The Labour Relations Board
Saskatchewan

ALLAN WIONZEK, Applicant v. INTERNATIONAL BROTHERHOOD of ELECTRICAL WORKERS, LOCAL 2067, Respondent

LRB File No. 022-11; September 21, 2011
Single Panel: Chairperson, Kenneth G. Love, Q.C.

The Applicant:	Self Represented
For the Respondent Union:	Rick Engle Q.C. and Heather Robertson

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.

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

REASONS FOR DECISION

Background:

[1] Allan H. Wionzek (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upon his assertion that the International Brotherhood of Electrical Workers, Local 2067 (the "Union") had abandoned and withdrawn his grievance filed in respect of his termination from his employment with the SaskPower (the "Employer").

[2] This application was heard by Kenneth G. Love Q.C., Chairperson of the Board sitting alone pursuant to s. 4(2.2) of the *Act* on September 12, 2011.

Facts:

[3] The Applicant's application to the Board relates to a grievance filed on his behalf by the Union following his termination from his employment on February 10, 2011.

[4] The Applicant was employed by the Employer as an Electrical Technician at the Wolverine Switching Station located close to Lanigan, Saskatchewan. He was terminated from his position with SaskPower on February 9, 2011.

[5] The Applicant's termination resulted from an investigation undertaken by the Employer related to time sheet entries made by the Applicant which were later changed by administrative staff of the Employer at the Applicant's request. Additionally, the Employer justified the discharge based upon disclosure of confidential information provided to the Applicant which he disclosed to other employees of the Employer.

[6] There was some evidence presented of meetings and incidents, including past discipline of the Applicant which will not be reported here as it is not particularly material to the issues under s. 25.1.

[7] The Applicant testified on his own behalf. The Board also permitted another witness, Jim Mitzel to testify on behalf of the Applicant by telephone. The Board heard from Gary Lewendon and Dennis Grado, both of whom were Assistant Business Agents for the Union and who were directly involved in representing the Applicant with respect to his discharge grievance. The basic facts with respect to this matter were not in dispute. There were some issues with respect to certain details as noted below.

[8] The process leading to the termination and the filing of the grievance began on February 9, 2010 when the applicant was asked to meet with officials of the Employer. The evidence was unclear as to how, where or why this meeting was called, but nevertheless, the meeting proceeded on that date. The Applicant was accompanied to that meeting by Gary Lewendon as his union representative.

[9] Mr. Lewendon testified that he met with the Applicant shortly before the meeting. He acknowledged that he was not familiar with the Applicant, nor the issue which was to be discussed. He testified that he advised the Applicant that he would provide general representation, but would be unable to speak to any specific allegations which would have to be answered by the Applicant.

[10] The meeting on February 9, 2010 convened in the morning (no-one was able to provide the actual start time) and lasted for a couple of hours. Following discussion of the issues concerning the Applicant's time sheet entries and the disclosure of confidential information, the evidence was that the Employer requested a break to consider the matter. After what was

described as an unusually length break, the Employer returned with a letter of termination for the Applicant. The Union filed a grievance against the termination the following day. (February 10, 2010)

[11] The grievance moved to the second level under the grievance procedure (apparently the meeting on February 9, 2010 was the first level). That meeting was held on February 25, 2010. At that meeting, Dennis Grado attended with the Applicant as his union representative.

[12] As was the case with Mr. Lewendon's representation at the February 9, 2010 meeting, Mr. Grado met with the Applicant shortly before the commencement of the meeting. He advised the Applicant that at the meeting, he would be there for support and to explain the union's position with respect to the grievance, but that where detailed explanations were required that the Applicant would have to speak to those.

[13] That meeting again discussed the issue of the time sheet entries by the Applicant. At issue were entries which he had made where he had claimed for "substitution". Substitution was when the in scope supervisor was unavailable (being on holidays, out of the area, etc.), the most senior, qualified person, with the ability to fill the position would be eligible to temporarily fill the position at a higher salary rate.

[14] A good deal of the evidence focused on when an employee could claim substitution. The Applicant took the position that it was an automatic entitlement whereas the Employer and the Union took the position that it required prior approval.

[15] At the second level meeting, the Applicant apparently made a statement at the meeting that he had been advised by an out of scope manager, Ryan Neufeld, that he should seek assistance from the administrative staff to assist him to make changes to his time sheets where he had claimed for substitution, which allegation was denied by Mr. Neufeld.

[16] By letter dated March 11, 2010, the Employer denied the second level appeal. In doing so, it noted with respect to the allegation that Mr. Neufeld had suggested he arrange to have his time sheets altered:

> *Further, Mr. Wionzek frustrated the hearing process in the making of false allegations of his supervisor during the 2nd hearing that was clearly determined to be a fabrication of events.*

[17] The Union elevated the grievance to the third step of the grievance procedure. That meeting was held on April 7, 2010. Again, the Applicant was accompanied by Mr. Grado. Mr. Grado testified that he advised the Applicant to be forthright at the meeting in his explanations. He noted however, that at no time did the Applicant express any remorse concerning the alleged wrongdoing. On April 21, 2010, the Employer rejected the third level appeal.

[18] During the course of the grievance procedure, the Union also collected considerable background material concerning the allegations, including, but not limited to, the Applicant's timesheets, correspondence between C. Graham and the Applicant, Notes from the investigation meeting on February 9, 2010 taken by the employer, the Union's own notes from the February 9, 2010 meeting, Emails between C. Graham and the Applicant, Notes from a prior meeting held on January 20, 2010 taken by Ryan Neufeld, the Employer's notes concerning the substitution claims, and a letter from the Applicant to S. Young dated April 13, 2010.

[19] The next step of the grievance procedure would require the Union to take the matter to arbitration. Prior to embarking on that step, the Union retained counsel to review the materials noted above which they had compiled, as well as other relevant materials in order to provide them with an opinion as to the likelihood of success at arbitration.

[20] By letter of June 15, 2010, counsel for the Union provided the following opinion:

> *Mr. Wionzek is facing a serious disciplinary charge. The union will need strong evidence from Mr. Wionzek to the contrary in order to have any chance whatsoever to win his grievance at arbitration. I suggest this opinion be provided to Mr. Wionzek for a full response before the union decides on a future course of action.*

[21] In accordance with counsel's suggestion, the Union provided the Applicant with a copy of the opinion. On June 17, 2011 he provided comments on the opinion to Mr. Grado of the Union. In his email, he raised numerous factual issues respecting the dates for which he had applied for substitution and other issues which he felt had not been considered by counsel for the union.

[22] On June 24, 2010, the Applicant, Mr. Grado, and Mr. Lewendon met with counsel for the Union to review the Applicant's concerns and to review the opinion letter of June 15, 2010. Subsequent to that meeting, the Employer also provided a copy of the Applicant's prior discipline record to the Union. Counsel also contacted Mr. Mitzel by telephone.

[23] Counsel for the Union considered the matters discussed at the June 24th meeting and the materials provided to him at that meeting and reconsidered the June 15th opinion which he had given to the Union. Following that reconsideration, he concluded in an opinion letter dated September 3, 201:

> *In light of the record, and along with the other factors addressed in my opinion letter, the breach of trust was serious enough in this case to warrant a major penalty for his actions. Consequently, I have concluded that the grievance will not succeed.*

[24] That opinion was also shared by the Union with the Applicant. On September 9, 2010, he again provided comments with respect to the opinion. In that letter, the Applicant made reference to email correspondence between himself and Calvin Graham which he felt had not been considered by counsel.

[25] On October 7, 2010, counsel for the Union again reviewed his opinion and provided another letter to the Union related to the issues raised by the Applicant in his comments on September 7, 2010. In that letter he concluded:

> *For these reasons, along with the other factors addressed in my previous letters of June 15, 2010 and September 3, 2010, the union does not have a reasonable chance to overturn the discharge if the matter proceeds to arbitration.*

[26] After this letter was provided, the evidence becomes a little murky. Mr. Lewendon and Mr. Grado both testified that the Applicant "would" have been invited to meet with the executive of the union when the grievance and Union counsel's opinion was being considered. However, neither of them extended any invitation to the Applicant to attend, testifying that it would have been up to the Union's business manager to extend that invitation. The Applicant denies having received any invitation to attend the meeting at which the Union determined not to proceed with his grievance.

[27] The Board was provided with a copy of the agenda for the September 29, 2010 Executive Board Meeting. The Minutes of that meeting note in connection with this matter;

> *4. The Executive received a legal opinion on a termination and pending grievance. Based on this opinion the Executive and Grievance Committee will follow the opinion unless more information is obtained in the near future.*

[28] The Board was also provided with a purported email from the Applicant which was purportedly sent in respect of the Executive Board Meeting on September 29, 2010 However, no-one was able to conclusively state that this email was sent by the Applicant nor received in conjunction with the meeting on September 29, 2010. Mr. Grado attempted to explain why the email did not contain the usual time date stamp markings or header information normally found on copies of emails by stating that the Union was experiencing computer issues since a recent upgrade. Since this document could not be verified, it has not been considered as a part of the evidence.

[29] There was also evidence pro-offered by Mr. Lewendon and Mr. Grado that the Applicant had been invited to meet with the Union executive to consider the grievance on October 18, 2010, but the Applicant had declined to meet with them. Again, neither Mr. Lewendon or Mr. Grado personally contacted the Applicant, nor was he advised in writing of his opportunity to meet with the Union executive. The Applicant denied having received any such invitation.

[30] On October 22, 2010, the Union formally withdrew the grievance filed on behalf of the Applicant.

Relevant statutory provision:

[31] Relevant provisions of the *Act* are as follows:

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

Analysis and Decision:

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

[33] 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 *Dwayne Lucyshyn v. Amalgamated Transit Union, Local 615*[1]. At paragraph 30 of that decision, the Board provided this summary of the Board's jurisprudence with respect to the duty of fair representation:

> [30] In *Hargrave, et al. v. Canadian Union of Public Employees, Local 3833, and Prince Albert Health District*, [2003] Sask. L.R.B.R. 511, LRB File No. 223-02, the Board set out the principles applicable to an analysis of the duty of fair representation, with a particular focus on arbitrariness and the scope of the Union's duty. The Board stated at 518 to 526:
>
> > *[27] As pointed out in many decisions of the Board, a succinct explanation of the distinctive meanings of the concepts of arbitrariness, discrimination and bad faith, as used in s. 25.1 of the Act, was made in Glynna Ward v. Saskatchewan Union of Nurses, [1988] Winter Sask. Labour Rep. 44, LRB File No. 031-88, at 47, as follows:*
> >
> > > *Section 25.1 of The Trade Union Act obligated the union to act "in a manner that is not arbitrary, discriminatory, or in bad faith". The union's obligation to refrain from acting in bad faith means that it must act honestly and free from personal animosity towards the employee it represents. The requirement that it refrain from acting in a manner that is discriminatory means that it must not discriminate for or against particular employees based on factors such as race, sex or personal favoritism. The requirement that it avoid acting arbitrarily means that it must not act in a capricious or cursory manner or without reasonable care. In other words, the union must take a reasonable view of the problem and make a thoughtful decision about what to do.*
> >
> > *[28] In Toronto Transit Commission, [1997] OLRD No. 3148, at paragraph 9, the Ontario Labour Relations Board cited with approval the following succinct explanation of the concepts provided by that Board in a previous unreported decision:*
> >
> > > *. . . a complainant must demonstrate that the union's actions were:*
> > >
> > > *(1) "Arbitrary" – that is, flagrant, capricious, totally unreasonable, or grossly negligent;*
> > >
> > > *(2) "Discriminatory – that is, based on invidious distinctions without reasonable justification or labour relations rationale; or*

[1] [2010] S.L.R.B.D. No. 6, 178 C.L.R.B.R. (2d) 96, CanLII 15756 (SKLRB), LRB File No. 035-09

> *(3) "in Bad Faith" – that is, motivated by ill-will, malice hostility or dishonesty.*
>
> *The behaviour under review must fit into one of these three categories. …[M]istakes or misjudgments are not illegal; moreover, the fact that an employee fails to understand his rights under a collective agreement or disagrees with the union's interpretation of those rights does not, in itself, establish that the union was wrong – let alone "arbitrary", "discriminatory" or acting in "bad faith".*
>
> *The concept of arbitrariness, which is usually more difficult to identify than discrimination or bad faith, is not equivalent to simple errors in judgment, negligence, laxity or dilatoriness. In Walter Prinesdomu v. Canadian Union of Public Employees, [1975] 2 CLRBR 310, the Ontario Labour Relations Board stated, at 315:*
>
> > *It could be said that this description of the duty requires the exclusive bargaining agent to "put its mind" to the merits of a grievance and attempt to engage in a process of rational decision making that cannot be branded as implausible or capricious.*
> >
> > *This approach gives the word arbitrary some independent meaning beyond subjective ill will, but, at the same time, it lacks any precise parameters and thus is extremely difficult to apply. Moreover, attempts at a more precise adumbration have to reconcile the apparent consensus that it is necessary to distinguish arbitrariness (whatever it means) from mere errors in judgment, mistakes, negligence and unbecoming laxness.*

. . . .

[34] There have been many pronouncements in the case law with respect to negligent action or omission by a trade union as it relates to the concept of arbitrariness in cases of alleged violation of the duty of fair representation. While most of the cases involve a refusal to accept or to progress a grievance after it is filed, in general, the cases establish that to constitute arbitrariness, mistakes, errors in judgment and "mere negligence" will not suffice, but rather, "gross negligence" is the benchmark. Examples in the jurisprudence of the Board include Chrispen, supra, where the Board found that the union's efforts "were undertaken with integrity and competence and without serious or major negligence. . . ." In Radke v. Canadian Paperworkers Union, Local 1120, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92, at 64 and 65, the Board stated:

> *What is expected of trade union officials in their representation of employees is that they will act honestly, conscientiously and without prejudgment or favouritism. Within the scope of these criteria, they may be guilty of honest errors or even some laxity in the pursuit of the interests of those they represent. In making decisions about how or whether to pursue certain issues on behalf of employees, they should certainly be alert to the significance for those employees of the interests which may be at stake.*

[35] Most recently, in Vandervort v. University of Saskatchewan Faculty Association and University of Saskatchewan, [2003] Sask. L.R.B.R. 147, LRB File Nos. 102-95 & 047-99, the Board stated, at 193:

> *[215] Arbitrariness is generally equated with perfunctory treatment and gross or major negligence. This standard arose from Canadian Merchant Service Guild v. Gagnon . . . .*

And further, at 194-95, as follows:

[219] In Rousseau v. International Brotherhood of Locomotive Engineers et al., 95 CLLC 220-064 at 143, 558-9, the Canada Labour Relations Board described the duty not to act in an arbitrary manner as follows:

> *Through various decisions, labour boards, including this one, have defined the term "arbitrary." Arbitrary conduct has been described as a failure to direct one's mind to the merits of the matter; or to inquire into or to act on available evidence; or to conduct any meaningful investigation to obtain the data to justify a decision. It has also been described as acting on the basis of irrelevant factors or principles; or displaying an indifferent and summary attitude. Superficial, cursory, implausible, flagrant, capricious, non-caring or perfunctory are all terms that have also been used to define arbitrary conduct. It is important to note that intention is not a necessary ingredient for an arbitrary characterization.*
>
> *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.*

[39] As noted above, the Canada Labour Relations Board took a similar view in Rousseau v. International Brotherhood of Locomotive Engineers et al., supra. In Johnson v. Amalgamated Transit Union, Local 588 and City of Regina, [1997] Sask. L.R.B.R. 19, LRB File No. 091-96, the Board referred to the evolution of the treatment of the issue of arbitrariness by the Canada Board. At 31-32, the Board observed as follows:

> *The Canada Labour Relations Board initially accepted the notion that, in the case of what were termed "critical job interests," the obligation of a trade union to uphold the interest of the individual employee affected would be close to absolute. What might constitute such critical job interests was not entirely clear, but loss of employment through discharge was clearly among them.*
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> *The Board continued to hold the view that the seriousness of the interest of the employee is a relevant factor. In Brenda Haley v. Canadian Airline Employees' Association, [1981] 81 C.L.L.C. 16,096, the Canada Board made this comment, at 609:*
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> > *This concept (i.e. critical job interests] is a useful instrument to distinguish circumstances where the balance between the individual and union or collective bargaining system interests will tilt in one direction or another. A higher degree of recognition of individual interests will prevail on matters of critical job interest, which may vary from industry to industry*

or employer to employer. Conversely on matters of minor job interest for the individual the union's conduct will not receive the same scrutiny and the Board's administrative processes will not respond with the same diligence or concern. Many of these matters may not warrant an expensive hearing. Examples of these minor job interests are the occasional use of supervisors to do bargaining unit work, or isolated pay dispute arising out of one or a few incidents and even a minor disciplinary action such as a verbal warning.

They concluded in the Brenda Haley case, however, that this factor should be evaluated along with other aspects of the decisions taken by the trade union. The decision contains this comment, at 614:

> *As frustrating as duty of fair representation discharge cases may be and as traumatic as loss of employment by discharge may be, we are not persuaded mandatory discharge arbitration is the correct response. It is an easy response but its effect on the group and institutional interests is too harsh. With the same view of the integrity of union officials and the merits of the grievance procedure shared by Professor Weiler we say unions must continue to make the difficult decisions on discharge and we must continue to make the difficult decisions complaints about the unions' decisions often require.*

They went on to summarize the nature of the duty imposed on the trade union, also at 614:

> *It is not the Board's task to reshape union priorities, allocate union resources, comment on leadership selection, second guess its decisions, or criticize the results of its bargaining. It is our task to ensure it does not exercise its exclusive majoritarian based authority unfairly or discriminatorily. Union decision makers must not act fraudulently or for improper motives such as those prohibited by human rights legislation or out of personal hostility, revenge or dishonesty. They must not act arbitrarily by making no or only a perfunctory or cursory inquiry into an employee's grievance. The union's duty of fair representation does not guarantee individual or group union decision makers will be mature, wise, sensitive, competent, effectual or suited for their job. It does not guarantee they will not make mistakes.*

> *The union election or selection process does not guarantee competence any more than the process does for those selected to act in other democratic institutions such as Parliament or appointees to administrative agencies.*

[40] Thus, there is a line of cases that suggests that where "critical job interests" are involved (e.g., discharge from employment), depending upon the circumstances of the individual case, a union dealing with a grievance may well be held to a higher standard than in cases of lesser importance to the individual in determining whether the union has acted arbitrarily (including whether it has been negligent to a degree that constitutes arbitrariness). The Board has taken a generally favourable view of this position as demonstrated in Johnson and Chrispen, supra.

[41] However, in Haley, supra, a case involving the missing of a time limit for referral to arbitration, the Canada Board also recognized that the experience of the union representative and available resources are relevant factors to be considered in assessing whether negligence is assumed to be of a seriousness that constitutes arbitrariness, stating as follows:

> *…The level of expertise of the union representative and the resources the union makes available to perform the function are also relevant factual considerations. These and other relevant facts of the case will form the foundation in each case to decide whether there was seriously negligent, arbitrary, discriminatory or bad faith, and therefore unfair, representation.*

[42] In Chrispen, supra, the Board approved of this position also, stating, at 150, as follows:

> *The reason why cases involving allegations of arbitrariness are the most vexing and difficult is because they require the Board to set standards of quality in the context of a statutory scheme which contemplates that employees will frequently be represented in grievance proceedings by part-time union representatives or even other co-workers. Even when the union representatives are full-time employees of the union, they are rarely lawyers and may have few qualifications for the responsibilities which this statutory scheme can place upon them.*
>
> *In order to make this system work, the legislature recognized that union representatives must be permitted considerable latitude. If their decisions are reversed too often, they will be hesitant to settle any grievance short of arbitration. Moreover, the employer will be hesitant to rely upon any settlement achieved with the union if labour boards are going to interfere whenever they take a view different from that of a union. The damage this would do to union credibility and the resulting uncertainty would adversely affect the entire relationship. However, at the*

> *same time, by voluntarily applying for exclusive representative status, the union must be prepared to accept a significant degree of responsibility for employees, especially if an employee's employment depends upon the grievance.*

[34] In the present case, the Applicant argues that the Union failed to properly represent him, insofar as the Union, in the final result, did not pursue the grievance it had filed regarding his termination.

[35] However, the evidence from the Union showed that the Union carefully considered the facts of the grievance, took pains to investigate the complaint independently, received legal advice on the situation and concluded that it had no reasonable chance of success in the event that the grievance proceeded to arbitration. That initial view was communicated to the Applicant by the Union. Following that, the Applicant had the opportunity to provide additional evidence and reply both in writing and at a meeting with counsel on June 24, 2010. Following that meeting, counsel reconsidered his opinion, but reached the same conclusion. Again, the Applicant was provided that opinion, commented on it, and it was again reconsidered, but with no change to the outcome

[36] 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.*

[37] The Applicant is requesting that this Board review the actions of the Union and determine, based on the evidence he provided, concerning what he believes is the proper interpretation of when substitution should be allowed, should lead to a different conclusion at arbitration.

[38] However, the Applicant's argument overlooks a prime element with respect to the Union's decision not to proceed with the grievance; that being that the Applicant's failure to take responsibility for his actions or show a desire to avoid a repeat of that behaviour. That, coupled with his failure to recognize that his actions may not have been in accordance with the established policy regarding when substitution is permissible, the Union felt that they would be

unable to persuade an arbitrator that there was an opportunity for rehabilitation and hence there was little likelihood of reinstatement by an arbitrator. .

[39] 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."

[40] 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 on three distinct occasions. The only issue was with respect to the Applicant's notification of his ability to have the opportunity to meet with the Executive Committee to consider the decision concerning the grievance. As noted above, the evidence on this issue was unsatisfactory. It is surprising that with respect to such an important decision concerning the livelihood of the Applicant, (that is the decision to abandon his attempt to recover his job), the Union was apparently so cavalier in their notification to him. As a minimum, one would expect that such communication would be in writing, preferably in letter form, but alternatively by email so that there would be a record that such communication occurred.

[41] While this failure to notify the Applicant is important, it does not amount to arbitrary conduct on the part of the Union. Both Mr. Lewendon and Mr. Grado testified that the Applicant "would" have been invited, that is, that it is a usual practice of the Union to invite grievers to meet with the Executive Committee when their grievance is being considered for withdrawal. As noted above, in order for the conduct of the Union to be arbitrary, the conduct complained of must be conduct which is "flagrant, capricious, totally unreasonable, or grossly negligent"[2]. Also, as noted above in *Radke v. Canadian Paperworkers Union, Local 1120*[3], the Board commented:

> *What is expected of trade union officials in their representation of employees is that they will act honestly, conscientiously and without prejudgment or favouratism. 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*

[2] See Toronto Transit Commission [1977] OLRD No. 3148, para 28 of Hargrave et al. v. Canadian Union of Public Employees, Local 3822 [2003] S.L.R.B.D. No. 47, Sask. L.R.B.R. 511, LRB File No. 223-02
[3] [1993] S.R.R.B.D. No. 27, 2nd Quarter Sask.Labour Rep. 57, LRB File No. 262-92 at 64 and 65

> *employees, they should certainly be alert to the significance for those employees of the interests which maybe at stake.*

[42] There is no evidence to suggest that the failure to notify the Applicant, if, indeed that failure did occur, was in any way motivated by any desire to conceal the actions of the Executive Committee from the Applicant's scrutiny or that any such action was motivated by anything other than an honest mistake as to whether or not he had been notified. I am sure that in the future, the Union will take steps to insure that there is a record kept of any communication with grievers when they are invited to meet with the Executive Committee.

[43] Nor was there any evidence presented that the decision to withdraw the grievance was in any way marred by the Union's discrimination against the Applicant. The decision was based upon a recommendation of counsel who had reviewed the issue on 3 separate occasions without change to his initial opinion that the case would be difficult to win.

[44] The Applicant also did not provide evidence of bad faith by the Union. The Union conducted a thourough and independent investigation of the facts, which was provided to counsel who 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.

Conclusion:

[45] The application is therefore dismissed.

DATED at Regina, Saskatchewan, this **21st** day of **September, 2011.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson