Labour Relations Board
Saskatchewan

CITY OF SASKATOON, Applicant v. AMALGAMATED TRANSIT UNION, LOCAL 615 AND STEWART KELLY READ, Respondents

LRB File No. 169-11; April 19, 2012
Chairperson, Kenneth G. Love Q.C.; Members: Brenda Cuthbert and Duane Siemens

For the Applicant:	Ms. Patricia J. Warwick
For the Respondent Union:	Mr. Gary Bainbridge
For the Respondent Stewart Kelly Read:	Self Represented

Reconsideration – Applicant alleges Board erred in granting relief against the Applicant by ordering matter which was the subject of a Duty of Fair Representation complaint by Respondent against Respondent Union. Applicant alleges that Board was either without jurisdiction or exceeded its jurisdiction in making order remitting matter to arbitration.

Reconsideration - Applicant alleges that Board misinterpreted or misapplied the law in making remittance order contrary to 4th criteria utilized by Board in reconsideration applications.

Reconsideration - Proper interpretation of law or policy – Applicant alleges Board decision is precedential and amounts to significant policy adjudication which the Board should reconsider pursuant to the 6th criteria utilized by Board in reconsideration applications.

Board discusses criteria for reconsideration.

Practice and Procedure - Respondent Union alleges that applicant should be barred from requesting reconsideration since it deliberately took no position with respect to the Duty of Fair Representation complaint and did not appear at the hearing of the complaint on its merits.

***The Trade Union Act*, s. 5, 18, 25.1 and 42.**

REASONS FOR DECISION

Background:

[1] Kenneth G. Love, Chairperson: The Amalgamated Transit Union, Local 615 (the "Union") represents transit employees of the Applicant, The City of Saskatoon (the "City" or the "Employer"). The Respondent ("Read") was a transit employee

employed by the City. Read filed an application under s. 25.1 of *The Trade Union Act*[1] (the "*Act*") on April 21, 2011.

[2] On September 28, 2011, the Chairperson of the Board, sitting alone pursuant to s. 4(2.2) of the *Act*, found[2] that the Union had breached its duty of fair representation owed to Read and in his decision ordered as follows:

> 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.

[3] The City declined to participate in the original hearing. It filed no reply and did not appear at the hearing of the complaint under s. 25.1 of the *Act.*

[4] Following receipt of the Chairperson's decision, the City filed the within application for reconsideration of the Board's decision.

[5] For the reasons which follow, the Board denies the request for reconsideration.

Facts and Evidence:

[6] The facts as found by the Chairperson in his decision dated September 28, 2011 were as follows:

> ***[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.*

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[1] R.S.S. 1978 c. T-17
[2] LRB File No. 062-11, 2011 CanLII 75570 (SK LRB)

[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[3] 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*

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

> *over excessive tardiness and, therefore, any other incidents should have no bearing on the outcome of the arbitration.*
>
> ***[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*[4] *(the "Act") on April 21, 2011.*

[6] In its application, the Employer relied upon Criteria 4 and 6 above.

Applicant's Arguments

[7] Counsel for the City made oral argument and filed case authorities which we have reviewed.

[8] In essence, the City argued that the Board erred in its decision asserting the Board was without jurisdiction or exceeded its jurisdiction by:

- **(a)** remitting the grievance to arbitration; and/or
- **(b)** waiving the time limits prescribed in the collective agreement with respect to submission of the grievance to arbitration.

[9] The City relied upon headings 4 and 6 set out above in respect of its arguments as to why the Board should reconsider this decision. It argued that the Board had erred in taking jurisdiction which it did not have in ordering the grievance be remitted to arbitration and/or the Board did not have jurisdiction to waive time limits imposed by the collective agreement for submission of grievances to arbitration and hence the decision should be reconsidered pursuant to heading 4.

[10] The City argued that the *Act* was silent with respect to any authority given to the Board to make the order which it made in this case. It argued that neither s. 5, s. 25.1, s. 18 or s. 42 provided sufficient authority to the Board to make the order in this case.

[11] Counsel for the Union acknowledged that the Board had, on many occasions, made similar orders in respect of complaints made under s. 25.1 of the *Act.*

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[4] R.S.S. 1978 c. T-17

However, the City argued that these orders were improperly made. The City argued that the proper remedy for breaches of s. 25.1 was a damage award.

[12] The City cited the Board decision in *Re: Napady*[5] a support for their view that the jurisdiction of the Board was limited. At paragraph 7 of that decision, the Board says:

> *An order will issue directing the Union to file a grievance with the Employer regarding Ms. Napady's complaint and directing the Employer to accept the grievance despite the expiry of the time limit under the collective agreement; both the Union and the Employer will be directed to process the grievance expeditiously.* ***This direction shall be without prejudice to the right of the Employer to raise any defences to the grievance at arbitration, including the expiry of time for filing same.*** *The Union shall also be directed to pay the sum of $200.00 to Ms. Napady for her expenses to attend the hearing before the Board. [Emphasis added]*

[13] The highlighted words above were relied upon by the City as showing the proper interpretation of the Board's authority in regards to its jurisdiction under s. 25.1 insofar as that direction by the Board, in their opinion, maintained the sanctity of the collective agreement between the parties.

[14] The City argued that as a result of the Board's Order, and through no fault on its part, it became the victim, being forced to participate in an arbitration process which would otherwise have been barred by the terms of the collective agreement.

[15] In support of its argument that the Board should have awarded damages in this case, the City cited the Court of Appeal decision in *SGEU and Betty Pickering v. Bonnie Moldowan*[6]. The City further argued that the issue of any delay could be dealt with by the Board by its apportionment of damages between the parties.

[16] In its arguments, the City also relied upon the decision of Geraint J. in *SGEU v. Saskatchewan (Labour Relations Board)*[7] as being instructive with respect to the Board's authority and jurisdiction, particularly insofar as s. 42 is concerned.

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[5] [2000] S.L.R.B.D. No. 28, LRB File No. 252-99
[6] [1995] 134 Sask R. 210, 8 W.W.R. 498, 126 DLR (4th) 289, 101 W.A.C. 210

[17] Alternatively, the City argued that, even if the Board had the authority to remit the grievance to arbitration, it did not have the jurisdiction to waive the time limits prescribed in the collective agreement for the processing of grievances to arbitration. In so doing, the City argued that the Board rewrote the collective agreement in making the Order which it made. It argued that the Board would require specific statutory authority to enable it to rewrite the collective agreement.

[18] The City argued that specific authority had been given the Board to abridge time in s. 5(n) of the *Act*, and that authority did not include any authority under s. 25.1 of the Act. In support, it referenced *Sullivan and Driedger on the Construction of Statutes 4th ed.*[8]

[19] In respect of heading 6 of the reconsideration criteria, the City argued that the Board's Order was prejudicial to the City insofar as time limits in the collective agreement are mandatory and they had expired. Furthermore, the City argued that it had placed reliance upon those time limits.

[20] The City also argued that an Order such as in this case, brought it into the business of the Union if they were to be subjected to an arbitration hearing in every instance where an error of the Union in representing an employee came to light. It argued that the Union chose to make the error in representing the union member after the time limits had expired and that the City should be entitled to rely upon the time limits for their protection.

Respondent Union's Arguments

[21] Counsel for the Union filed a written brief and case authorities which we have reviewed.

[22] Counsel for the Union argued firstly that the City should be precluded from making an application for reconsideration in this case because it had failed to make any submissions or be joined as a party to these proceedings. The Union argued that

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[7] [1994] 127 Sask. R. 163, S.J. No. 618, 51 A.C.W.S. (3d) 1288; Approved by Saskatchewan Court of Appeal without further reasons in [1995] 131 Sask. R. 246, CanLII 3950

[8] At pp. 186 et seq.

one of the primary functions of the Board was to provide for timely resolution of grievances. It argued that the City abdicated its ability to object to any proceedings of the Board based upon its failure to participate in the initial hearing of this matter. The Union argued that this failure, by using the reconsideration procedure to remedy its initial failure to participate and protect its interests, resulted in untimely delay which should not be countenanced by the Board.

[23] The Union also argued that the issue of Board jurisdiction was already decided by the Board having accepted that it had jurisdiction to make the Order in respect of which reconsideration is requested and as such, any application to determine the jurisdiction of the Board to make such order should be brought before the Court of Queen's Bench for Saskatchewan.

[24] The Union argued that there must be finality in proceedings before the Board and parties should not seek to re-try the same issue, which it argued the City was attempting to do in this case. In support of that proposition, the Union cited the Supreme Court of Canada decision in *Danyluk v. Ainsworth Technologies Inc.*[9] The Union argued that it was even more important in this case where the ultimate decision may be one made by an arbitrator.

[25] The Union also argued that the City should have directed any complaints concerning the Board's jurisdiction to order the relief which was ordered to the Saskatchewan Court of Queen's Bench by way of judicial review. It argued that ground 4 of the reconsideration criteria did not include errors of law or jurisdiction. In support of that position, the Union cited *United Brotherhood of Carpenters and Joiners of America, Local 1985 v. Saskatchewan Labour Relations Board.*[10]

[26] The Union further argued that the City was speculating on any errors which the Board had made in the original decision since it had failed to participate in the original hearing. Furthermore, it argued that as a result of its non participation, the City was, at its core, attempting to introduce new evidence into the proceedings.

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[9] [2001] 2 SCR 460
[10] [2011] S.J. No. 671

[27] The Union argued as well, that the present application represented an attempt by the City to conduct an appeal of the original decision in which it did not participate.

[28] In respect to ground 6 of the reconsideration criteria the Union argued that the original decision did not offend this criteria because (i) the decision did not represent new law since orders of this nature were the norm for labour relations Boards in Canada, and (ii) that the original order represents precisely the type of remedy contemplated by the statute.

[29] The Union cited several authorities for this position, including *Saskatchewan Council for Crippled Children and Adults Employees Union (Re)*[11], *K.H. (Re)*[12], *Adams, Canadian Labour Law, 2d edition*[13], *Andrew, Labour Relations Board Remedies in Canada (2nd ed)*[14]and *MacNeil, Trade Union Law in Canada*[15].

[30] The Union argued that this type of order (ie: the sending of a grievance to arbitration) is a necessary and desirable form of order which is essential to ensure that a successful applicant under s. 25.1 can pursue his or her grievance notwithstanding any misconduct by his representative union.

[31] The Union also argued that the City was not prejudiced in any way by the Board's order since, absent the wrongdoing by the Union, as found by the Board, the matter would have proceeded to arbitration in the normal course. The Union argued that the City would, in fact, receive a "windfall" if the arbitration were not to proceed.

[32] The Union also argued that there were no policy reasons to make changes to the Board's original order. It argued that the time lines and jurisdiction arguments made by the City were not applicable when the Board fashions an order under s. 25.1. In support of this argument, the Union cited *Johnson (Re:)*[16].

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[11] [1984] Feb. Sask. Labour Rep. 42
[12] [1998] S.L.R.B.R. 76, LRB File No. 015-97
[13] Canada Law Book at para 13.1100
[14] At para 15:2500
[15] At paras 7.1620-7.1630
[16] [1998] S.L.R.B.D. No. 13 LRB File No. 091-96

[33] In respect of the City's argument that the Board should substitute a monetary award for damages, the Union argued that such a suggestion was "preposterous", insofar as the Board was in no position to assess any damages resultant from any breach of the Collective Agreement citing in support both *K.H.* and *Johnson*, supra.

Relevant Statutory Provisions:

[34] Relevant statutory provisions include s. 5, 18, 25.1 & 42 of the *Act*, which provide as follows:

> *5 The board may make orders:*
>
> *(a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit or a subdivision thereof or some other unit;*
>
> *(b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, but no order under this clause shall be made in respect of an application made within a period of six months from the date of the dismissal of an application for certification by the same trade union in respect of the same or a substantially similar unit of employees, unless the board, on the application of that trade union, considers it advisable to abridge that period;*
>
> *(c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;*
>
> *(d) determining whether an unfair labour practice or a violation of this Act is being or has been engaged in;*
>
> *(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;*
>
> *(f) requiring an employer to reinstate any employee discharged under circumstances determined by the board to constitute an unfair labour practice, or otherwise in violation of this Act;*
>
> *(g) fixing and determining the monetary loss suffered by an employee, an employer or a trade union as a result of a violation of this Act, the regulations or a decision of the board by one or more persons, and requiring those persons to pay to that employee, employer or*

trade union the amount of the monetary loss or any portion of the monetary loss that the board considers to be appropriate;

(h) *determining whether a labour organization is a company dominated organization;*

(i) rescinding or amending an order or decision of the board made under clause (d), (e), (f), (g) or (h), or amending an order or decision of the board made under clause (a), (b) or (c) in the circumstances set out in clause (j) or (k), notwithstanding that a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;

(j) amending an order of the board if:

(i) the employer and the trade union agree to the amendment; or
(ii) in the opinion of the board, the amendment is necessary;

(k) rescinding or amending an order or decision of the board made under clause (a), (b) or (c) where:

(i) there is a collective bargaining agreement in existence and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary of the effective date of the agreement; or

(ii) there is no agreement and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary date of the order to be rescinded or amended;

notwithstanding that a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;

. . .

18. The board has, for any matter before it, the power:

(a) to require any party to provide particulars before or during a hearing;

(b) to require any party to produce documents or things that may be relevant to a matter before it and to do so before or during a hearing;

(c) that is vested in the Court of Queen's Bench for the trial of civil actions to:

(i) summon and enforce the attendance of witnesses;

(ii) compel witnesses to give evidence on oath or otherwise;

and

(iii) compel witnesses to produce documents or things;

(d) to administer oaths and solemn affirmations;

(e) to receive and accept any evidence and information on oath, affidavit or otherwise that the board in its decision sees fit, whether admissible in a court of law or not;

(f) subject to the regulations made by the Lieutenant Governor in Council, to determine the form in which evidence of membership in a trade union or communication from employees that they no longer wish to be represented by a trade union is to be filed with the board on an application for certification or for rescission, and to refuse to accept any evidence that is not filed in that form;

(g) subject to the regulations made by the Lieutenant Governor in Council, to determine the form in which and the time within which any party to a proceeding before the board must file or present any thing, document or information and to refuse to accept any thing, document or information that is not filed or presented in that form or by that time;

(h) to order preliminary procedures, including pre-hearing settlement conferences;

(i) to determine who may attend and the time, date and place of any preliminary procedure or conference mentioned in clause (h);

(j) to conduct any hearing using a means of telecommunications that permits the parties and the board to communicate with each other simultaneously;

(k) to adjourn or postpone the proceeding;

(l) to defer deciding any matter if the board considers that the matter could be resolved by arbitration or an alternative method of resolution;

(m) to bar from making a similar application for any period not exceeding one year from the date an unsuccessful application is dismissed:

(i) an unsuccessful applicant;

(ii) any of the employees affected by an unsuccessful application;

(iii) any person or trade union representing the employees affected by an unsuccessful application; or

(iv) any person or organization representing the employer affected by an unsuccessful application;

(n) to refuse to entertain a similar application for any period not

exceeding one year from the date an unsuccessful application is dismissed from anyone mentioned in subclauses (m)(i) to (iv);

(o) to summarily refuse to hear a matter that is not within the jurisdiction of the board;

(p) to summarily dismiss a matter if there is a lack of evidence or no arguable case;

(q) to decide any matter before it without holding an oral hearing;

(r) to decide any question that may arise in the proceeding, including, without restricting the generality of the foregoing, any question as to whether:

(i) a person is a member of a trade union;

(ii) a collective agreement has been entered into or is in operation; or

(iii) any person or organization is a party to or bound by a collective agreement;

(s) to require any person, trade union or employer to post and keep posted in a place determined by the board, or to send by any means that the board determines, any notice that the board considers necessary to bring to the attention of any employees;

(t) to enter any premises of an employer where work is being or has been done by employees, or in which the employer carries on business, whether or not the premises are those of the employer, and to inspect and view any work, material, machinery, appliances, articles, records or documents and question any person;

(u) to enter any premises of a trade union and to inspect and view any work, materials, articles, records or documents and question any person;

(v) to order, at any time before the proceedings has been finally disposed of by the board, that:

(i) a vote or an additional vote be taken among employees affected by the proceeding if the board considers that the taking of such a vote would assist the board to decide any question that has arisen or is likely to arise in the proceeding, whether or not such a vote is provided for elsewhere; and

(ii) the ballots cast in any vote ordered by the board pursuant to subclause (i) be sealed in ballot boxes and not counted except as directed by the board;

(w) to enter on the premises of an employer for the purpose of conducting a vote during working hours, and to give any directions in connection with the vote that it considers necessary;

> *(x) to authorize any person to do anything that the board may do pursuant to clauses (a), (b), (d), (e), (i), (j), (s), (t), (u) and (w), on any terms and conditions the board considers appropriate, and to require that person to report to the board on anything done.*
>
> *. . .*
>
> *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 and Decision:

[35] The Board has consistently applied the same stringent test in determining whether or not a reconsideration application should be allowed. As set out by the Board in *Grain Services Union v. Saskatchewan Wheat Pool et al.*[17]

> *A request for reconsideration is not an appeal or a hearing de novo, nor is it an opportunity to reargue a case, raise new arguments or present new evidence, but rather, it generally allows important policy issues to be addressed, such as evidence to be presented that was not previously available, or errors to be corrected.*

[36] The reason why such a stringent test is applied by the Board was set out in *City of North Battleford v. Canadian Union of Public Employees, Local 287.*[18]

> *…the policy behind such a restrictive approach to reconsideration is to accord a serious measure of certainty and finality to the decisions of the Board, while affording "a fulsome degree of flexibility to respond to exigencies of fact and circumstance which may militate against the continued governance of determinations earlier made.*

[37] The criteria consistently reviewed and applied by the Board on an application for reconsideration are set out in *Remai Investment Corporation, operating*

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[17] [2003] Sask. L.R.B.R. 454, LRB File No. 003-02, at 456
[18] [2003] Sask. L.R.B.R. 288, LRB File No. 054-01, at 291

*as Imperial 400 Motel v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union et a*l.[19]

> *Though the Board has the power under Section 5(i) to reopen decisions it has arrived at, this power must be exercised sparingly, in our view, and in a way which will not undermine the coherence and stability of the relationships which the Board seeks to foster. In a comment on an application for reconsideration of a decision of the British Columbia Labour Relations Board in Corporation of the District of Burnaby v. Canadian Union of Public Employees, [1974] 1 Can. L.B.R. 128, at 130, the Board asserted that "speed and finality of decisions are especially imperative in labour relations. Of no area of law is it truer to say that justice delayed is justice denied.*
>
> *In the three jurisdictions we have alluded to above - Canada, British Columbia and Ontario - the recognition of the need to balance the claim for reconsideration against the value of finality and stability in decision-making is reflected in the procedures adopted by labour relations tribunals. In all of them, the procedure followed in connection with an application for reconsideration departs from the procedure employed for other kinds of applications. In all three cases, the applicant is required to establish grounds for reconsideration before a decision is made whether a rehearing or some other disposition of the matter is appropriate.*
>
> *We have concluded that such a two-step approach is appropriate in cases of this kind. We do not agree with counsel for the Employer that we were mistaken in requiring that an applicant who seeks reconsideration of a decision of the Board must persuade us that there are solid grounds for embarking upon that course.*
>
> *Counsel for the Employer argued that we should adopt the alternative of entertaining a full rehearing of the case, rather than establishing this intermediate stage. He predicted that this would not have the effect of an uncontrolled increase in the number of such applications. It is difficult to see, however, why allowing an automatic trial de novo to a disappointed applicant would not expose the Board to a growing number of applications to rehear cases in which the contest is serious or the stakes high.*
>
> *In other jurisdictions, particularly in British Columbia, there has been extensive discussion of the criteria which labour relations boards might use to determine whether an applicant has been able to establish that there are grounds which justify the reopening of a decision. In their decision in the case of Overwaitea Foods v. United Food and Commercial Workers, No. C86/90, the British Columbia Industrial Relations Council set out the following criteria:*
>
> > *In [Western Cash Register v. International Brotherhood of Electrical Workers, [1978] 2 CLRBR 532], the Board articulated four criteria in which it would give favourable consideration to an application for reconsideration. Subsequent decisions (Construction Labour Relations*

[19] [1993] 3rd Quarter Sask. Labour Rep. 103, LRB File No. 132-93, at 107-108:

> *Association of British Columbia, BCLRB No. 315/84, and Commonwealth Construction Co. Ltd., BCLRB No. 61/79, [1979] 3 Can LRBR 153), added a fifth and sixth ground:*
>
> > *1. If there was no hearing in the first instance and a party subsequently finds that the decision turns on a finding of fact which is in controversy and on which the party wishes to adduce evidence; or,*
> >
> > *2. if a hearing was held, but certain crucial evidence was not adduced for good and sufficient reasons; or,*
> >
> > *3. if the order made by the Board in the first instance has operated in an unanticipated way, that is, has had an unintended effect on its particular application; or,*
> >
> > *4. if the original decision turned on a conclusion of law or general policy under the Code which law or policy was not properly interpreted by the original panel; or,*
> >
> > *5. if the original decision is tainted by a breach of natural justice; or,*
> >
> > *6. if the original decision is precedential and amounts to a significant policy adjudication which the Counsel may wish to refine, expand upon, or otherwise change.*

[38] The Applicant relied upon criteria Nos. 4 and 6 in making this application. Summarily, Criteria #4 is; "Does the decision turn on a conclusion of law or general policy under the *Act*, which law or policy was not properly interpreted by the original panel?" Summarily, Criteria #6; is "Is the original decision precedential and amounts to a significant policy adjudication which the Board may wish to refine, expand upon, or otherwise change?"

[39] The City in its arguments regarding Criteria #4 focus on the Board's jurisdiction to make the order which it made in the original decision. However, as noted by counsel for the Union, for the Board to have made the order which it made, presumes that the Board has already assumed the jurisdiction which the City wishes to attack. Once that jurisdiction has been utilized to make the original order, the proper means of

attack of that assumption of jurisdiction is by way of application for judicial review in the Saskatchewan Court of Queen's Bench.

[40] The City cited numerous examples of the Board having taken the jurisdiction which it alleged should be reviewed. However, it provided no decisions from this Board where an issue of Board jurisdiction had been accepted for review under s. 5(i) of the *Act.*

[41] Conversely, the Union's argument showed the genesis of the Board's determination of its jurisdiction and its use since, is our decision in *Saskatchewan Council for Crippled Children and Adults Employees Union (Re)*[20]. In that case, Chair Dennis Ball (now Mr. Justice Ball), explained the Board's authority for the type of order to which the City now objects. At para 23, the Board says"

> *In the Board's opinion, Sections 5 and 42 of the Act taken together are wide enough to permit it to order that a grievance proceed to arbitration if and when a union breaches its duty of fair representation to a proposed grievor. Furthermore, the broad wording of Sections 5 and 42 of the Act do not confine the Board to making orders only with respect to parties who violate the Act. To be meaningful any order directing a review of the applicant's dismissal would necessarily apply to the employer, who is already a party in this application. The actual procedure to be followed would depend upon the circumstances of the case. However, if a union has already demonstrated a failure to fairly represent employees in filing a grievance it would be unrealistic to expect it to be properly representative of those same employees in the ensuing arbitration process. For that reason any order could be structured so that the selection of a representative nominee to the Arbitration Board would be the privilege and responsibility of the employee rather than the union.*
>
> *If the Board should grant a remedy to the applicants in the circumstances of this case, it would not purport to amend, alter, or rectify the Collective Bargaining Agreement between the parties in any way. The agreement, including the mechanism contained therein for the resolution of disputes, would remain intact, unchanged and binding upon the parties. The Board would simply be exercising its statutory authority to make orders requiring compliance with The Trade Union Act.* ***The remedy available to the applicants would have its origin in the statute and not in the Collective Bargaining Agreement****. [Emphasis added.]*

[20] [1984] Feb. Sask. Labour Rep 42., LRB File Nos: 248 to 251-83 inclusive

[42] Similarly, in *K.H. (Re)*[21], then Chairperson Grey further explained the Board's acceptance of jurisdiction to make such orders. At pp. 80-81, the Board speaks of its "normal" authority to order a matter to arbitration.

> *The Board will therefore follow its normal remedial path of ordering the Union and Employer to refer the grievances of K.H. to arbitration. In relation to which grievances are subject to the Order to refer to arbitration, the Board orders the Union and Employer to proceed to arbitrate the grievance filed in relation to the written warning given to K.H. on June 7, 1995 which was set out on page 2 of the Board's Reasons for Decision dated July 9, 1997; the grievances relating to the suspension of K.H. on October 23, 1995 and October 25, 1995 which are set out on pages 5 and 6 of the Board's earlier Reasons; the denial of sick leave benefits grievance filed with the Employer in November, 1995; and the grievance relating to the termination of K.H.'s employment which was filed with the Employer on February 5, 1996…*

[43] Further, at pp 85-86 of *Re: K.H.,* the Board dealt with the issue of non-compliance with the provisions of the collective agreement regarding timeliness, laches, settlement, abandonment and the like. In that regard, the Board stated:

> *In all instances of a finding of a breach of the duty of fair representation, the union has compromised the grievance of the employee. The union may have failed to file the grievance within the time frame set out in a collective agreement or failed to process the grievance in accordance with the procedures set out in the collective agreement. It may have settled the grievance or withdrawn the grievance, as it did in the present case. In normal circumstances, the employer could successfully raise preliminary 86 Saskatchewan Labour Relations Board Reports [1998] Sask. L.R.B.R. 76 objections to the jurisdiction of a board of arbitration to hear and determine the grievance based on the union's non-compliance with the provisions of the collective agreement, or legal doctrines such as laches, settlement, abandonment and the like.*
>
> *The Board, however, has authority under ss. 5(c), (d), (e) and 42 to make an effective Order requiring the Union to properly represent the employee. In this instance, the Order will require the Union and Employer to refer the grievances to arbitration without challenging the jurisdiction of the arbitration board to hear and determine the grievances on their merits due to conduct on the part of the Union that constituted a breach of its duty to fairly represent K.H. Such an Order is necessary in order to permit the aggrieved employee to have his grievances heard by a board of arbitration in the manner they would have been heard but for the Union's breach of its duty of fair representation. In this instance, the grievances would not have been withdrawn and would have been referred to an arbitration board in a timely fashion. This is not to say that the arbitration board is without authority to consider the delay in*

[21] [1998] S.L.R.B.R. 76, LRB File No.: 015-97

> *processing a grievance as reason to assign a portion or all of a claim for monetary loss to the Union should the employee be successful before the arbitration board; it is not, however, a reason for refusing to hear and determine the employee's grievance.*

[44] Assumption of jurisdiction such as taken by the Board in its original decision, as pointed out by Union counsel, is not unusual for Labour Relations Boards throughout Canada. As was noted by Adams in *Canadian Labour Law, 2d edition*[22]:

> *The remedy [for a breach of the duty of fair representation] can be innovative and can affect the employer. Where the complaint concerns the failure to pursue a grievance to arbitration, labour boards have ordered the trade union to take the grievance to arbitration and the employer to waive any preliminary objections to arbitration such as the issue of expiry of time-limits provided in the collective agreement.*

[45] MacNeil in *Trade Union Law in Canada*[23] describes a factual situation similar to that which is the subject matter of this decision. He says:

> *In order to ensure that procedural niceties do not interfere with this possibility [that is the referral of a grievance to arbitration] employers are normally named as parties to the action and are entitled to participate in the hearing, especially in giving background that will enable the determination of whether the grievance may have had some merit. An employer's failure to attend a hearing will not bar the Board from ordering a remedy which may affect the employer's rights. Boards can order that objections to arbitrability, which may be available under the collective agreement, be waived so that the merits of the grievance will be considered by the arbitrator.*

[46] Therefore, in assuming the jurisdiction to remit the grievance to arbitration in accordance with the collective agreement, and to waive the time limitations which may be a bar to its being heard by an arbitrator, the Board was relying upon long established authority for making such Orders. For that reason, the application by the City for reconsideration of the Board's exercise of this jurisdiction based upon ground # 4, is denied.

[47] The City also argues that the decision is precedential and amounts to a significant policy adjudication which the Board may wish to revisit. With respect, we cannot agree with the City's arguments in this regard.

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[22] Canada Law Book at para 13.1100

[48] Clearly, the Board has made similar Orders in the past and has had the opportunity to revisit this jurisdiction multiple times and has not seen fit to "*refine, expand upon, or otherwise change"* the scope of the remedial orders made by it under s. 25.1.

[49] The City argued not that the policy underscoring the utilization of the Board's jurisdiction should be refined, expanded or otherwise changed, but rather that the Board did not have the jurisdiction it exercised or had exceeded its jurisdiction in making the impugned order. It further argued that the policy was wrong because it prejudiced the City as a result of the matter now having to proceed to arbitration. However, as noted above that prejudice is a normal result of the finding of a violation of s. 25.1, one which the City should have been cognizant of when it determined not to appear at the hearing of the initial complaint.

[50] The referral of grievances to arbitration and the waiving of time limitations, when the Board has found a breach of the duty of fair representation, is not a new policy adopted by the Board in this instance, but rather is a policy of long standing. The Board therefore finds that there is nothing novel in the orders which were made in the original case and does not see any need to refine, expand upon, or otherwise change those orders as requested by the City.

[51] For these reasons, the application is denied.

DATED at Regina, Saskatchewan, this **19th** day of **April, 2012.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson

[23] At paras 7.1620-7.1630