The Labour Relations Board
Saskatchewan

STEWART KELLY READ, Applicant v. AMALGAMATED TRANSIT UNION, LOCAL 615, Respondent and THE CITY OF SASKATOON, Interested Party

LRB File No. 062-11; September 28, 2011
Chairperson, Kenneth G. Love, Q.C.

For the Applicant:	Self Represented
For the Respondent Union:	Jim Yakubowski and Craig Dunlop
For the Respondent Employer:	No one appearing

Duty of Fair Representation – s. 25.1 – Probationary Employee determined to be unfit to drive transit vehicle by supervisor – Suspension ultimately results in termination of employee – Union grieves termination – Grievance taken unsuccessfully by Union to all levels under the Collective Agreement prior to arbitration – Union requests legal opinion regarding chances of success at arbitration.

Following receipt of legal opinion, Union Executive recommends arbitration be pursued – Question referred to meeting of Union members who approve submission of grievance to arbitration.

Subsequent to approval of submission to arbitration, Union member requests membership reconsider earlier decision – Motion to reconsider submission of grievance to arbitration passed by 2/3 majority of membership present at meeting.

Vote on reconsideration delayed in order to allow Applicant to be present and provide argument with respect to motion to reconsider decision to proceed to arbitration. Meeting held, but insufficient union members present to constitute a quorum – 2nd meeting held in afternoon – quorum present – motion to overturn decision to submit grievance to arbitration passed.

Arbitrary conduct – Board reaffirms that determination by membership regarding submission of grievance to arbitration falls afoul of the duty of fair representation – Board confirms that such a procedure is inappropriate insofar as it is impossible to know whether the decision made by the membership was based on appropriate considerations and only those considerations – Board orders grievance be submitted to arbitration.

REASONS FOR DECISION

Background:

[1] Amalgamated Transit Union, Local 615, (the "Union") is certified as the bargaining agent for transit employees of The City of Saskatoon (the "Employer"). The Applicant was a probationary bus driver employed by the City of Saskatoon Transit Department.

[2] On or about August 19, 2009, the Applicant was late for his appointed shift as a bus driver. He spoke to a supervisor who claimed that the Applicant's eyes were glossy and he smelled of liquor. He was deemed unsuitable to drive by the supervisor and was sent home.

[3] Subsequent to this incident, the Employer determined that the Applicant was not a suitable employee and terminated his employment as a bus driver on August 25, 2009. The Union grieved against that decision by grievance dated August 25, 2009, which grievance was acknowledged to have been received by the Employer on August 28, 2009.

Facts:

[4] There was no dispute with respect to the facts in this case. The Applicant testified on his own behalf and Mr. Craig Dunlop, the President of the Local, testified on behalf of the Union.

[5] The grievance was processed by the Union through all three (3) of the levels for settlement of grievances under the collective agreement. In all cases, the Union was unsuccessful in having the decision to terminate the Applicant reversed or modified. A final appeal to the Executive Committee of the City of Saskatoon City Council was also unsuccessful.

[6] Following rejection of the appeal to the Executive Committee of the City of Saskatoon City Council, the Union sought and obtained legal advice with respect to the prospects of success should the Union proceed to arbitration. Based upon that opinion, the Executive of the Union formulated a recommendation to a general membership meeting that the grievance should proceed to arbitration.

[7] In accordance with its usual procedure, the Union Executive referred the question of whether the grievance should proceed to arbitration to its general membership at a meeting held on October 20, 2010. At two meetings[1] held on October 20, 2010 the Minutes of that meeting report as follows:

> *<u>Kelly Read termination</u> grievance to be heard by City Council May 17th Response denied by council.*
>
> *Exec. Recommends to proceed to Arbitration; 2nd by: Sis. E. Gendron*
>
> *AM Yea 15 Nay 0 PM Yea 33 Nay 2 CARRIED*

[8] On December 15, 2010, another general membership meeting was held by the Union. At that meeting a motion was moved and passed 24 Yeas vs. 6 Nays. Following the passage of that motion, another motion was made "to table the motion until the Jan. 2011 meeting and inform Bro. Kelly Read of the meeting so he would be able to attend and state his case". That motion was also passed.

[9] At the meeting on January 19, 2011, there was no quorum at the meeting in the AM. In the PM the motion to rescind the earlier motion to support sending the grievance to arbitration was passed by the membership by a vote of 16 to 13.

[10] At the January, 2011 meeting, the Applicant testified that the proponents of the rescission motion, a G. Kapeller who had alleged that he had proof that the Applicant had not disclosed that he was late on other occasions. He testified that there was no proof of such allegations offered and that Mr. Kapeller engaged in a character assassination of him to sway the vote on the rescission.

[11] At that meeting, Mr. Yakubowski, the Vice-President of the Union is reported in the Minutes to have noted that the only incident "that Management was concerned about was the one on the day in question". He went on to note that Management had not raised any other incidents over excessive tardiness and, therefore, any other incidents should have no bearing on the outcome of the arbitration.

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[1] It was common for membership meeting to be held both in the morning and in the early evening to accommodate Union members working shifts.

[12] Following the reconsideration of the decision to proceed to arbitration, the Union did not proceed with the planned grievance arbitration. The Applicant filed his application under s. 25.1 of *The Trade Union Act*[2] (the "Act") on April 21, 2011.

Applicant's arguments:

[13] The Applicant argued that he had been dealt with unfairly by the Union in allowing the decision to proceed to arbitration to be reconsidered. He argued that the decision was motivated by arguments unrelated to the merits of his case, insofar as there was allegations that he had been late on other occasions, but the allegations were unfounded and no evidence was presented in support of those allegations.

[14] The Applicant also argued that Mr. Kapeller made personal attacks on him rather than making any factual presentation at the January 19, 2011, meeting which he described as slanderous.

Union's arguments:

[15] The Union argued that they had done everything they were required to do in the processing of the grievance. They took it though all of the steps save arbitration, which step they were prevented from taking because of the resolution of the membership. They acknowledged that the executive of the Union supported submitting the matter to arbitration, but they could not do so as their Constitution required that decisions concerning referral of matters to arbitration were to be the subject of approval by the Union membership.

[16] In support of their position, they referenced Article 13.5 of their Constitution which reads, in part, as follows:

> *…any expenditures, other than those which are normal and routine or specifically provided for by the L.U.*[3] *bylaws, must be authorized by a majority vote of the members of the L.U. in attendance at a regular meeting of the L.U.*

Relevant statutory provision:

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[2] R.S.S. 1978 c. T-17
[3] Local Union

[17] Relevant statutory provisions of the Act provided 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:

[18] The Board considered a similar situation in *Gordon W. Johnson v. Amalgamated Transit Union, Local 588*[4]. In that decision, the Board reviewed an application made by Mr. Johnson against the Amalgamated Transit Union local which was certified to represent transit employees in the City of Regina. As was the case here, the Union in the Johnson case also referred decisions, concerning the submission of grievances to arbitration, to a meeting of the membership.

[19] In that decision, at pages 42-44 (Sask L.R.B.R.) the Board made the following comments:

> *Trade Unions are democratic organizations, with a tradition of strong reliance on the opinions and directions of their members. This is one of their chief strengths, and one of the foundations for confiding to them the important interests which they are charged with representing.*
>
> *The genesis of the duty of fair representation, however, lies in a recognition that any organization which is governed exclusively by majoritarian principles has the potential to be oppressive to individual employees or minority groups of employees. Because these individuals and groups have no option but to rely on the certified trade union to represent their interests, the courts, legislatures and labour relations boards which have considered the issue concluded that their bargaining agents must be held to a minimal standard of fairness in dealing with them, a standard described earlier in these reasons, defined in terms of a proscription of trade union decision-making which is arbitrary, discriminatory or in bad faith.*
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> *The roots of the duty of fair representation lie in a recognition that, in addition to an expression of the will of the majority, democratic principles must provide for the protection of individuals and minorities from the excesses of majoritarianism. An individual, in the scheme of collective bargaining, cannot assert that his or her interest should prevail over others, or that it represents an entitlement of an absolute kind. The duty of fair representation requires, however, that he or she can require that any decision which is made concerning those interests does not reflect malice, ill will, or denigration on discriminatory grounds. More importantly for our purposes here, those decisions should, to use language which has become common in the discourse concerning the duty of fair representation,*

[4] L.R.B. File No. 091-96, [1997] Sask. L.R.B.R. 19

> *reflect a consideration of all factors which are relevant to the decision and of no factors which are not relevant.*
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> *A decision-making process of the kind followed here fall afoul of the duty of fair representation, in our view, because it is impossible to know whether the decision was based on the appropriate considerations and only those considerations. Mr. McCormick speculated that the vote went against the pursuit of the grievance because "Mr. Johnson's past caught up with him" – that is to say, that his colleagues felt his cumulative record might make dismissal reasonable. Mr. McCormick said that he did not think the employees disliked Mr. Johnson, who was personally popular, but that they may have felt his work performance justified the criticisms leveled at him by the Employer. Mr. Johnson said that he had heard "talk" about the high cost of arbitration, and his sense was that this might have played a role in the outcome of the vote.*
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> *The problem with the use of a referendum ballot as a means of making this kind of decision is that there is no way of knowing whether either of these two explanations played a role in the decision, or what range of other factors the voters may have taken into account. The decision is neither amenable to explanation nor accountable to Mr. Johnson or to the Union executive which had reached a contrary conclusion through a process of investigation and careful thought. Mr. McCormick made considerable efforts, as apparently did other officers to persuade the employees to support the executive recommendations; it cannot be said, however, whether their activity had any influence at all, or whether the employees considered another set of considerations entirely.*
>
> *…*
>
> *Mr. McCormick and the other members of the executive took what steps they could to ensure that the members of the bargaining unit were properly briefed prior to the vote, and that they understood that the executive was in favour of proceeding to arbitration.* ***The mechanism of the vote among the entire group of employees, many of whom had not participated in the discussion at the membership meeting, and some of whom may not have been in possession of any information beyond what was on the notice was, in our opinion, inherently arbitrary as a means of making a decision about the fate of an individual employee, however useful it might be as a means of obtaining direction about issues of more general significance.*** *[emphasis added]*

[20] Those comments by the Board are as appropriate now as they were then and must guide the decision in this case and we adopt the reasoning and rational of the Board in that case. This case was somewhat more egregious than that encountered in the Johnson case as it appears from the testimony, particularly of the Applicant that the decision to reconsider the earlier decision to proceed to arbitration was influence by irrelevant considerations brought up by Mr. Kappeller. Vice-President Yakubowski made a point of noting to the membership that any additional tardiness by the Applicant was not the basis for his termination and was, therefore, irrelevant to the consideration of whether to proceed to arbitration or not.

[21] In this case, the Union executive had made a reasoned determination, based on legal advice, to proceed to arbitration. At the hearing, they repeated their desire to have continued to have pressed on to arbitration, but which decision they felt they were prevented from doing by the membership's reconsideration of the original decision to proceed.

[22] As noted above, the decision by the Union membership not to proceed with the submission to arbitration, as was the original decision by the membership to proceed, was inherently arbitrary. For these reasons, the application is allowed.

[23] The Board hereby **orders:**

1. That the grievance filed by the Union concerning the dismissal of the Applicant is hereby referred to arbitration in accordance with the provisions of the collective bargaining agreement. Any time limitations contained within the collective bargaining agreement are hereby waived, extended or abridged as necessary to allow the grievance to be processed to arbitration.

2. That a copy of this decision shall be posted by the Union, within three (3) business days of its receipt by them, in a place in the workplace where it may be viewed by as many employees in the bargaining unit as possible.

3. I will remain seized with respect to any matters arising out of this determination.

DATED at Regina, Saskatchewan, this **28th** day of **September, 2011.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson