The Labour Relations Board
Saskatchewan

PATRICK MILLER, Applicant v. AMALGAMATED TRANSIT UNION, LOCAL 615, Respondent

LRB File No. 139-09; June 24, 2010
Vice-Chairperson, Steven D. Schiefner, sitting alone.

The Applicant:	Mr. Patrick Miller
For the Respondent Union:	Mr. Greg Winkenweder

Duty of Fair Representation – Arbitrariness – Employee alleges trade union failed to fairly represent him in failing to file grievance related to the loss of an accommodation associated with particular type of bus – Management completed review of buses and concluded that it was mechanically similar to other buses in fleet and safe to operate – Union officials participated in review and agreed with findings and conclusion, including management's decision to cease providing blanket accommodations associated with this type of bus – Trade union declines to advance grievance on behalf of employees who lost accommodation - Board not satisfied that trade union's decision was arbitrary or otherwise in violation of *The Trade Union Act*.

The Trade Union Act, s. 25.1

REASONS FOR DECISION

Background:

[1] **Steven D. Schiefner, Vice-Chairperson:** The Amalgamated Transit Union, Local 615, (the "Union") represents a unit of employees working for the City of Saskatoon within that City's Transit Department. The bargaining unit including drivers, maintenance and dispatch staff and other ancillary personnel. The City of Saskatoon is the employer of these employees and the Union is their exclusive bargaining agent. Through its Transit Department, the City of Saskatoon provides public transportation services utilizing an extensive fleet of buses. The Applicant, Mr. Patrick Miller, was at all material times employed by the City of Saskatoon as a bus driver and thus a member of the unit of employees represented by the Union.

[2] The Applicant applied to the Saskatchewan Labour Relations Board (the "Board") on November 30, 2009 alleging that the Amalgamated Transit Union, Local 615 (the "Union") violated s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the *"Act*") in failing to fairly

represent him in respect of grievance proceedings or rather (and more accurately) for failing to commence grievance proceedings on his behalf.

[3] The Union denied that they failed to fairly represent the Applicant.

[4] The matter was heard on June 10, 2010 in Saskatoon, Saskatchewan by the Vice-Chairperson of the Board sitting alone pursuant to s. 4(2.2) of the *Act*. No Reply was filed by the City of Saskatoon and the employer did not participate in the hearing.

[5] The Applicant testified on his own behalf. The Union called Mr. Greg Winkenweder, the Union's President and Business Manager, and Mr. Tyson Materi, a member of the Union's Executive Board.

Facts:

[6] The Saskatoon Transit Department operates a fleet of approximately 140 buses and has approximately 400 employees, of which approximately 255 are full time drivers.

[7] The Applicant testified that he joined the Saskatoon Transit Department in December of 2006. Prior to joining the Transit Department, the Applicant had been a professional truck driver and he completed his training and probation without incident.

[8] In late 2007 or early 2008, the Applicant injured his back while driving and was off work for approximately two (2) months. The Applicant testified as to his belief that his injury was related to the type of bus that he was driving. Apparently, a few years earlier, the City of Saskatoon had purchased a number of new buses utilizing a new design. The buses were commonly referred to as "low floor" buses and had a number of benefits, including ease of embarking and disembarking for passengers, as the buses could "kneel" down. However, the Applicant also testified as to his belief that these buses had a rougher ride and he attributed that rougher ride to the new design of the buses.

[9] The parties (as appears to be common in the industry) referred to the various buses by their year of manufacture. The Applicant indicated that it was the "95" and "97" series of low floor buses that were in issue. He testified that it was one of these series of buses that he was driving when he originally injured his back and that it was these series of buses that he

believed had the most problem with their suspension and, thus, had the worst ride. In subsequent years, the manufacturer produced newer versions of the same low floor design that were more comfortable to drive. However, the Applicant took the position that low floor buses, by their design, generally have a poorer ride than a conventional bus; testifying that, in his experience, some old conventional buses had a better ride than newer low floor buses.

[10] The Applicant also testified as to his observation that, as the low floor buses aged, the suspension problems became progressively worse. While at the time of the Applicant's original injury, the new "low floor" buses were new, by the time of the hearing, these buses had been in service for many years. The Applicant testified as to his belief that many of the buses in these series (i.e. the 95 and 97 series of buses) had exceeded their serviceable life.

[11] Following his original back injury (in the fall of 2007 or early 2008), the Applicant's doctor provided him with a medical note indicating a recommendation that he no longer drive the 95 and 97 series of buses. Apparently, the Saskatoon Transit Department had an accommodation list containing information as to various "disabilities" or accommodation needs of their employees. These lists were used by the Saskatoon Transit Department in both the allocation of work and in the allocation of equipment (i.e. buses). With respect to the former, in a return to work situation, an injured bus driver might be assigned to work in the maintenance department as an accommodation if (for example) he/she was temporarily unable to drive. With respect to the latter, if an employer (as was the case for the Applicant) had a medical note indicating that he/she ought not operate a certain type of equipment, the equipment would be arranged in such a fashion to avoid that employee operating that type of equipment. For example, because the Applicant had a medical note indicating he should not drive the 95 and 97 series of buses, the equipment would be arranged in such a fashion that he was assigned another type of bus for his route.

[12] The Applicant testified that a number of employees had similar notes with similar accommodation restrictions (i.e. were not to drive the 95 or 97 series of low floor buses). The accommodation list was used to ensure that these employees were also not assigned the impugned equipment for their routes.

[13] While the accommodation list covered more than just restrictions related to the 95 and 97 series of buses, the number of employees on this list with restrictions related to the 95

and 97 series of buses was commonly known to be large and growing. Apparently, the number of people and/or the complexity of the accommodation restrictions grew over time such that in recent years it became more and more difficult to allocate equipment and/or to find drivers for the 95 and 97 series of buses. In addition, employees who were not on the accommodation list began to raise concerns that buses were not being fairly allocated. As a result, in the spring of 2009, management embarked upon a review of the ride comfort of the 95 and 97 series of buses. Management asked the Union to participate in that review.

[14] The goal of this review was to determine if there was a contributory relationship between the ride comfort of the impugned buses and the injuries being reported by employees. The study included a review of all maintenance records for these buses and the maintenance process, including preventative and other maintenance undertaken on these buses. Finally, the impugned buses were test driven to evaluate steering ability and driver seat suspension and to identify any problematic issues in their operation. The review concluded that the 95 and 97 series of buses were mechanically similar to the rest of the City's fleet of buses and safe to operate. The review noted that many of the original deficiencies identified with the 95 and 97 series of buses (including lack of power steering, poor seat design, etc.) had been upgraded, such that all of the City's fleet of buses had the same air ride seat, power steering, air ride suspension, and similar bus controls. However, the review did also note that some of the 95 and 97 series of buses required maintenance, while others required refurbishment.

[15] As indicated, Union representatives participated in the review and the findings were presented to a labour/management meeting in March of 2009. The review appeared to cast doubt on the contributory relationship between ride comfort of the impugned buses and the injuries being reported by employees. As a consequence, management asked the Union for its position on various options with respect to the drivers on the accommodation list with respect to the 95 and 97 buses. Three (3) options were discussed; continuing to accommodate operators who provide documentation that they are unable to drive these series of buses for medical reasons; cease providing accommodations related to these buses; or (the "middle ground") continuing to provide an accommodation to operators already on the list but declining to provide any more such accommodations. The Union's position on these options was that either management continue providing accommodations to all employees or collectively cease providing this accommodation but that the so called "middle ground" was not acceptable to the

Union. The Union's other response to this issue was to place pressure on management to refurbish all of its fleet of buses, including (and in particular) the 95 and 97 series of buses.

[16] On April 30, 2009, management met with the Executive of the Union and gave notice that, effective June 21, 2009, it would be no longer providing accommodations associated with the 95 or 97 series of buses (as it had in the past). In doing so, the City agreed to an enhanced plan to replace/refurbish its fleet of buses and, in the interim, encouraged its operators to fill out defect reports whenever specific problems with buses were identified. For any employees who continued to believe that a medical accommodation was required, the City intended to have its Disability Assistance Consultant contact that person's doctor to clarify the City's findings and to obtain updated medical information to determine how best to accommodate that person's medical needs. Simply put, the employer gave notice of its intention to cease providing blanket accommodations for operators with past documentation identifying restrictions associated with the 95 and 97 series of buses.

[17] On May 25, 2009, the Applicant was called to a meeting with management and advised that his previous accommodation related to the 95 and 97 series of buses would cease effective June 21, 2009. Management explained its rationale for doing so and provided the Applicant with a copy of the report summarizing its review of the buses.

[18] The Applicant testified that, after June 21, 2009, low floor buses were generally assigned on a random basis and no effort was made by management to avoid him operating the 95 or 97 series of buses. In theory, all operators had a similar chance of being assigned the 95 or 97 series of buses. However, low floor buses were not used on all routes and, as such, operators could avoid the impugned series of buses by selecting or bidding on routes that were more typically serviced with convention buses. On the other hand, if an operator was assigned a route that utilized low floor buses, that operator would be aware that he/she could be assigned a 95 or 97 series bus. The Applicant testified that in August of 2009 he was working on Route 11 (a designated low floor route) and that it seemed like he was continually being assigned either a 95 or a 97 bus (contrary to the theory of even rotation).

[19] In the fall of 2009, the Applicant suffered another back injury while driving one of the 95 or 97 series of buses and was off work for two (2) months. The Applicant testified that he asked his doctor for a note indicating that he could no longer operate the 95 or 97 series of

buses but that his doctor refused to do so. The Applicant was unaware whether or not his doctor had spoken to the City's Disability Assistance Consultant or whether any information that may have been provided by this person was a factor in the doctor's decision to not provide the Applicant with another note seeking to continue his previously medical restriction.

[20] In October of 2009, the Applicant attended a meeting of the membership of the Union and asked that a grievance be filed on his behalf regarding the loss of his accommodation associated with the 95 or 97 series of buses. The Union Executive said they would look into it. In November of 2009, the Applicant attended the next meeting of the membership of the Union and again asked that a grievance be filed on his behalf. The Applicant was advised at the latter meeting by Mr. Craig Dunlop, the Union's Vice-President, that the Union would not be filing a grievance on his behalf because the Union did not believe that it was a grievable matter. The Applicant was upset and left the meeting early. Dissatisfied with Mr. Dunlop's answer, the Applicant asked various members of the Union's Executive to file a grievance regarding the loss of his accommodation but no grievance was ever filed on his behalf.

[21] In cross-examination, the Applicant admitted that, although his injury occurred while driving on one of the impugned series of buses, back injuries can occur while driving any of the City's buses.

[22] Mr. Winkenweder testified that the Union was aware of the accommodation list and was also aware of management's concern about the fact that it was growing; that the number of people on the accommodation list was starting to become difficult for the City to manage; and that members of the Union (members not on the accommodation list) were starting to raise concerns about how low floor buses were being allocated. Mr. Winkenweder confirmed that the Union participated in the City's review of the impugned buses and that the Union agreed with the conclusions flowing from that review; namely that the 95 and 97 series of buses were mechanically similar to the City's other buses and were generally safe to drive. The Union's primary goal was to encourage management to refurbish/renew its buses at a faster pace, something which management agreed to following their review.

[23] The Union advised its members to "book" (to complete a Defect Report) on any buses that required maintenance. The Union also advised its members, who continued to have concerns about the 95 and 97 series of buses, to select routes that did not generally use low

floor buses. However, in cross-examination Mr. Winkenweder acknowledged that a member's success in obtaining a preferred selection (being able to avoid low floor buses) was largely dependent upon that member's relative seniority.

[24] Both Mr. Winkenweder and Mr. Materi confirmed that, by the time of the Union's November membership meeting, the Union's Executive Board had met and had discussed the potential of filing and advancing a grievance on behalf of members who lost their accommodation related to the 95 and 97 buses. In response to a question from the Board, Mr. Winkenweder indicated that the Union did not contact legal counsel prior to making the decision to not file or advance a grievance on behalf of the Applicant. Nor did the Union formally advise the Applicant in writing of the Union's decision regarding his desired grievance.

[25] Although no formal letter was provided to the Applicant, Mr. Winkenweder testified to his understanding that the Applicant had been informed by Mr. Dunlop during the November membership meeting that the Union would not be filing a grievance on his behalf because the Union did not believe that the loss of his accommodation was a grievable matter.

Argument of the Parties:

[26] The Applicant's argument was essentially two (2) pronged; firstly, the Applicant argued that he had a strong case for a successful grievance against the City; and secondly, that the Union closed their mind to the potential of his desired grievance because of their participation in management's review of the 95 and 97 series of buses.

[27] The Applicant argued that the City's basis for taking away his accommodation was "lacking". The Applicant took the position that the City of Saskatoon owed a duty to accommodate his injury in the manner they had in the past and that the City's decision to cease doing so was a violation of that duty. The Applicant questioned the procedures used by the individuals involved in completing the 2009 review of the 95 and 97 series of buses and their finding that these buses were "safe" to operate. He also questioned how his Employer could just disregard his previous medical note indicating that he should not drive the 95 and 97 series of buses. While the Applicant could not point to a provision in the collective agreement that the Employer had violated, he argued that management had clearly violated their duty to accommodate his medically documented restrictions. As a consequence, the Applicant took the

position that he had a strong case for a successful grievance and that the Union's conclusion that the loss of his accommodation was not a grievable matter was simply incorrect.

[28] To which end, the Applicant argued that the Union's decision to not advance his grievance was not thoughtfully made; that it was a perfunctory decision based on their reliance on management's review of the buses. The Applicant argued that it should have had independent examination of the impugned buses and that it was an error for the Union to rely on the City's investigations as to the safety of these buses. Furthermore, the Applicant pointed to poor record keeping on the part of the Union, including a lack of minutes of its Executive and membership meetings, as indications of serious neglect on the part of the Union in handling all grievances, including his.

[29] The Applicant argued that the Union failed to fairly represent him in failing to file and advance a grievance on his behalf related to the loss of his accommodation. The Applicant sought an Order of this Board directing the Union to file and prosecute his desired grievance.

[30] The Union denied that it failed to fairly represent the Applicant. The Union argued that they did turn their mind to the merit of advancing a grievance of the nature desired by the Applicant. However, the conclusion of the Union's Executive Board was that such a grievance would not be successful for a number of reasons. Firstly, the Union did not believe that the loss of the accommodation related to the 95 and 97 series buses was a grievable matter (i.e. did not involve a violation of the collective agreement). Secondly, the Union was satisfied that management's conclusion as to the safety of the 95 and 97 series of buses was correct. The Union agreed with management's findings that these buses were mechanical similar to the City's other buses and, with regular and appropriate maintenance, were safe to drive. Simply put, the Union agreed with management's decision to cease providing accommodations associated with the impugned buses, particularly in light of management's other decisions (i.e. to inspect and repair buses as soon as possible after a defect is reported and to begin replacing/refurbishing its buses on an enhanced basis).

[31] The Union argued that, while the loss of the accommodation may have been disappointing for the members affected, the City did what the Union asked when they agreed to replace/refurbish its fleet of buses on an enhanced basis, which would be beneficial for all members, including those on the accommodation list.

[32] The Union acknowledged that they may have been lacking in their communication with the Applicant, both in failing to formally advising the Applicant of the Union's decision and in not explaining their reasons better. However, the Union argued that their decision to not advance a grievance on behalf of the Applicant (or any other member of the Union who lost their accommodated related to the 95 or 97 series of buses) was reasonable and only occurred after a thoughtful look at the potential for obtaining a favourable outcome.

Relevant statutory provisions:

[33] Section 25.1 provides as follows:

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

Analysis and Decision:

[34] This Board's general approach to applications alleging a violation of s. 25.1 of the *Act* was well summarized in *Laurence Berry v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep 65, LRB File No. 134-93, at 71-72:

> *This Board has discussed on a number of occasions the obligation which rests on a trade union to represent fairly those employees for whom it enjoys exclusive status as a bargaining representative. As a general description of the elements of the duty, the Board has indicated that it can do no better than to quote the principles outlined by the Supreme Court of Canada in the case of Canadian Merchant Services Guild v. Gagnon, [1984] 84 CLLC 12,181:*
>
> > *The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*
> >
> > *1. The exclusive power conferred on a union to act as a spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
> >
> > *2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
> >
> > *3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*

> *4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*
>
> *5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employees.*

The terms "arbitrary," "discriminatory," and "in bad faith," which are used in the legislative description of the kind of conduct on the part of a trade union which is to be prevented, have been held to address slightly different aspects of the duty. The Supreme Court in Gagnon used the following comments from the decision of the British Columbia Labour Relations Board in Rayonier Canada (B.C.) Ltd. (1975), 2 CLRBR 196, at 201, to convey the distinct attributes of the duty of fair representation:

> *... The union must not be actuated by bad faith, in the sense of personal hostility, political revenge, or dishonesty. There can be no discrimination, treatment of particular employees unequally whether on account of such factors as race and sex (which are illegal under the Human Rights Code) or simple, personal favoritism. Finally, a union cannot act arbitrarily, disregarding the interests of one of the employees in a perfunctory manner. Instead, it must take a reasonable view of the problem before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations.*

This Board has also commented on the distinctive meanings of these three concepts. In Glynna Ward v. Saskatchewan Union of Nurses, LRB File No. 031-88, they were described in these terms:

> *Section 25.1 of The Trade Union Act obligated the union to act "in a manner that is not arbitrary, discriminatory, or in bad faith". The union's obligation to refrain from acting in bad faith means that it must act honestly and free from personal animosity towards the employee it represents. The requirement that it refrain from acting in a manner that is discriminatory means that it must not discriminate for or against particular employees based on factors such as race, sex or personal favoritism. The requirement that it avoid acting arbitrarily means that it must not act in a capricious or cursory manner or without reasonable care. In other words, the union must take a reasonable view of the problem and make a thoughtful decision about what to do.*

[35] The Applicant did not allege, and this Board saw no evidence of, discrimination on the part of the Union within the meaning accepted for that term by this Board. Also, the Applicant did not allege, and this Board saw no evidence of, bad faith on the part of the Union in the sense that it acted out of personal animosity or hostility toward the Applicant or based on political revenge or dishonesty.

[36] The whole of the Applicant's complaints centered around the issue of "arbitrariness", with the Applicant arguing that the Union's review of the situation were cursory or perfunctory and that the Union's decision to not advance a grievance on his behalf was seriously flawed. Simply put, the Applicant argued that the Union's decision related to his desired

grievance was made without reasonable care such that the Union conduct fell below the standard expected of them by this Board.

[37] In *Hargrave, et al. v. Canadian Union of Public Employees, Local 3833 and Prince Albert Health District*, [2003] Sask. L.R.B.R. 511, LRB File No. 223-02, the Board set out the principles applicable to an analysis of the duty of fair representation, with a particular focus on the definition of "arbitrariness" and the jurisprudence of labour boards in distinguishing "mere negligence" from the kind of conduct necessary to sustain a violation of s.25.1. The Board stated the following at pp. 34 to 38:

> *[34] There have been many pronouncements in the case law with respect to negligent action or omission by a trade union as it relates to the concept of arbitrariness in cases of alleged violation of the duty of fair representation. While most of the cases involve a refusal to accept or to progress a grievance after it is filed, in general, the cases establish that to constitute arbitrariness, mistakes, errors in judgment and "mere negligence" will not suffice, but rather, "gross negligence" is the benchmark. Examples in the jurisprudence of the Board include Chrispen, supra, where the Board found that the union's efforts "were undertaken with integrity and competence and without serious or major negligence. . . ." In Radke v. Canadian Paperworkers Union, Local 1120, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92, at 64 and 65, the Board stated:*
>
> > *What is expected of trade union officials in their representation of employees is that they will act honestly, conscientiously and without prejudgment or favouritism. Within the scope of these criteria, they may be guilty of honest errors or even some laxity in the pursuit of the interests of those they represent. In making decisions about how or whether to pursue certain issues on behalf of employees, they should certainly be alert to the significance for those employees of the interests which may be at stake.*
>
> *[35] Most recently, in Vandervort v. University of Saskatchewan Faculty Association and University of Saskatchewan, [2003] Sask. L.R.B.R. 147, LRB File Nos. 102-95 & 047-99, the Board stated, at 193:*
>
> > *[215] Arbitrariness is generally equated with perfunctory treatment and gross or major negligence. This standard arose from Canadian Merchant Service Guild v. Gagnon . . . .*
>
> *And further, at 194-95, as follows:*
>
> > *[219] In Rousseau v. International Brotherhood of Locomotive Engineers et al., 95 CLLC 220-064 at 143, 558-9, the Canada Labour Relations Board described the duty not to act in an arbitrary manner as follows:*
> >
> > > *Through various decisions, labour boards, including this one, have defined the term "arbitrary." Arbitrary conduct has been described as a failure to direct one's mind to the merits of the matter; or to inquire into*

> *or to act on available evidence; or to conduct any meaningful investigation to obtain the data to justify a decision. It has also been described as acting on the basis of irrelevant factors or principles; or displaying an indifferent and summary attitude. Superficial, cursory, implausible, flagrant, capricious, non-caring or perfunctory are all terms that have also been used to define arbitrary conduct. It is important to note that intention is not a necessary ingredient for an arbitrary characterization.*
>
> *Negligence is distinguishable from arbitrary, discriminatory or bad faith behaviour. The concept of negligence can range from simple negligence to gross negligence. The damage to the complainant in itself is not the test. Simple negligence may result in serious damage. Negligence in any of its variations is characterized by conduct or inaction due to inadvertence, thoughtlessness or inattention. Motivation is not a characteristic of negligence. Negligence does not require a particular subjective stage of mind as does a finding of bad faith. There comes a point, however, when mere/simple negligence becomes gross/serious negligence, and we must assess when this point, in all circumstances, is reached.*
>
> *When does negligence become "serious" or "gross"? Gross negligence may be viewed as so arbitrary that it reflects a complete disregard for the consequences. Although negligence is not explicitly defined in section 37 of the Code, this Board has commented on the concept of negligence in its various decisions. Whereas simple/mere negligence is not a violation of the Code, the duty of fair representation under section 37 has been expanded to include gross/serious negligence . . . The Supreme Court of Canada commented on and endorsed the Board's utilization of gross/serious negligence as a criteria in evaluating the union's duty under section 37 in Gagnon et al. [[1984] 1 S.C.R. 509]. The Supreme Court of Canada reconfirmed the utilization of serious negligence as an element to be considered in Centre Hospitalier Régina Ltée v. Labour Court, [1990] 1 S.C.R. 1330.*

[36] In North York General Hospital, [1982] OLRB Rep. Aug. 1190, the Ontario Labour Relations Board addressed the relation of negligence to arbitrariness as follows, at 1194:

> *A union is not required to be correct in every step it takes on behalf of an employee. Moreover, mere negligence on the part of a union official does not ordinarily constitute a breach of section 68. See Ford Motor Company of Canada Limited, [1973] OLRB Rep. Oct. 519; Walter Princesdomu and The Canadian Union of Public Employees, Local 1000, [1975] OLRB Rep. May 444. There comes a point, however, when "mere negligence" becomes "gross negligence" and when gross negligence reflects a complete disregard for critical consequences to an employee then that action may be viewed as arbitrary for the purposes of section 68 of the Act. In Princesdomu, supra, the Board said at pp 464-465:*
>
> > *Accordingly at least flagrant errors in processing grievances--errors consistent with a "not caring" attitude--must be inconsistent with the duty of fair representation. An approach to a grievance may be wrong or a provision inadvertently overlooked and section 60 has no application. The duty is not designed to remedy these kinds of errors. But when the importance of the grievance is taken into account and the experience and identity of the decision-maker ascertained the Board may decide that a course of conduct is so, implausible, so summary or so reckless to be unworthy of protection. Such circumstances cannot and should not be distinguished from a blind refusal to consider the complaint.*

[37] In a subsequent decision, Canada Packers Inc., [1990] OLRB Rep Aug. 886, the Ontario Board confirmed this position as follows, at 891:

> *A review of the Board's jurisprudence reveals that honest mistakes, innocent misunderstandings, simple negligence, or errors in judgment will not of themselves, constitute arbitrary conduct within the meaning of section 68. Words like "implausible", "so reckless as to be unworthy of protection", "unreasonable", "capricious", "grossly negligent", and "demonstrative of a non-caring attitude" have been used to describe conduct which is arbitrary within the meaning of section 68 (see Consumers Glass Co. Ltd., [1979] OLRB Rep. Sept. 861; ITE Industries, [1980] OLRB Rep. July 1001; North York General Hospital, [1982] OLRB Rep. Aug. 1190; Seagram Corporation Ltd.. [1982] OLRB Rep. Oct. 1571; Cryovac, Division of W.R. Grace and Co. Ltd., [1983] OLRB Rep. June 886; Smith & Stone (1982) Inc., [1984] OLRB Rep. Nov. 1609; Howard J. Howes, [1987] OLRB Rep. Jan. 55; George Xerri, [1987] OLRB Rep. March 444, among others). Such strong words may be applicable to the more obvious cases but may not accurately describe the entire spectrum of conduct which might be arbitrary. As the jurisprudence also illustrates, what will constitute arbitrary conduct will depend on the circumstances.*

[38] The British Columbia Labour Relations Board has taken a similar view with respect to matters of process. In Haas v. Canadian Union of Public Employees, Local 16, [1982] BCLB No. L48/82, that Board stated as follows:

> *... similarly, the Board will be reluctant to find a breach of Section 7 by virtue of the manner in which particular grievances are pursued. As stated earlier, a complainant must demonstrate shortcomings in the union's representation beyond the areas of mere negligence, inadvertent errors, poor judgment, etc. The shortcomings must be so blatant as to demonstrate that the grievor's interests were pursued in an indifferent or perfunctory manner.*
>
> *Too often the intended purpose and limits of Section 7 are not well understood. A union is afforded wide latitude in the manner in which it deals with individual grievances; the Board will only find violations of Section 7 where a union's manner of representation of an individual grievor is found to be an obvious disregard for his rights or for the merits of the particular grievance. Broadening the scope of Section 7 beyond the areas described in earlier pages of this decision would not be in keeping with the purpose and objects of the Labour Code; it would encourage the filing of a myriad of unfounded and frivolous Section 7 applications to the Board and it could also force unions to untenable positions in grievance handling because of the weight they would have to give to possible Section 7 complaints hanging over their heads.*
>
> *. . .*
>
> *Each case must be decided on its own merits; suffice to say, however, that the Board may well find shortcomings in the manner in which the union dealt with a particular matter without finding that such shortcomings support a Section 7(1) complaint. The Board may well find that a union could have been more vigourous and thorough in its investigation of the facts in a particular case; it may even question the steps taken in dealing with a grievance and the ultimate decision made with respect to that grievance. However, that does not necessarily mean that a complaint under Section 7(1) will be substantiated. To substantiate a charge of arbitrariness, there must be convincing evidence that there was a blatant disregard for the rights of the union member.*

[38] In other words, when confronted with an allegation of arbitrariness on the part of the trade union in the representation of its members, the Board is not looking to determine whether or not we believe that the trade union erred in its strategies or that their decisions may have been wrong. To successfully sustain an allegation of arbitrariness, an applicant must establish more than mere negligence (i.e. mistakes on the part of the union), an applicant must satisfy the Board that the trade union's impugned conduct was grossly or seriously negligent (i.e. reckless, capricious, or perfunctory). See: *Randy Gibson v. Communications, Energy and Paper workers Union of Canada, Local 650*, [2002] Sask. L.R.B.R. 574, LRB File No. 089-02.

[39] For example, this Board has confirmed that it does not "sit on appeal" of a trade union's decision not to advance a grievance to arbitration and, in particular, will not decide if a trade union's conclusion as to the likelihood of success of a grievance was correct nor will the Board 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*. Similarly, this Board has held that there is no breach of the duty of fair representation where a trade union withdraws a grievance, if it took a reasonable view of the circumstances and if it made a "thoughtful decision" not to advance that particular grievance to arbitration. 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. While these cases involve a trade union's decision not to proceed to arbitration with a grievance, the same test is applied at all stages of the grievance process, including the initial decision to file a grievance.

[40] In the present case, the evidence does not disclose conduct on the part of the Union sufficient to sustain a violation of the *Act* (under the rubric of "arbitrariness" or otherwise). Simply put, after conducting a review of the 95 and 97 series of buses and after that review cast doubt on the continued need to provide blanket accommodations to persons reporting medical restrictions associated with these buses, the employer gave notice to the Applicant of its intention to discontinue providing the Applicant's previous accommodation. The employer offered to have its Disability Assistance Consultant contact the Applicant's doctor to clarify the City's findings and to obtain updated medical information. The Applicant's doctor declined to provide another medical note stating that the Applicant continue to be unable to drive the 95 and 97 series of buses (the type of note had been previously provided).

[41] While the Union relied on management's review of the impugned buses in making its decision as to whether or not to file and advance a grievance on behalf of the Applicant, the Union's own members, including journeyman mechanics, played an integral role in management's review. It is not apparent to the Board (as suggested by the Applicant) that an independent review of the buses by someone else was necessarily or would have provided more, different or better information. Interestingly, for much of management's review, the City would have been relying on the advice and expertise of the Union's members. The participation of the Union's members in this review gave the Union direct knowledge as to the subject matter in dispute sufficient for the Union to form its own opinion as the operational safety of the 95 and 97 series of buses. The mere fact that the Union came to the same conclusion as management is not indicative of a lack of independence or a perfunctory decision making process on the part of the Union. The Union's Executive reviewed management's findings and conclusion and concluded that management's decision to cease providing accommodations with respect to the 95 and 97 series of buses was reasonable.

[42] Rather than attempting to pressure management to continue its previous policy of providing blanket accommodations, the Union pursued (and believed that they achieved) other valuable improvements for their members, in the form of an enhanced plan to replacing/refurbishing the City's buses.

[43] While it would appear that the Union's record keeping was inadequate and the Union's communication with the Applicant lacked an appropriate degree of formality (i.e. a written response, with explanation and/or reasons), I am satisfied that the Union's Executive reasonably turned their mind to the Applicant's dispute with management (i.e. the loss of his accommodation); that they made a thoughtful decision with respect to the potential of obtaining a favourable outcome for the Applicant through grievance proceedings; and that they communicated their decision and the substance of their reasons to the Applicant in a timely fashion.

[44] The Applicant clearly believed that he had a strong case for a grievance against his Employer, which raises an interest dilemma for this Board. As I have indicated, it is not this Board's role to assess the correctness of the Union's decision (i.e. whether or not the Union's decision to decline to advance a grievance on behalf of the Applicant under these circumstances

was correct). Yet, the Applicant is, in essence, asking his Board to infer the kind of recklessness or non-caring attitude necessary to sustain a violation of s. 25.1 of the *Act* by examining the relative strength or merit of his desired grievance. After reviewing the evidence presented in these proceedings, I am not inescapably drawn to the conclusion that Applicant's grievance was so clear and so compelling that the Union's decision to not advance it can be seen as indicative of a violation of the *Act*.

[45] This Board has acknowledged that many factors may be 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.

[46] After reviewing the evidence presented in these proceedings, I am unable to conclude that the Union's conduct was arbitrary or otherwise in violation of s. 25.1 of the *Act*. For the foregoing reasons, the Applicant's application must be dismissed.

DATED at Regina, Saskatchewan, this **24th** day of **June, 2010.**

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson