The Labour Relations Board
Saskatchewan

JOHN STEPHAN MORAN, Applicant v. SASKATCHEWAN JOINT BOARD, RETAIL WHOLESALE AND DEPARTMENT STORE UNION, Respondent, SASKATCHEWAN GAMING COMMISSION, EMPLOYER and PUBLIC SERVICE ALLIANCE OF CANADA, INTERESTED PARTY

LRB File No. 062-10; April 29, 2011
Chairperson, Kenneth G. Love, Q.C.; Members: John McCormick and Kendra Cruson

The Applicant:	John Stephan Moran
For the Respondent Union:	Mr. Larry Kowalchuk
For the Respondent Employer:	No one appearing
For the Interested Party	No one appearing

Duty of Fair Representation – Section 25.1 of the *Trade Union Act* – Employee alleges that Union failed to properly represent himself and other employees of the Shipping/Receiving Department of the Employer – Employees unhappy with methodology whereby their holiday pay being paid pursuant to collective agreement – Raise issue with Union – Union takes matter to Management but is rebuffed – Employee alleges grievance should have been filed but was not – Union subsequently raises issue during collective bargaining and achieves change to collective bargaining to satisfy concerns of employees – Application dismissed.

REASONS FOR DECISION

Background:

[1] Saskatchewan Joint Board, Retail Wholesale and Department Store Union, (the "Union" or "RWDSU") is voluntarily recognized as the bargaining agent for a unit of employees of Saskatchewan Gaming Corporation, carrying on business as Casino Regina (the "Employer"). The Public Service Alliance of Canada ("PSAC") is certified by the Board to represent other employees of the Employer. The Applicant filed an application on June 2, 2010 alleging that the Union failed in its duty of fair representation.

[2] The Union raised a preliminary objection to the application on the basis that it was not certified by the Board as the bargaining agent for the Applicant. By letter decision dated March 30, 2011, the Board determined that it had jurisdiction to determine this issue. This application came to the Board for hearing on April 7, 2011.

Facts:

[3] The Applicant, at the time of his application, was employed at Casino Regina as a Shipper/Receiver/Stock Clerk. On September 29, 2009, he sent a letter, via email, to numerous employees of RWDSU and Casino Regina making two principle complaints. Firstly, he took exception to the method whereby holiday pay was being paid to Shipper/Receiver/Stock Clerks pursuant to s. 17.03 of the then collective agreement between RWDSU and Casino Regina. Secondly, he suggested that the three Shipper/Receiver/Stock Clerks should be transferred from the RWDSU bargaining unit to the bargaining unit certified to PSAC.

[4] By his calculations, the Shipper/Receiver/Stock Clerks were not being paid their holiday pay in accordance with the provisions of *The Labour Standards Act*[1]. He testified and filed as an exhibit[2] in these proceedings a calculation which he had done showing the amounts which he claimed should be paid to Shipper/Receiver/Stock Clerks.

[5] By letter dated March 2, 2010, the Union provided a response to the Applicant's September 29, 2009 correspondence. The response resulted from a previous application filed by the Applicant with the Board[3]. Following a pre-hearing conducted by the Registrar of the Board, the Applicant withdrew that application.

[6] The Union, in its March 2, 2010 letter, took the position that the amount being paid pursuant to the collective agreement exceeded the amount which the employer was statutorily required to pay employees under *The Labour Standards Act*. Furthermore, they advised that the Union was considering options to assist the impacted employees and referenced upcoming collective bargaining and proposals from members related to such bargaining being sought shortly.

[7] On March 11, 2010, the Employer wrote to the Applicant in response to a letter[4] dated March 4, 2010 in which the Applicant and the other Shipper/Receiver/Stock Clerks had requested that the Employer allow for banking of holiday pay rather than having it paid each pay period as stipulated in the collective agreement. The Employer's response was that it was

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[1] R.S.S. 1978 c. L-1
[2] Exhibit E-3 also Exhibit "D" to the Application
[3] LRB File No. 146-09
[4] This is the calculation of amounts he claimed as due referenced in paragraph 4 of these Reasons

bound by the provisions of the collective agreement and the Employer was not prepared to contravene that agreement by making the adjustments requested.

[8] In his cross-examination, the Applicant acknowledged that the collective agreement had been changed during the last round of collective agreement negotiations to provide that he and the other Shipper/Receiver/Stock Clerks could, if they wished, bank their holiday pay. The Applicant, however, continued to assert that the amounts being paid were incorrect, citing s. 39 of *The Labour Standards Act*.

[9] Negotiations for a new collective agreement between RWDSU and the Employer were interrupted by strikes by employees of Casino Regina. Both employees represented by RWDSU and PSAC engaged in strike action against their employer, which strike lasted a considerable period. However, the strike action was ultimately resolved and a new collective agreement ratified by the membership of the Union effective on February 9, 2010. That collective agreement contained new language in Article 17.03 (new language bolded).

> *17.03 In each pay period the Employer will pay each employee an amount equal to 5.00% of his/her salary for that period.* ***Employees shall have the choice to bank their statutory pay or have it paid in each pay period. Employees shall select their choice in writing once per year in January. Employees may access banked statutory pay at any time during the year by written request. Such requests will be paid on the following pay period whenever possible. Any unused banked statutory pay shall be paid to the Employee in the last pay period prior to December 25.***

[10] The Applicant testified that he approached PSAC about the possibility of the Shipper/Receiver/Stock Clerks joining that Union. The person he approached was a shop steward of that Union. He testified that the person later advised that PSAC would not pursue any changes necessary to have the Shipper/Receiver/Stock Clerks be added to their bargaining unit. He testified that he was advised that the person he had discussed the matter with had communicated with someone more senior in PSAC who had made that decision.

[11] The Union elected to call no evidence in respect of the complaint.

Relevant statutory provision:

[12] Relevant statutory provisions of the *Act* provide as follows:

> *11(2) It shall be an unfair labour practice for any employee, trade union or any other person:*
>
> > *(a) to interfere with, restrain, intimidate, threaten or coerce an employee with a view to encouraging or discouraging membership in or activity in or for a labour organization, but nothing in this Act precludes a person acting on behalf of a trade union from attempting to persuade an employer to make an agreement with that trade union to require as a condition of employment membership or maintenance of membership in the trade union or the selection of employees by or with the advice of a trade union or any other condition in regard to employment, if such trade union has been designated or selected by a majority of employees in an appropriate unit as their representative for the purpose of bargaining collectively;*
> >
> > *. . .*
> >
> > *(f) to use coercion or intimidation of any kind against an employee with a view to discouraging activity which might lead to the rescission of an order or decision of the board under clause 5(a), (b) or (c).*
>
> *. . .*
>
> *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.*

Applicant's arguments:

[13] The Applicant's arguments focused primarily on his belief that the Union had failed to represent him and the other Shipper/Receiver/Stock Clerks which concerns were unrelated to his complaint concerning the issue of payment of holiday pay. Specifically, he focused upon the fact that RWDSU had not been certified by the Board to represent employees and had not, to date, filed either a successorship application or a certification application with the Board. This failure to make such application, the Applicant argued, left the employees unrepresented.

[14] He also argued that the strike action taken by the employees represented by RWDSU was unlawful.

[15] The Applicant also argued that because the RWDSU was not certified that it should not be allowed to represent the Shipper/Receiver/Stock Clerks. He pointed to the scope clause of the collective agreement which had no reference to those positions. That clause, and hence the collective agreement, he argued, referenced only Food and Beverage workers at Casino Regina.

Union's arguments:

[16] The Union argued that they had done everything they could with respect to the holiday pay issue. Firstly, they argued, they had discussed the issue with management, but were rebuffed. Secondly, because the clause in the collective agreement was very clear as to how holiday pay was to be paid, the Union could not advance a grievance challenging the Employer's interpretation of the provision. Thirdly, they did take the issue to collective bargaining, and following a strike, were able to achieve what the Applicant had requested in his original September 29, 2009 correspondence.

[17] Mr. Kowalchuk, on behalf of the Union, noted that the current collective agreement provided for wage rates for Shipper/Receiver/Stock Clerks in Schedule "A" to that agreement. Furthermore, he pointed to clause 12.02 which included the Shipper/Receiver/Stock Clerks within the scope of the agreement. That clause provides:

> *12.02 Job titles and minimum hourly wage rates for all employees covered by this Agreement shall be set out in Appendix "A" attached hereto which shall form a part of this Agreement.*

Analysis and Decision:

[18] Throughout the course of this hearing, the Board heard a good deal of irrelevant and at times caustic evidence. It was clear that the Applicant and the Union were not good friends and that the Applicant was not a willing supporter of the Union. He made numerous personal attacks against Mr. Kowalchuk which were, in the opinion of the Board, unnecessary and added nothing to the evidentiary basis for his complaint.

[19] In cases like this, which the Board determined to hear based upon its jurisdictional ruling on March 30, 2011, as in cases heard by the Board pursuant to s. 25.1 of the *Act*, the onus of proof lies with the Applicant. In the Board's opinion, the Applicant failed to satisfy this onus.

[20] During the course of the hearing, the Board was lenient in providing the Applicant the ability to present his case. However, notwithstanding the Board's frequent attempts to bring the Applicant back to the evidentiary issues, the Applicant continued to provide argument as distinct from evidence necessary to establish his case.

[21] From the summary of the factual evidence set out above, it is clear that the Union did not abrogate its duty to fairly represent the Applicant. While the Union does not enjoy the benefits of a certificate from the Board with respect to its representation of the employees for whom it bargains at Casino Regina, it has done so for many years. While the Applicant took exception to the fact that RWDSU did not have either an Order of successorship from this Board or a certification Order, that issue is irrelevant to these proceedings. We determined to hear the application based upon RWDSU's common law duty to fairly represent employees for whom it bargained.

[22] However, the test for fair representation is not changed whether this application was dealt with pursuant to s. 25.1 of the *Act* or by virtue of the common law duty of fair representation. The same basic principles enunciated by this Board will govern that duty.

[23] 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*[5]:

> *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* <u>*Canadian Merchant Services Guild v. Gagnon*</u>*, [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.*

[5] [1993] 4th Quarter Sask. Labour Rep 65, LRB File No. 134-93, at 71-72:

> *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.*

[24] There was no evidence to establish that the Union in any way discriminated against the Applicant or any of the other Shipper/Receiver/Stock Clerks, that the Union was arbitrary in its approach to the issues raised by the Applicant or the other Shipper/Receiver/Stock Clerks, or that the Union acted in bad faith with respect to its representation of the Applicant or the other Shipper/Receiver/Stock Clerks. On the contrary, the evidence established that the Union took the concerns of the Shipper/Receiver/Stock Clerks seriously and discussed the matter with the Employer, who determined that it would follow the provisions of the collective

agreement as written. The Union then took the issue to negotiations and achieved what the Applicant had initially requested for the Shipper/Receiver/Stock Clerks insofar as the holiday pay issue was concerned.

[25] With respect to the issue of representation of the Shipper/Receiver/Stock Clerks by PSAC, the evidence established that the Applicant approached PSAC about that prospect, but that PSAC had determined not to make any application to the Board to amend its certification Order, or to engage in discussions with RWDSU concerning that possibility. Absent some willingness on the part of PSAC to undertake representation, there was nothing that RWDSU could do to force PSAC to undertake such representation.

[26] As for the issue raised by the Applicant concerning the alleged underpayment of benefits, he was advised at the hearing that the Board had no jurisdiction to make any determinations under *The Labour Standards Act* and we decline to do so.

[27] The application is hereby dismissed.

DATED at Regina, Saskatchewan, this **29th** day of **April, 2011.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson