

**The Labour Relations Board  
Saskatchewan**

**DWAYNE LUCYSHYN, Applicant v. AMALGAMATED TRANSIT UNION, LOCAL 615,  
Respondent**

LRB File No. 035-09; January 5, 2011

Chairperson, Kenneth G. Love, Q.C.

For the Applicant: Mr. Richard W. Danyiuk, Q.C.  
For the Respondent Union: Mr. Greg Winkenweder

**Practice and Procedure – Board considers application for contempt regarding failure to comply with Board Order.**

**Remedy – Section 25.1 remedial authority – Board’s overriding goal is to place employee in position he/she would have been in but for breach – Board avoids punitive remedies and seeks to design remedies that support and foster underlying purposes of *The Trade Union Act*.**

**REASONS FOR DECISION**

**Background:**

[1] **Kenneth G. Love, Q.C., Chairperson:** Dwayne Lucyshyn, (the “Applicant”) applied to the Board on April 1, 2009 alleging that the Amalgamated Transit Union, Local 615 (the “Respondent Union”) denied the Applicant fair representation under *The Trade Union Act*, R.S.S. 1978, c. T-17 (the “Act”) within the meaning of Section 25.1 of the *Act*.

[2] The Respondent Union denied any and all of the allegations contained within the application. A hearing took place with respect to the allegations and the Board found that the Respondent Union did not properly represent the Applicant. The Board gave the Respondent Union a detailed description of the steps it was to take with respect to the grievances filed by the Applicant.

[3] On September 8, 2010, counsel on behalf of the Applicant wrote to the Board to advise that the Respondent Union had not complied with the Board’s Order of April 8, 2010. Counsel for the Applicant also requested the following relief in that correspondence:

1. *A finding that the Union is in contempt of the Board's Order of April 8, 2010; and*
2. *A further Order mandating the Union comply with the Order of April 8, 2010; and*
3. *A direction that the Union pay the legal fees of Mr. Lucyshyn on a solicitor-client basis, as the utter lack of any attempt at compliance has necessitated this application.*

[4] This application was heard by the Chairperson of the Board sitting alone pursuant to s. 4(2.2) of the *Act* in Saskatoon, Saskatchewan on December 20, 2010.

**Facts:**

[5] The Respondent Union acknowledged that they had not complied with the terms of the Board's Order of April 8, 2010. Mr. Wickenweder, on behalf of the Respondent Union advised that in accordance with the Order, he had appointed Mr. Al Holmes, a member of the Respondent Union, to investigate and report on the Applicant's grievance complaints. He tendered a copy of that report as Exhibit U-1.

[6] Mr. Wickenweder acknowledged that a copy of Mr. Holmes' report was never given to the Applicant as required by the Order. It was presented to the Executive of the Respondent Union. The Executive of the Union directed Ms. Deb Muzyka, a member of the Executive, with the responsibility of meeting with the Applicant. That meeting never occurred.

[7] The lack of co-operation between the Executive members of the Respondent Union, as noted in the Board's decision of April 8, 2010, was apparent in the exchange of emails that passed between Mr. Holmes and Ms. Muzyka, which emails were filed as Exhibit U-3.

*On June 7, 2010, Mr. Holmes sent an email to various Union Executive members with a "cc" to Mr. Lucyshyn as follows:*

*After looking over the 10 outstanding grievances pertaining to Brother Lucyshyn, I find enough merit in them to continue the grievance process and ask that you, the executive of ATU615 take a serious look into them as they are violations of our CBA, If you do not have these grievances please feel free to contact myself or Brother Lucyshyn to get them.*

*On June 18, 2010, Ms. Muzyka sent an email to Mr. Holmes with "ccs" to various union officials as follows:*

*Al I sent you a message last week asking to meet to discuss your investigation of Dwayne's DFR, copying the message to Dwayne as well but have yet to receive a response. This must be presented to a union executive member by I believe the end of this week so that they may present your report to the executive as a whole at the next e-board meeting.*

*Mr. Holmes responded on June 18, 2010 as follows:*

*Deb,  
Where did you ever see me say or write I didn't want to work with you or anyone else on the executive? Had I received anything up until this email from you, I would have responded to it.  
Deb I hope that you have known me better over the years to insinuate anything else. Let's setup this meeting ASAP as I begin my holidays after Fri June 25 for a few weeks.*

*Ms. Muzyka then responded:*

*Do you not check your e-mail @ work?? Does Dwayne not? I sent it to both of you. Al, I am not insinuating anything at all, just that I sent you a message and got no reply. It has been made clear to me that many people downtown do not trust any of the executive so how would I know if anyone is willing to work with any of us or not? That's why I will not attend union meetings any longer as I hate the bloodshed and attacking. Check your e-mail downtown as I sent it on the 10<sup>th</sup> and can send another copy. I assumed that if you had an account there, you read it. Sorry if I mistook that but I know Dwayne would read his so he could have passed it on to you...*

*Insinuate is a strong word, maybe we should watch what we say so it's not taken the wrong way and I am including myself in this as well. There was no malice intended in my response, only that I now had your home e-mail so figured I would ask why. You yourself know how the executive is treated by the membership. They are not easy shoes to walk in.*

*I am around next week but really only available on Friday as Tuesday is my other off day and booked up.*

**[8]** After this exchange of emails, nothing seemed to have occurred. Mr. Wickenweder advised the Board that he had tried to contact the Applicant, but his approach was rebuffed. Unfortunately, he was unable to advise when or where this contact allegedly occurred.

**[9]** Mr. Wickenweder requested the Board provide the Respondent Union with more time to resolve the issues and comply with the Order. He argued that they should not be penalized in costs as the matter could have been settled between the Respondent Union and the Applicant without the necessity of a lawyer being involved.

[10] Mr. Danyliuk argued that the Respondent Union had admitted that it had not complied with the Board's Order and should therefore be found in contempt. He suggested that the Board consider appointing a mediator to assist the Respondent Union and the Applicant to reach a solution. He argued that it was shocking that the Respondent Union would ignore an Order of the Board. He argued that it was necessary to bring the matter back to the Board's attention to get the results ordered by the Board. The action was necessitated by the Respondent Union's inactivity and it was reasonable that they be required to pay solicitor-client costs.

**Relevant statutory provisions:**

[11] Relevant statutory provisions are as follows:

5        *The board may make orders:*

...

(e)        *requiring any person to do any of the following:*

(i)        *to refrain from violations of this Act or from engaging in any unfair labour practice;*

(ii)       *subject to section 5.1, to do any thing for the purpose of rectifying a violation of this Act, the regulations or a decision of the board;*

...

*Deadline to report unfair labour practice*

*12.1(1) Subject to subsection (2), the board may refuse to hear any allegation of an unfair labour practice that is made more than 90 days after the complainant knew, or in the opinion of the board ought to have known, of the action or circumstances giving rise to the allegation, unless the respondent has consented in writing to waive or extend the deadline.*

13        *A certified copy of any order or decision of the board shall be filed in the office of a local registrar of the Court of Queen's Bench and shall thereupon be enforceable as a judgment or order of the court, and in the same manner as any other judgment or order of the court, but the board may nevertheless rescind or vary any such order.*

...

*15(2) Any person who fails to comply with any order of the board, whether made prior to or after the coming into force of this section, is, in addition to any other penalty imposed on him under this Act, guilty of an offence and liable on summary conviction:*

...

(b) *in the case of a corporation or trade union, to a fine of \$250;*

*for each day or part of a day during which the non-compliance continues.*

...

18.1 *The members of the board shall have the same privileges and immunities as a judge of the Court of Queen's Bench.*

...

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.*

...

42. *The board shall exercise such powers and perform such duties as are conferred or imposed on it by this Act, or as may be incidental to the attainment of the objects of this Act including, without limiting the generality of the foregoing, the making of orders requiring compliance with the provisions of this Act, with any regulations made under this Act or with any decision in respect of any matter before the board.*

### **Analysis & Decision:**

#### **Should the Respondent Union be cited for Contempt?**

[12] The Board has previously determined in its decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Temple Gardens Mineral Spa Inc.*<sup>1</sup> that it had, pursuant to the Act, as a minimum, the power of contempt in the face of the tribunal (*contempt in facie*). However, the contempt in this case was contempt out of the face of the tribunal (*contempt ex facie*) and the power to cite for contempt in such cases has normally been found to reside only in superior courts.

[13] The Board in *Temple Gardens, supra*, outlined a compelling case for the Board to also possess the power to cite for contempt out of the face of the tribunal, but in the final result, restricted itself to the power to cite for contempt only in the face of the tribunal. However, even in that case, the Board declined to cite the witness for contempt and chose an alternative remedy.

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<sup>1</sup> [2006] CANLII 62957, LRB File No. 217-05

**[14]** In this case, the Board finds it unnecessary to consider further its power to cite for contempt. Citing the Respondent Union for contempt in these proceedings, whether the power to do so exists or not, does not advance the situation here. There are outstanding grievances with respect to which the Respondent Union continues to fail to properly represent the Applicant. It is that failure that needs to be addressed.

**[15]** When it fashioned its Reasons for Decision on April 8, 2010, the Board took great pains to outline a process which, if followed, would have provided the Applicant the representation he deserved and would permit the Respondent Union to make a reasoned decision with respect to the merits of the various grievances and what position it would take with respect to them. However, due to inactivity and internal bickering, those detailed instructions were not followed.

**[16]** As a result, the Board has determined to appoint its own Agent to conduct the necessary investigations of the grievances and follow the proper steps regarding those grievances. Mr. John McCormick, of McCormick Labour Solutions, will act as the Board's Agent in this respect. The Respondent Union will be responsible to pay all expenses, reasonably and necessarily incurred by Mr. McCormick in fulfilling this mandate, including, but not limited to travel, sustenance and lodging expense. In addition to his expenses, the Respondent Union shall be responsible to pay a per diem for each day or portion thereof during which Mr. McCormick is engaged in his activities as the Board's Agent. The amount of that per diem shall be negotiated between Mr. McCormick and the Respondent Union. Should agreement not be reached, the Board will determine the amount of that per diem.

**[17]** We concur with Mr. Danyiuk that this application, given the clarity of the Board's direction regarding the process to be followed, should not have been necessary. In *Petite v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 555<sup>2</sup>*, the Board, in furtherance of the objective of attempting to keep the Applicant whole, awarded him the sum of \$750.00/ hearing day to assist with respect to the costs incurred in making the application under s. 25.1. In this case, the hearing lasted less than half a day. Accordingly, we direct that the Respondent Union shall make payment of \$375.00 to counsel for the Applicant to be directed towards his account with respect to this matter.

**[18]** The Board therefore orders:

1. With respect to Grievances “B” – “E” as identified in the Board’s decision of April 8, 2010, these matters are hereby remitted to Mr. John McCormick, as agent of the Board to be dealt with as follows:
  - a) Mr. McCormick shall, within thirty (30) days of this decision, meet with the Respondent Union and Mr. Holmes with respect to the status of the investigation of the various grievances;
  - b) Mr. McCormick shall conduct such further and other investigation as he shall determine to be necessary or desirable, and shall thereafter, provide a written report of his findings. Such written report shall be submitted to the Applicant and the Respondent Union within ten (10) business days of the completion of that report.
  - c) Following submission of his report, Mr. McCormick shall meet with the Applicant and the executive of the Respondent Union to determine their position with respect to the matters outlined in his report. If, in his opinion mediation of any of the disputes is desirable, he shall engage the parties in mediation prior to making any recommendation with respect to proceeding with any grievances.
  - d) The Respondent Union shall review the recommendations of Mr. McCormick and the comments of the Applicant, as determined in the meeting referenced in c) above, at its next Executive meeting following the meeting referenced in c) above, and shall make a determination if it shall proceed with any of the Applicant’s grievances. Mr. McCormick shall be entitled to attend that executive meeting and speak to matters raised in his report..
  - e) If the Executive of the Respondent Union determines not to proceed with any of the grievances, it shall advise the Applicant forthwith, in writing, with the reasons why it has determined not to proceed with the grievances;

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<sup>2</sup> [2009] CANLII 27858, LRB File No. 158-08

f) Upon receipt of the reasons why the Respondent Union has determined not to proceed with any of the Applicant's grievances, the Applicant shall be permitted to appeal the decision of the Executive not to proceed with those grievances in accordance with the Bylaws of Local 615 or the Constitution of the Amalgamated Transit Union;

g) If the Executive of the Respondent Union determines to proceed with any of the Applicant's grievances, then any time limits related to the grievance procedure in the Collective Agreement between the Respondent Union and the Employer are hereby waived and the grievance shall be taken to the next applicable step of the grievance procedure;

h) All of Mr. McCormick's out of pocket expenses, properly vouchered, and his *per diem* honorarium as outlined above shall be paid to Mr. McCormick by the Respondent Union within thirty (30) days of the presentation of invoice(s) by him.

i) The Respondent Union shall, within thirty (30) days of the date of this agreement, pay to counsel for the Applicant the sum of \$375.00 as a contribution to his costs associated with bringing this application.

j) Mr. McCormick, in his role as investigating officer of the Board, shall have all of the powers and authority of an Investigating Officer appointed pursuant to s. 4(12.1) of the *Act*.

k) The Board will remain seized of this matter and any matters that may arise with respect to the process set out above.

**DATED** at Regina, Saskatchewan, this **5th** day of **January, 2011**.

**LABOUR RELATIONS BOARD**

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Kenneth G. Love, Q.C.  
Chairperson