The Labour Relations Board
Saskatchewan

BRENT SAUNDERS, Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1975, Respondent Union and THE UNIVERSITY OF SASKATCHEWAN, Respondent Employer

LRB File No. 095-10; December 8, 2010
Single Panel: Chairperson, Kenneth G. Love, Q.C.

The Applicant:	Self Represented
For the Respondent Union:	Crystal Norbeck
For the Respondent Employer:	David Stack and Tim Epp

Duty of fair representation – Scope of duty - Union fairly and adequately investigated circumstances and consulted with legal counsel before determining likelihood of success at arbitration – Arrived at informed and reasonable view with respect to success of grievance at arbitration – Union fulfilled duty of fair representation – Board dismisses application.

Duty of fair representation – Union determined not to proceed to arbitration with grievance – Prior to communicating this decision to Employer advised grievor of right to appeal decision to General Membership of Union – General Membership concurred in decision not to proceed to arbitration

Section 36.1 – Denial of Natural Justice – Board restates approach to allegations under s. 36.1 – Confirms that its supervision is restricted to disputes between union member and a union related to the union's constitution and the member's membership therein or discipline thereunder and the denial of natural justice – No evidence that membership or constitutional issues involved – Application dismissed.

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

REASONS FOR DECISION

Background:

[1] Brent A. Saunders (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based upon his assertion that the Canadian Union of Public Employees, Local 1975 (the "Union") had abandoned and withdrawn his selection grievance filed in respect of his application for a position within the Facilities Management Department of The University of Saskatchewan (the "Employer").

Facts:

[2] The Applicant's application to the Board relates to a grievance filed on his behalf by the Union with respect to his not having been the successful candidate in a competition on job posting 8462, being a job posting for a Service Mechanic Supervisor in the Facilities Management Department of the Employer (the "FMD"). The Application alleged a violation of both sections 25.1 and 36.1 by the Union in failing to properly represent the Applicant or in the application of the principles of natural justice in respect of disputes between an employee and his trade union related to matters in the constitution of the trade union or the employee's membership in the trade union.

[3] The Applicant was employed by the Employer as an electrician in the FMD. The Applicant applied for a job posting for a Service Mechanic Supervisor in the FMD. He was not the successful candidate for the position. The position was awarded to another employee of the FMD who had been hired more recently than the Applicant and therefore, had less seniority. The Applicant felt as the most senior, qualified applicant, he should have been awarded the position.

[4] He asked the Union to grieve the job completion. He testified that on his initial contact with the Union that they felt confident that his grievance would be successful. Minutes of a Grievance Committee meeting on March 26th, 2009, filed by the Union confirm this view. The Union agreed to pursue the grievance. The Minutes provide:

> *Brent's case has a reasonable chance of success at arbitration, as he more closely meets the posted requirements, and is senior to Dale.*

[5] The Union took the grievance to Stage 1 of the grievance procedure outlined in the collective agreement. The grievance was denied by the Employer. At its grievance committee meeting on April 21, 2009, the Union resolved to move the grievance forward to a Stage 2 hearing before proceeding to arbitration. The Minutes of the grievance committee meeting on May 8, 2009 note that the Union was still attempting to get a date for the Stage 2 hearing. No hearing date had been established when the committee again met on June 16, 2009.

[6] The grievance committee met again on August 18, 2009. The Minutes of that meeting note that a Stage 2 meeting had been scheduled for September 4, 2009. As at the

committee meeting on September 15, 2009, the Minutes note that the meeting for Stage 2 had been held as scheduled, but the committee was still awaiting a response from the Employer.

[7] The Minutes of the grievance committee of October 26, 2009 reveal that the response from the Employer in the Stage 2 procedure was "not in Brent's favour." The Minutes also note that the Chairperson of the grievance committee, Brad McKaig, spoke to the Applicant when the response from the Employer had been received and "told him we'd discuss his grievance at monthly grievance mtg, then get back to him." The Minutes also note that there should be no problem with the time lines in the collective agreement with respect to a reference of the grievance to arbitration as the Employer had been advised on March 27, 2009 of the Union's intention to refer the matter to arbitration, if necessary.

[8] It was following the Stage 2 meeting that the Union began to have concerns about the likelihood of success in arbitration proceedings. The Chairperson of the grievance committee approached the Applicant and advised him of their concerns, particularly that the Applicant had not, in the view of the Employer, demonstrated that he had the necessary qualifications for the position during the interview process for the position. Nevertheless, the Applicant advised Mr. McKaig that he wished to proceed to arbitration. He was advised that he could approach the general membership at a general membership meeting with respect to his grievance.

[9] The Applicant attended a general membership meeting on October 26, 2009 at which time his grievance was raised with the general membership. The membership voted to refer the grievance for a legal opinion. His file was then forwarded to the Union servicing representative to request a legal opinion be provided from the Union's in-house counsel.

[10] At the November 16, 2010 meeting of the grievance committee, the Minutes note that the grievance file was forwarded for a legal opinion. The Minutes go on to state "[I]f legal opinion is that his case is winnable, and we should proceed, then we will take it to arbitration."

[11] A legal opinion was obtained by the Union. The Minutes of the grievance committee meeting on May 19, 2010 disclose that the legal opinion put the probability of success at arbitration at 25%. The committee, with the abstention of Wayne Foley, a member of the

committee, the committee resolved "not to proceed to arbitration. Brent to be written a letter to inform him and to advise that he can appeal to the membership at June GMM."

[12] On May 21, 2010, the Union wrote to the Applicant advising that the grievance committee was recommending withdrawal of his grievance to the Local Executive Committee of the Union. He was advised by the Grievance Chairperson, Judy Classen:

> *If you do not agree wit [sic] the recommendation to withdraw, you may make an appeal in person at the Local membership meeting on* ***June 22, 2010 at 12:00 p.m. in room 101 Arts Building.*** *If you are not able to appear in person and still wish to make an appeal you may send me a written statement which will be communicated to the membership on your behalf. Please contact me no later than* ***June 14, 2010*** *to indicate if you wish to appeal to the membership.*

[13] The Applicant did appear at the General Membership Meeting held on June 22, 2010. At that meeting, the Local Union President, Glenn Ross, spoke against the Applicant's motion to proceed to arbitration. According to the Minutes of the meeting, he cited in his argument, responsibility to the membership insofar as the chances of success were limited in 25%. He suggested that if the arbitration were unsuccessful, that it would set a precedent which could be used against them in the future. Furthermore, he suggested that the cost of the proceedings could be $10,000 – $20,000. On a secret ballot vote, the membership voted against proceeding to arbitration with the grievance. The Union subsequently withdrew the grievance.

[14] The Applicant then filed this application. In his application and in his testimony, he maintained that the reason for bringing the application was based upon a statement made to him by Glen [sic] Ross, wherein he alleged that a co-worker had been advised by Mr. Ross to him that the Union had not properly represented him [i.e.: the Applicant]. The co-worker advised the Applicant about this conversation whereupon he contacted Mr. Ross to determine what exactly he meant. His application alleged that Mr. Ross suggested that only three (3) members of the Grievance Committee (of five (5) members that made up the committee) had made the decision not to proceed with the arbitration. He alleged that all five (5) members should have been present to make that decision.

[15] In his testimony, Mr. Ross explained that it was not unusual for there to be less than full attendance at grievance committee meetings since they were usually held at lunch time

and often committee members were unable to attend. He suggested that his comments regarding any propriety of the representation of the Applicant were related to not having obtained a legal opinion regarding the grievance earlier in the process which would have alleviated the necessity for the Applicant to have had to go to the membership to obtain a legal opinion.

[16] The Applicant also complained that he felt that Mr. Ross should not have spoken against his application to have the grievance proceed to arbitration at the General Membership Meeting. Further, he alleged that the executive were attempting to "stack" the meeting since there were usually fewer members in attendance at General Membership Meetings.

[17] Mr. Ross, in cross-examination denied any attempt to "stack" the meeting. He explained his opposition to having the matter go forward to arbitration was based solely upon the recommendation of Union legal counsel as to the probability of success. Had success been more likely, he testified that he would have supported the grievance going forward. He said that it would not have been a prudent use of the Union's funds to expend the monies necessary to go forward with a weak case that could have resulted in a bad precedent for the union.

Relevant statutory provision:

[18] 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.*
>
> *36.1(1) Every employee has a right to the application of the principles of natural justice in respect of all disputes between the employee and the trade union certified to represent his bargaining unit relating to matters in the constitution of the trade union and the employee's membership therein or discipline thereunder.*
>
> *(2) Every employee shall be given reasonable notice of union meetings at which he is entitled to attend.*
>
> *(3) No employee shall unreasonably be denied membership in a trade union.*

Analysis and Decision:

<u>Allegations under s. 25.1</u>

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

[20] 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 extensively reviewed in *Beatty v. Saskatchewan Government and General Employees Union*, [2006] Sask. L.R.B.R. 440, LRB File No. 086-04 at 464 through 473. It is unnecessary to repeat that review here.

[21] In the present case, the Applicant argues that the Union failed to properly represent him, insofar as the Union withdrew the grievance it had filed and refused to proceed to arbitration. His basis for his allegation that he was improperly represented flow from the conversation he had with his co-worker concerning the comments made by Mr. Ross.

[22] I accept the testimony of Mr. Ross as to the rationale behind his comment regarding representation of the Applicant. There was nothing in those comments to suggest any breach of s. 25.

[23] The evidence from the Union showed that the Union initially believed that the Applicant had a valid grievance as noted by the grievance committee in their Minutes. However, it became apparent to them after the Stage 2 meeting and decision that they may have overlooked some provisions of arbitral decisions which had been pointed out to them by the Employer. Nonetheless, on the Applicant's motion, they took legal advice on the likelihood of success, which opinion did not support the Applicant's case. On that basis they determined to abandon the grievance rather than spend money on a cause which did not look fruitful and which had the potential of creating a bad precedent for future grievances.

[24] The Union provided the opportunity to the Applicant to appeal the grievance committee decision to the general membership, which he did. There is nothing in the evidence provided which shows that there was any arbitrary, discriminatory or bad faith manifest in any of its decisions regarding the Applicant's grievance.

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

> *The Board does not sit in appeal of decisions made by unions, does not decide if a union's opinion of the likelihood of success of a grievance was*

> *correct and does not minutely assess and second guess every union action.*

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

[27] The Applicant failed to provide any evidence to the Board that the actions of the Union were arbitrary. In fact, the evidence from the Union showed that their decision was anything but arbitrary. They conducted an independent investigation, received legal advice from counsel and provided the Applicant the opportunity to appeal the decision of the Grievance Committee to the Union's General Membership.

[28] There was no evidence presented that the decision to withdraw the grievance was in any way marred by any discrimination against the Applicant. The Applicant also did not provide evidence of bad faith by the Union. The Union and the Employer came to the same conclusion based on its review of arbitration decisions. Also, the Union took legal advice which determined the likelihood of success of arbitrating the Applicant's grievance. The Board concludes that there is nothing in the Union's conduct which can be characterized as being done in bad faith.

Allegations under s. 36.1

[29] With respect to the Applicant's allegations that the Union violated s. 36.1 of the *Act*, the Board's approach to such allegations was summarized in *Nadine Schreiner v. Canadian Union of Public Employees, Local 59 and City of Saskatoon*,[1] as follows:

> *Section 36.1(1) of the Act confines the Board's supervision to disputes between union members and a union relating to matters in the union's constitution and the member's membership therein or discipline thereunder. The Board's supervision of those matters is further confined to determining whether the member has been afforded the right to the application of the principles of natural justice, as opposed to considering the merits or perceived correctness of the decision by the union. In McNairn, supra, the Saskatchewan Court of Appeal held that for the Board to assume jurisdiction pursuant to either s. 36.1 or s. 25.1 of the Act, the "essential character of the dispute" must fall within the subject matter of the provision. The Court stated as follows, at 370:*

[1] [2005] Sask. L.R.B.R. 523, LRB File No. 175-04

> *Thus sub-section 36.1(1) imposes a duty upon a union (again correlative to the right thereby conferred upon an employee), to abide by the principles of natural justice in disputes between the union and the employee involving the constitution of the trade union and the employee's membership therein or discipline thereunder. As such, the subsection embraces what may be characterized as "internal disputes" between a union and an employee belonging to the union, but it does not embrace all manner of internal dispute. For the subsection to apply, the dispute must encompass the constitution of the union and the employee's membership therein or discipline thereunder.*

[30] The Board saw no evidence that the Applicant's right to the application of the principles of natural justice within the meaning of s. 36.1 of the *Act* was violated by the Union. In the present case, the Board saw no evidence the Applicant was denied the application of his rights as set forth in the Constitution of the Union, or was denied membership therein or was disciplined thereunder. To the contrary, the Union advised the Applicant of his ability to appeal the decision to withdraw his grievance to the general members. The Applicant availed himself of this opportunity. The fact that the membership denied his appeal or that Mr. Ross spoke against his appeal, is not indicative of a breach of natural justice; but rather the membership's right to decide how best to allocate the Union's resources and advance the rights of its members by not creating a bad precedent. Nor does it invoke the provisions of s. 36.1 of the *Act*.

Conclusion:

[31] The application is therefore dismissed.

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

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson