts to notify such individuals of the settlement and such individuals will then have one year from the date the list is provided by the employer to the union within which to claim their entitlement. Any entitlements not claimed within the said one year period shall be deemed to have lapsed.*
>
> 5. *For those individuals who fall within paragraph 2(a) the employer will undertake to expedite the identification and calculation of their entitlement as soon as possible and inform each individual so they may make a timely choice as to whether they prefer pay or time off in lieu as a settlement of their claim.*
>
> 6. *It is understood by both parties that this settlement is subject to their respective ratification processes and that further, once ratified this settlement resolves all outstanding grievances cited in the Pelton award and those subsequent related grievances listed in the aforementioned Appendix A.*
>
> *Dated at Regina, Saskatchewan effective the 16 day of April, 2009.*

[27] Upon hearing the quantum of compensation to be paid to affected members, both Mr. Kasper and Mr. Olbrich objected, wanting to know what say they would have in the acceptance of the tentative global settlement. Under the global settlement, the maximum compensation would be $3,300 or 112 hours of time in lieu. Both Mr. Olbrich and Mr. Kasper believed this quantum of compensation to be wholly inadequate and repeatedly expressed their concerns to the Union. Furthermore, both Mr. Kasper and Mr. Olbrich believed they had the right, as the lead grievors in their respective grievances, to "sign off" on any settlement of their grievances. The documentary evidence indicates that in early 2009 the Union responded to both Mr. Kasper and Mr. Olbrich (and to other concerned members) explaining the Union's position. In doing so, the Union indicated its intention to hold a ratification vote with affected members. The Union prepared a package of information for affected members, including a copy of the memorandum of settlement with the Employer, a ballot, and an explanation of the voting procedure. The Union decided to utilize a mail-in ballot procedure and distributed packages to affected members on or about April 29, 2009. The Union explained the global settlement and voting process to affected member as follows:

> *April 29, 2009*
>
> *Dear Provincial Adult Corrections Employees:*
>
> ***Re: Memorandum of Agreement re: Rest Breaks***
>
> *As you are no doubt aware the Employer Representatives and Representatives of the Provincial Corrections Committee recently completed negotiations to settle*

> *the outstanding monetary considerations as a result of the two awards by Robert Pelton dealing with rest breaks in adult corrections. The first dated January 16, 2006, and the second dated November 18, 2008.*
>
> ***The Memorandum of Agreement (MOA) is enclosed and I encourage you to read it carefully.***
>
> *Ratification of the Rest Break MOA will result in closure of thirty seven (37) grievances respecting rest breaks filed across the province on behalf of adult corrections employees.*
>
> ***Please ensure you carefully read the enclosed instructions respecting mail in voting procedures and follow them exactly.***
>
> ***Your ballot must be in the Regina SGEU office before May 19, 2009.***
>
> *If you have any questions respecting the MOA or mail in balloting procedure please contact one of the following PCC representatives who attended the negotiations.*
>
> *1. Ernie Brossart at the Saskatoon Correctional Centre*
> *2. Cathy Suchorab at the Pine Grove Correctional Centre*
> *3. Curtis Jerome at the Regina Correctional Centre*
> *4. Victor Timm at the Prince Albert Correctional Centre*
> *5. Hank Lashta Chair LIR Component*
>
> *In solidarity,*
>
> *Hank Lashta*
> *Chair of LIR Component*

[28] The documentary evidence indicates that 902 members were eligible to vote. However, only 437 ballots were returned from affected members. The returned ballots were counted by the Union on May 20, 2009. Of the 437 affected members, 380 voted in favour of the global settlement package (i.e. approximately 87%) and 55 members voted against (i.e. approximately 13%). Based on this result, the Union considered the Memorandum of Settlement to be ratified and advised the Employer to begin processing payments to affected workers.

[29] Mr. Kasper testified that he did not receive his vote package from the Union and, thus, was unable to participate in the vote of affected members. Mr. Kasper testified that he did not hear about the voting process until after it was concluded, at which point (i.e. May 22, 2009), he contacted the Union and expressed his concern about the "processes" utilized by the Union. The Union investigated and responded that Mr. Kasper's ballot and information package had been mailed to the Regina Correctional Centre. This was an error as Mr. Kasper no longer worked at that facility. At that point in time, Mr. Kasper was working for the Saskatchewan Apprenticeship and Trade Certification Commission. Although Mr. Kasper continued to be an

employee of the Employer and a member of the Union, he was no longer working at the Regina Correctional Centre, where his ballot and information package was mailed.

[30] Although Mr. Olbrich received his ballot and participated in the vote process, he testified as to similar concerns regarding the process utilized by the Union, particularly so after learning that only 437 of the affected members (i.e. 48%) returned their ballots and participated in the vote. Both Mr. Kasper and Mr. Olbrich expressed their concerns to the Union following the vote in May of 2009 by way of various emails.

[31] The Union's response to these concerns is summarized in two (2) emails directed to both Mr. Kasper and Mr. Olbrich on May 22, 2009:

> *Hello Darrell*
> *Those eligible to vote were the staff who were on employed in adult CPSP on and before 31 Dec 2005 and were still employees of Executive Government on 30 Apr 2009. The mailing list was a cross reference of, a list provided by SGEU records, a list provided by the PSC and the various center lists in possession of the Chief Stewards who checked each center. Out of these lists a master list was developed and the mail out generated.*
>
> *Please advise any staff who believes they are affected that whether they voted or not will not affect their eligibility for the award. The employer has been advised to begin processing payouts and they should be in touch with staff to advise them respecting their entitlement in the near future. There was no intention to miss anybody.*
> *H. Lashta*
>
> *. . .*
>
> *Hello Darrell*
> *My previous e-mail explains how the mailing list was developed. We attempted to make the lists as inclusive as possible however there may have been some who were missed, their ballots mailed to old addresses, mis delivered by the mail, or as in Franks case the address was the Jail. Please rest assured there was no malice in developing the mailing lists. Also please be advised that whether someone voted or not does not preclude them from eligibility for the payout. The MOA requires the employer to contact and make payment to the affected employees in SPSP Adult Corrections as soon as possible. In addition the MOA requires the employer to send us (the Union) a list of all those who are no longer working in CPSP Adult Corrections at which point we (the Union) will have one year from the time we receive the list to contact them to make a claim Please see attached MOA. I expect Curtis will be looking for people to assist in contacting those no longer in CPSP Adult Corrections if you are interested please contact him.*
> *H. Lashta*

[32] Apparently unsatisfied with Mr. Lashta's response, Mr. Kasper contacted Mr. Bob Bymoen, the President of the Union, and asked him to have the Union rethink their decision to include the Prism Industries grievance in the global settlement of all rest break grievances. Mr. Bymoen reply to Mr. Kasper's request with an email dated June 5, 2009, denying Mr. Kasper's request and indicating that the Union was unwilling to reconsider its decision to include the Prism Industries grievance in the global settlement agreement.

[33] As indicated, Mr. Kasper filed his application with this Board on June 12, 2009 alleging the Union failed to represent him fairly. Mr. Olbrich filed his application with the Board on June 25, 2009. Both Mr. Kasper and Mr. Olbrich testified that, as of the date of the hearing, they had not asked for, nor accepted, their respective payments under the global settlement agreement with the Employer.

[34] Mr. Kasper testified that his primary objection to the global settlement was the quantum of the compensation he was to receive. In Mr. Kasper's opinion, the amount he was eligible for under the global settlement agreement was an "*insult*". Mr. Kasper calculated that he worked approximately 213 shifts per year and, assuming that he missed all of his rest breaks each year, he would have been entitled to compensation for 106 hours each year he worked. Mr. Kasper testified that he worked for sixteen (16) years under essentially the same circumstances with respect to the availability of rest breaks and thus calculated that he was entitled to compensation for 1704 hours or approximately $50,000 (based on an hourly wage of $29.44).

[35] In cross-examination by counsel for the Union, Mr. Kasper admitted that, although he was the lead grievor in the Prism Industries grievance, that grievance was intended to include other employees (approximately fourteen (14) Shop Supervisors). In addition, Mr. Kasper admitted that, because of the nature of the work he performed for Prism Industries, he was entitled, from time to time, to leave work early (i.e. half an hour early). Mr. Kasper testified that, when he did so, he was performing work-related duties most of the time but admitted that sometimes he left early for personal reasons. Mr. Kasper also admitted that, while he was an employee of Prism Industries, he also owned a private business through which he repaired cars and sold lubricants. Mr. Kasper admitted that, from time to time, he made personal phone calls and performed certain tasks related to his private business while he was working but clarified that he only did so before and after work and during his rest breaks. Mr. Kasper also admitted

that there were times when he (and other Shop Supervisors) did not have supervisory responsibilities for inmates during a shift, such as during a facility lock-up or when prisons were locked-down.

[36] In cross-examination by counsel for the Employer, Mr. Kasper admitted that his grievance had only been successful in part, in that his grievance had also alleged (unsuccessfully) that compensation for missed rest breaks should be paid at a premium rate (i.e. overtime rate). Mr. Kasper admitted that, in preparing his application to this Board and in calculating the compensation to which he believed he was entitled, he had erroneously assumed that Arbitrator Pelton had awarded compensation at a premium rate. Mr. Kasper also admitted that, although he assumed that he had missed all of his rest breaks for sixteen (16) years in calculating the compensation to which he alleged he was entitled, he had, in fact, received some of his rest breaks; and had made personal phone calls from work and completed other tasks of a personal nature while at work (i.e. on rest breaks). Furthermore, Mr. Kasper also admitted that during his period, management had raised concern with Shop Supervisors regarding hours of work and employees not working the full duration of their shift. Mr. Kasper admitted that it would be a lot of work to determine which rest breaks were missed and which rest breaks were provided and that the Employer was disputing the number of rest breaks that employees alleged were missed. Finally, Mr. Kasper testified that he was not asserting that any of the other employees identified as affected members in the global settlement agreement did not miss rest breaks to which they were entitled.

[37] In cross-examination by counsel for the Union, Mr. Olbrich also admitted that, although he was the lead grievor in the Olbrich grievance, that grievance was intended to include other employees in his unit (approximately 36 Correction Workers). Mr. Olbrich made a similar calculation with respect to the amount of compensation to which he believed he was entitled. Mr. Olbrich testified that he worked both day and night shifts as a Correction Worker; but that only the day shift was in contention (as rest breaks were provided on the night shift). Mr. Olbrich calculated that he worked approximately 112 day shifts per year and, assuming that he missed all of his rest breaks on these shifts, Mr. Olbrich calculated that he was entitled to compensation for 56 hours per year. Mr. Olbrich testified that he was unable to take rest breaks for seventeen (17) of the twenty-three (23) years that he worked as a Correction Worker (i.e. from 1988 to 1995). As a consequence, Mr. Olbrich calculated that he was entitled to compensation for 952 hours or approximately $25,723 (based on an hourly wage of $27.02).

[38] In cross-examination by counsel for the Union, Mr. Olbrich admitted that the ability of Correction Workers to take rest breaks on their shifts varied depending upon who was supervising their shift. For example, Mr. Olbrich testified that one (1) supervisor did the utmost to ensure staff received their rest breaks, one (1) supervisor tried but was less successful and one (1) supervisor didn't try at all to ensure that staff received their rest break. In cross-examination, Mr. Olbrich adopted the estimate provided by a correction worker in the hearing before Arbitrator Pelton that, after 1995, most Correction Workers in the unit within which he worked received approximately one third (1/3) of their rest breaks[21]. In addition, Mr. Olbrich admitted that he was a cigarette smoker and that Correction Workers who smoked after 1995 and until 2000 (when smoking was abolished at the facility) had to go to assigned areas to smoke. Mr. Olbrich testified that during this period, when a staff wanted to go for a cigarette, they would tell their team leader, who would come over and help supervise the inmates while they had a smoke break. During this period, Mr. Olbrich testified that approximately one half (1/2) of the staff smoked.

[39] In addition, Mr. Olbrich admitted that staff on his unit were sometimes permitted to take their coffee breaks when the facility was subject to a security lock-down. In addition, Mr. Olbrich admitted that he was disciplined by management on more than one (1) occasion for engaging in non-work related activity (playing cards) during work hours. Mr. Olbrich admitted that playing cards was a common practice during lunch hours and rest breaks, especially on the night shift.

[40] In cross-examination, Mr. Olbrich admitted that any calculation of missed rest breaks to which he was entitled would have to be discounted for the rest breaks which he actually received, which ranged from one third (1/3) to one half (½) plus the smoke breaks which he took during the period 1995 to 2000, plus card games that were played during work hours. Mr. Olbrich also acknowledged that if the Union returned to Arbitrator Pelton seeking a determination as to the quantum of compensation to which he (and other affected members) were entitled, the burden of proving which rest breaks were missed would be on the Union.

[41] Finally, Mr. Olbrich admitted that a major component of his concern that the Olbrich grievance should have been kept separate from the other grievances was based on his

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[21] See: Page 18 of Arbitrator Pelton's Preliminary Award.

belief that other grievors (i.e. other units of Correction Workers) routinely received more rest breaks than he did; some whom Mr. Olbrich believed received the vast majority or even all of their rest breaks and thus should not have been entitled to compensation. In response to questioning by counsel for the Union, Mr. Olbrich named several individuals whom he believed received their rest breaks but were, nonetheless, eligible under the global settlement agreement.

[42] In cross-examination by counsel for the Employer, Mr. Olbrich acknowledged that the Union had successfully negotiated for a high hourly rate (i.e. $27.00 to $29.00 per hour) in calculating the compensation for affected members. Mr. Olbrich admitted that his hourly wage would not have achieved this level until approximately 2001 and that it would have been significantly lower than that when he started working.

[43] At the close of the Applicant's respective cases, the Board had heard two (2) days of testimony and received Exhibits A-1 to A-13 from Mr. Kasper, Exhibits B-1 to B-6 from Mr. Olbrich, and Exhibits R-1 to R-25 were tendered by the Union.

Argument of the Parties:

[44] Mr. Kasper argued that the Union failed to fairly represent him in a number of respects. Firstly, Mr, Kasper argued that the Union erred in combining "his" grievance (i.e. the Prism Industries grievance) with other grievances without his consent. Mr. Kasper took the view that, while trade unions normally have control over grievances, once the Union decided to take his grievance to arbitration, they lost control; that he became a "party"; that it became "his" grievance and, as such, he had the right to be personally involved in any decisions (after the arbitrator's award) involving the settlement of his grievance.

[45] Secondly, Mr. Kasper argued that the Prism Industries grievance was qualitatively different from the other grievances and, thus, should have been kept separate. Mr. Kasper took the view that his grievance had been successful before Arbitrator Pelton; that he knew how many rest breaks he had missed; that, in his opinion, he was entitled to more compensation (substantially more) than he was slated to receive under the global settlement agreement; and that the Union was merely dividing his award (i.e. the large monetary compensation to which he was entitled) among other members of the Union resulting in a smaller award for him. To which end, Mr. Kasper argued that, if the Union had returned his grievance to Arbitrator Pelton, he would have received considerably more compensation than he received under the global

settlement. Mr. Kasper asked the Board to compare the amount he thought he should receive (i.e. $50,000) to the maximum compensation available under the global settlement (i.e. $3,300). Mr. Kasper noted that Arbitrator Pelton had ruled that he (and other grievors) were entitled to compensation dating back to the date of first infraction but that the Union had abandoned any claim to compensation for any period prior to January 1, 1996. In conclusion, Mr. Kasper argued that the compensation he was to receive under the global settlement agreement was an insult.

[46] Finally, Mr. Kasper alleged that the Union failed to send ballot packages to affected members, such as himself, who had been part of the original grievances before Arbitrator Pelton. Mr. Kasper speculated that the reason 465 affected members did not return their ballot packages was because they did not receive them in the first place. Furthermore, Mr. Kasper argued that the Union did not have a quorum in their ratification vote of the global settlement agreement and thus the result was invalid as an illegal vote.

[47] Mr. Kasper took the position that the Union's conduct toward his grievance was indicative of discrimination, bad faith, or at least, arbitrariness on the part of the Union.

[48] As did Mr. Kasper, Mr. Olbrich argued that the Union should have settled his grievance separately and/or returned to Arbitrator Pelton for a remedy hearing prior to dealing with the other grievances. Mr. Olbrich argued that Arbitrator Pelton's November 18, 2008 award clarified that he only had jurisdiction over the original five (5) grievances and thus the Union should have dealt with those grievances first. Mr. Olbrich took the position that, if the Union had settled this grievance first, his share of the compensation would have been greater. Mr. Olbrich argued that, because of how his unit was run, the evidence related to his grievance would have been easier to provide and the Union would not have needed to abandon the period prior to 1996. Mr. Olbrich argued that the language of Arbitrator Pelton's awards was clear; that affected members were entitled to compensation back to the date of first infraction, which Mr. Olbrich asserted was 1988 for him. Thus, Mr. Olbrich argued the Union abandoned seven (7) years of additional compensation to which he was entitled in favour of providing compensation to a much broader group of members.

[49] Finally, Mr. Olbrich argued that the evidence established that the voting procedure used by the Union to ratify the global settlement agreement was flawed because at least some of the people did not get their ballot packages and the majority of people did not participate in the

voting process. As did Mr. Kasper, Mr. Olbrich argued that the Union's decision to expand the group of eligible members had the effect of diluting the capacity of the original grievors to object (vote down) the global settlement agreement. To which end, Mr. Olbrich argued that the Union disregarded the interests of the smaller group of grievors (of which he was a member) in favour of a larger group of grievors (of which members of the executive of the Union were members).

[50] For these reasons, Mr. Olbrich argued the Union's conduct was capricious, indicative of bad faith and/or grossly negligent.

[51] By way of remedy, Mr. Kasper and Mr. Olbrich were both seeking monetary compensation from the Union.

[52] In its application for non-suit, the Employer asked this Board to dismiss the applications of both Mr. Kasper and Mr. Olbrich on the basis that the evidence tendered by the Applicants was insufficient to demonstrate a *prima* facie case of a violation of s. 25.1 of the *Act*. The Employer argued that very narrow and specific circumstances were required to sustain a violation of s. 25.1; circumstances that the Employer argued were simply not present in the evidence tendered by the Applicants. The Employer relied on the decision of the Ontario Superior Court in the case of *Blasdell v. Ontario Labour Relations Board*, 2006 CanLII 2777 (On S.C.D.C.) for the proposition that the mere fact a large number of members vocally disapprove of the steps taken by a trade union is not evidence of bad faith on the part of that union (i.e. either unfairness or arbitrariness).

[53] In addition, the Employer relied upon the decision of this Board in *Murray Hildebaugh v. Saskatchewan Government and General Employees' Union*, [2003] Sask. L.R.B.R. 272, 2003 CanLII 62874, LRB File No. 097-02 for the proposition that trade unions owe a duty to both the bargaining unit as a whole and to the individuals in grievances; that these two (2) duties are often in conflict; and that trade unions must balance collective and individual interests in deciding how best to conduct grievance proceedings, including settlements thereof. The Employer argued that the evidence established no arbitrary or capricious conduct on the part of the Union. Rather, the Employer argued the evidence established that the Union listened to the concerns of both Mr. Kasper and Mr. Olbrich but merely came to a different conclusion as to the best strategy for dealing with the rest break issue; a strategy which the Employer argued

had been successful used by the Union to negotiate a substantial settlement for affected members.

[54] The Employer argued that, contrary to the assertions of the Applicants, Arbitrator Pelton had encouraged the Employer and the Union to negotiate the compensation to which affected correction workers were entitled and that is exactly what they did. The mere fact that the Applicants did not get what they wanted (or what they thought they were entitled to) is not indicative of either bad faith or arbitrariness on the part of the Union. To which end, the Employer argued that speculation of the Applicants that they could have received more compensation had their respective grievances had been returned to Arbitrator Pelton was just that; speculation. The Employer pointed to the Applicant's own evidence which indicated that they expressed their concerns to the Union and the Union listened; that the Union investigated; and that the Union had responded, explaining why they had adopted the strategy they did.

[55] The Employer took the position that the Applicants had failed (both individually and collectively) to establish a *prima facie* case of a violation of s. 25.1 of the *Act* and, therefore, ask the Board to dismiss both applications.

[56] The Union argued in support of the Employer's non-suit application and did so for essentially the same reasons as advanced by the Employer. In addition, the Union cautioned the Board that the Applicants' "allegations" and "speculations" ought not to be treated by the Board as evidence. The Union argued that the evidence that had been tendered by the Applicants was not sufficient to sustain a violation of s. 25.1 of the *Act* and thus, it would be an offence to the principles of natural justice to compel the Union to continue responding to the Applicants' allegations and speculations in the absence of a *prima facie* case.

Relevant statutory provisions:

[57] Section 25.1 of *The Trade Union Act* provides as follows:

> *Every employee has the right to be fairly represented in grievance or rights arbitration proceedings under a collective 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:

[58] To survive the Employer's non-suit application, the Applicants' evidence must establish a *prima facie* case of a violation of the nature alleged in their respective applications. While the evidentiary burden on the Applicants would normally be the balance of probabilities, at this state in the proceedings, they need only satisfy this Board with a *prima facie* case. See: *Mitchell's Gourmet Foods Inc*, *supra*. In other words, in the present case, the Employer's non-suit application can not succeed if there is some evidence upon which the Board could reasonably infer or conclude that the Union's conduct was arbitrary, discriminatory or indicative of bad faith within the meaning ascribed to those terms by this Board.

[59] At this stage in the proceedings, the Applicants' evidence is uncontradicted, save for evidence adduced in cross-examination. In addition, at this stage in the proceedings, the Board does not decide whether the Applicants' evidence should be accepted by the Board or how much weight should be given to their evidence but rather, whether the evidence received by the Board up to this point in the proceedings (if accepted by the Board) could reasonably lead to the inference and/or conclusions suggested by the Applicants; namely that the Union failed to fairly represent the Applicants in relation to their respective grievances.

[60] Before analyzing the Applicants' evidence, it is appropriate for the Board to review its general approach to applications alleging a violation of s. 25.1 of the *Act*, which was well summarized in *Laurence Berry v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep. 65, LRB File No. 134-93, at paras. 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.*

[61] In addition, in *Lorraine Prebushewski v. Canadian Union of Public Employees, Local* 4777, 2010 CanLII 20515, LRB File No. 108-09, the Board, after setting forth the general approach as described in *Laurence Berry, supra*, made the following observations at paras. 55 to 60 that seem relevant to the current applications:

[55] The obvious corollary of the above captioned description of the duty of fair representation was articulated by this Board in Kathy Chabot v. Canadian Union of Public Employees, Local 4777, supra; that being, that very narrow and specific behaviour/conduct on the part of a trade union is required to sustain a violation of the statute. A common misconception is that this Board is a governmental agency established to generally hear complaints about trade unions. However, from a plain reading of s.25.1 of the Act, it is apparent that this Board does not sit in general appeal of each and every decision made by a trade union in the representation of its membership. To sustain a violation of s. 25.1, the Board must be satisfied that a trade union has acted in a manner that is "arbitrary" or that is "discriminatory or that it acted in "bad faith". These terms are not mere chalices into which applicants may pour their criticisms of their trade union for presentation to the Board. These terms have specific meanings that define the threshold in the exercise of this Board's supervisory authority. For example, the Board has no jurisdiction to sustain a violation on the basis that a trade union could have provided better representation for a member or on the basis that a trade union did not do what the member wanted. Similarly, the Board does not have jurisdiction to sustain a complaint from a member that he/she received poor service and/or was treated rudely or that there were delays in receiving phone calls or correspondence. While such allegations may be relevant to the Board's understanding of the circumstances of an alleged violation of s.25.1, the Board supervisory responsibility is focused on determining whether or not the impugned conduct of a trade union has achieved any of the thresholds of arbitrariness or discrimination or bad faith. The theory being that conduct not achieving one of these thresholds is more appropriately a matter for that trade union's internal complaint processes and/or for consideration by the membership during the election of their leadership.

[56] For example, this Board has held that there is no breach of the duty of fair representation where a trade union declines to file or withdraws a grievance, if it took a reasonable view of the circumstances and if it made a "thoughtful decision" not to advance the grievance. See: I.R. v. Canadian Union of Public Employees, Local 1975-01, et al., [2006] Sask. L.R.B.R. 344, LRB File No. 139-03; and Dave Leblanc v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 555, et al., [2007] Sask. L.R.B.R. 648, LRB File No. 028-07.

[57] Similarly, this 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: Randy Gibson v. Communications, Energy and Paperworkers Union of Canada, Local 650, [2002] Sask. L.R.B.R. 574, LRB File No. 089-02. Similarly (and as already indicated), this Board has 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 trade union's conclusion as to the likelihood of success of a grievance was correct or minutely assess each and every decision made by a trade union in representing its members. See: Kathy Chabot v. Canadian Union of Public Employees, Local 4777, supra.

[58] This Board has acknowledged that many factors are taken into consideration by a trade union in deciding whether or not to advance a grievance, one of which is the likelihood of obtaining a favourable outcome for the grievor. But there are other factors that may also legitimately influence a trade union's decision, the most obvious being the cost of proceeding to arbitration. By way of further example, this Board has held that it is not

> *inappropriate for a trade union to consider the injury to its credibility and relationship with an employer by advancing a questionable grievance. See: Edward Datchko v. Deer Park Employees' Association, [2006] Sask. L.R.B.R. 354, LRB File Nos. 262-03 & 263-03.*
>
> *[59] The exclusive right to represent a unit of employees brings with it many responsibilities for a trade union. In representing a member in grievance proceedings, a trade union may be required to make a number of difficult decisions, including how best to investigate the circumstances of a dispute between a member and his/her employer, assessing the relative strength or merits of a potential grievance; determining whether or not to advance a desired grievance and, if so, deciding how best to present and prosecute the case on behalf of the grievor. In doing so, the trade union must take into account both the interests and needs of the individual member(s) directly affected by the grievance and the collective interests of the remaining members of the bargaining unit, including how best to allocate the trade union's scarce resources.*
>
> *[60] The cases are legion that demonstrate the point that this Board's supervisory responsibility pursuant to s. 25.1 is not to ensure that any particular member achieves his/her desired result; but rather the purpose of this provision is to ensure that, in exercising their representative duty, a trade union does not act in an arbitrary or discriminatory fashion or in bad faith.*

[62] In the Board's opinion, the evidence tendered by the Applicants does not reasonably lead the inference or conclusions that either Mr. Kasper or Mr. Olbrich suggest; that being that the Union acted in an arbitrary or discriminatory manor or exercised bad faith in representing them in their respective grievance proceedings. As this Board has previously stated, very specific and narrow conduct is necessary to sustain a violation of s. 25.1; conduct which, in our opinion, was not apparent by the close of the Applicants' cases. In the Board's opinion, the Applicants' evidence does not reasonably lead to the conclusion that a violation of s. 25.1 of the *Act* had occurred and, thus, the Applicants failed to establish a *prima facie* case.

[63] Firstly, the assertion by the Applicants that they ought to have been "parties" to their grievances and, thus, have had the right to determine the outcomes of their respective grievances, is wrong in both law and logic. The fact the Union took the grievances to arbitration did not transfer any ownership or control of the grievance from the Union to the Applicants (nor did it transfer control to any of the other members of the Union affected by those grievances). While undoubtedly both Applicants had a vested financial interest in the outcome of their respective grievances, they were merely the lead grievors in two (2) group grievances that affected a number of other members; not just them. But even if these had been individual grievances, taking a grievance to arbitration does not transfer ownership or control of that grievance to the grievor. The grievor does not become a party to the proceedings by testifying

before an arbitrator. The grievances remain the property (for lack of better word) of the Union and the Union maintains carriage of those grievances. Simply put, it is the Union's responsibility to decide the proper disposition of grievances both before and after a decision is made to proceed to arbitration.

[64] Secondly, the Applicants asserted that the Union's decision to file additional grievances, and thus add additional grievors, undermined the strength of their respective cases or otherwise disadvantage them, personally, in the settlement that was received by means of the global settlement agreement. For example, both Mr. Kasper and Mr. Olbrich asserted that they could have received more compensation had their respective grievances been settled first or returned to Arbitrator Pelton with their individual grievances first. With all due respect to the Applicants, their assertions in this regard appeared to be based on a mis-reading of Arbitrator Pelton's awards.

[65] Although Arbitrator Pelton indicated that the grievors were entitled to claim for missed rest breaks dating back to the date of first infractions (i.e. there was no time limit on their capacity to claim for compensation), the onus of proving which rest breaks had been missed was on the respective grievors (or rather, on the Union on behalf of those grievors). The evidence indicated that the Employer was disputing that the affected members had not been able to take the majority of their breaks (in one form or another). While Arbitrator Pelton may have clarified that the Applicants were entitled to compensation, how much compensation they were entitled to was yet to be proven. Arbitrator Pelton acknowledged the evidentiary problem facing the Union and the efficacy of pursuing a global settlement agreement.

[66] While the Applicants both calculated large sums of compensation to which they believed they were entitled, these calculations were based on the assumption that they missed the vast majority of their coffee breaks. With all due respect, the evidentiary foundation for the Applicants' calculations quickly eroded in cross-examination. Mr. Kasper admitted to conducting personal affairs related to his private business at work <u>on his coffee breaks</u>; he admitted to occasionally leaving work early for personal reasons; and he admitted that, during the disputed period, management had expressed concerns about Shop Supervisors working less than their allotted hours. All of these admissions eroded Mr. Kasper's claim as to the number of coffee breaks which he missed. Mr. Olbrich admitted in cross-examination that his capacity to take rest breaks during the disputed period was largely dependent upon which supervisor was supervising

his shift. He admitted that, generally speaking, Correction Workers on the shift for which the dispute over rest breaks arose received approximately one/third (1/3) or more of their disputed rest breaks. However, Mr. Olbrich also admitted to receiving more breaks; including breaks associated with smoking (during the period 1995 – 2000) and playing cards. Finally, both Applicants admitted that correction workers had no supervisory responsibilities (thus satisfying the Pelton criteria for defining a rest break) when the facility was under lock-down or when the prisoners were locked-up and indicated that the facility was locked down and/or the prisoners were locked-up on a regular basis. While it is entirely possible that the Applicants missed a large number of their rest breaks, all of these various admissions are indicative the evidentiary difficulties the Union faced in proving which rest breaks were missed and which rest breaks were taken by the affected members (in one form or another).

[67] The Applicants testified that they know how many rest breaks they missed; but proving that before an arbitrator would be an entirely different matter; particularly so for coffee breaks that occurred (or rather didn't occur) up to twenty (20) years ago. The evidence indicated that the Employer kept no official records as to rest breaks taken. Certainly, the Applicants tendered no objectively verifiable evidence as to which rest breaks had been missed (or taken), save their own assertions, which (with all due respect) was easily eroded on cross-examination. Yet the burden of proving which rest breaks were missed would be on the Applicants (or rather on the Union on behalf of the Applicants) should the Union have returned to an arbitrator to determine the compensation to which they were entitled. Arbitrator Pelton identified the evidentiary burden facing the Union and clearly saw this as a limiting factor in the Union's capacity to seek compensation for affected members.

[68] Simply put, the evidence lead before this Board did not reasonably lead to the conclusion that the Union erred in filing additional grievances (i.e. adding additional grievors) and negotiating a global settlement agreement rather than proceeding back to arbitration with the Olbrich and Prism Industries grievances (assuming they were the best and clearest examples of missed coffee breaks).

[69] However, even if we were to conclude that the Union had erred in doing so (filing additional grievances and negotiating a global settlement agreement), this Board has previously stated that our role is not to second guess the myriad of decisions that must be made by a trade union in deciding how best to advance a grievance nor if or under what circumstances a

grievance should be settled or abandoned. As previously stated, this Board's supervisory responsibility is to ensure that, in making such decisions, a trade union does not act in a discriminatory or arbitrary manor or in bad faith. See: *Randy Gibson v. Communications, Energy and Paperworkers Union of Canada, Local 650,* [2002] Sask. L.R.B.R. 574, LRB File No. 089-02 and *Kathy Chabot v. Canadian Union of Public Employees, Local 4777*, [2007] Sask. L.R.B.R. 401, LRB File No. 158-06. In other words, the test for this Board in exercising our supervisory responsibility as set forth in s. 25.1 of the *Act* is not whether we believe the Union erred in representing the Applicants in their respective grievances proceedings but whether we are satisfied that the impugned conduct of the Union is sufficient to be indicative of discriminatory, arbitrariness or bad faith; which as this Board has previously indicated, is an entirely different question.

[70] A review the Applicants' evidence does not reasonably lead to the conclusion that the Union was discriminatory or took a perfunctory view of the Applicants' grievances or was grossly negligent or exercised bad faith in deciding not to return to an arbitrator or in the means by which their respective grievances were settled. While it is not the duty of this Board to assess the relative strength or weakness of a particular grievance, the evidentiary burden on the Union, together with the lack of objectively verifiable evidence to establish which coffee breaks were missed, would have represented a significant impediment to achieving the kind of large compensation to which Mr. Kasper and Mr. Olbrich claimed they were entitled. The Union's Mr. Lashta identified this concern to the Applicants early in his correspondence and explained the Union's strategy in pursuing a global settlement agreement with the Employer.

[71] By contrast the Board notes that, through the global settlement agreement, the Union was successful in obtaining compensation for the equivalent of four hundred and seventy-two (472) missed coffee breaks without the necessity of an evidentiary hearing. In addition, the Union was successful in negotiating compensation at a premium hourly rate; a rate in excess of the Applicants' respective wage rates for most of the compensable period.

[72] It is understandable that the Applicants were primarily concerned with their respective grievances. However, unlike the Union, the Applicants were not responsible for the interests of the thirteen (13) other Shop Supervisors affected by the Prism Industries grievance (none of whom were called by Mr. Kasper to testify); nor the thirty-five (35) other Correction Workers affected by the Olbrich grievance (none of whom were called by Mr. Olbrich to testify);

or the 862 other correction workers ultimately determined to be affected by the rest break issue. Their grievances may well have been, as the Applicants' suggested, the strongest and best cases the Union could have used as a precedent for the larger resolution of the rest break issue for the other grievors. However, for just these two (2) grievances, the Union faced the prospect of conducting evidentiary hearings for up to forty (40) different correction workers (each of whom would have had his/her own unique fact situation) to individually prove how many rest breaks they missed or were unable to take. Under these circumstances, the Union's decision to pursue a global settlement agreement with the Employer (and thus avoid the cost, delay and effort of multiple evidentiary hearings) certainly appears to fall well within the range of reasonableness.

[73] With all due respect to the concerns expressed by the Applicants, we were not reasonably drawn to the conclusion that the Union erred in pursuing a global settlement agreement as a means of resolving either the Olbrich or Prism Industries grievances. But more importantly in terms of exercising our supervisory responsibility under s. 25.1 of the *Act*, we were not reasonably drawn to the conclusion that the Union's decision not to negotiate the Olbrich and Prism Industries grievances separately was discriminatory, arbitrary or made in bad faith.

[74] In coming to this conclusion, the Board is mindful that both Mr. Kasper and Mr. Olbrich expressed their respective and common concerns to the Union and these concerns were answered; maybe not in the way the Applicants wanted; but they were answered. Simply put, the Union and the Applicants had different views as to the best strategy for resolving the rest break issue. The Union explained the strategy they intended to pursue and their reasons for doing so. Under the circumstances, it matters not to this Board if the Union was wrong in their decision (i.e. which strategy ought to have been adopted); only that the Union took a reasonable view of the circumstances, gave consideration to the competing interests before them, and made a thoughtful decision. See: *Gibson, supra,* and *Chabot, supra*.

[75] Thirdly, both Mr. Kasper and Mr. Olbrich appeared to hold the view that they were entitled to more compensation than other affected members under the global settlement agreement for a variety of reasons, including that they were "first in line" or that they were otherwise more deserving than other qualifying members. For example, Mr. Olbrich asserted that other members of the Union, who qualified under the global settlement agreement, should not have been eligible for compensation because they received most (or all) of their rest breaks and did so in support of his assertion that he should have received more compensation. Firstly,

the fact that their grievances were recognized first does not entitle them to a larger share of compensation. Secondly, the evidence as to who did, and who did not, receive their disputed coffee breaks was less than compelling. However, even assuming Mr. Olbrich was correct that other correction workers receiving most (even all) of their rest breaks, this is not evidence that the Union failed to fairly represent Mr. Olbrich in relation to his grievance. It is not axiomatic that the Applicants were entitled to receive more compensation because they were first or because other individuals, whom Mr. Olbrich deemed to be less deserving, also received compensation under the global settlement. The potential that the Union may have been able to negotiate an agreement with the Employer that provided too much compensation to some, doesn't automatically lead to the conclusion that global settlement agreement did not provide enough compensation for either Mr. Olbrich or Mr. Kasper. The test for this Board is not whether there were members who were less deserving than the Applicants; but rather, whether or not the means by which the Union resolved the Olbrich and Prism Industries grievances was so unreasonable that this Board could infer discrimination, arbitrariness or bad faith on the part of the Union. For all of the foregoing reasons, we are unable to reasonably make such an inference based on the evidence tendered thus far in the proceedings.

[76] With respect to the ratification vote, upon concluding a global settlement agreement with the Employer, the Union decided to put that agreement to the affected members by way of a ratification vote using a mail-in ballot procedure. The evidence established that there were 902 affected members and that the Union utilized an internal process to establish and vet the list of affected members. The documentary evidence establishes that the Union attempted to ensure that their information as to affected members and their mailing address was correct. Nonetheless, only 437 members returned their ballots and Mr. Kasper testified that he did not receive his ballot and asserted that other affected members (members whom Mr. Kasper asserted would have been sympathetic to his position) also did not receive their ballots. The Applicants asked the Board to draw the inference that the Union was either grossly negligent or willfully deceptive in conducting the vote based on these facts. In the alternative, the Applicants asked the Board to deem the vote to be fundamentally flawed because of a lack of quorum.

[77] With all due respect to the legitimate concern of Mr. Kasper that he did not receive his ballot and was thus unable to participate in the ratification vote, the evidence tendered by the Applicants was insufficient to establish a sufficient foundation for either gross negligence or inappropriate conduct on the part of the Union. There are many reasons why so

many affected members may have declined to participate in the ratification vote. Mr. Kasper testified that he seldom participated in ratification votes of the Union. Simply put, in the absence of evidence that more than one (1) person did not actually receive his/her ballot, the Board is unable to reasonably come to the conclusion suggested by the Applicants. Speculation is not evidence and, absent sufficient evidence, this Board can not reasonably infer the kind of misconduct suggested by the Applicants. With respect to the issue of quorum, the Board saw no evidence that the Union was required to achieve quorum in the conduct of a ratification vote of a grievance settlement. Absent evidence that the Union was required to achieve quorum, it is neither possible nor reasonable for this Board to conclude that the ratification vote was flawed for lack of quorum. For the foregoing reasons, the Applicants' evidence did not reasonably lead to the conclusion that the voting procedures utilized by the Union to ratify the global settlement agreement were indicative of discrimination, arbitrariness or bad faith.

[78] Having examined the evidence of the Applicants, including the numerous documents tendered thus far in the proceedings, the Board was not satisfied that the Applicants established a sufficient evidentiary foundation to sustain a violation of the *Act*. Simply put, having due regard to the evidence presented thus far in these proceedings, we are unable to draw the inferences or come to the conclusions suggested by the Applicants; namely, that the Union failed to fairly represent them in their respective grievance proceedings.

Conclusion:

[79] For the foregoing reasons, the Employer's application for non-suit is granted and the Applicants' applications are dismissed.

DATED at Regina, Saskatchewan, this **6th** day of **May, 2010.**

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson