The Labour Relations Board
Saskatchewan

RICHARD PERRY, Applicant v. UNITED BROTHERHOOD OF CARPENTERS, LOCAL 1985, and SOUTH WBD HOLDINGS LTD. o/a SOUTH EAST CONSTRUCTION, Respondents

LRB File No. 184-12; November 28, 2012
Chairperson, Kenneth G. Love, Q.C:

For the Applicant:	Self Represented
For the Respondent Union:	Robert W. Olson
For the Respondent Employer:	Michael Silvernagle

Duty of Fair Representation – Section 25.1 Trade Union Act – Employee discharged due to Site Owner barring him from construction site – Union conducts investigation, attempts to mitigate penalty, finds member alternate employment, and takes legal advice. Board finds no evidence that conduct of Union was arbitrary, discriminatory or in bad faith.

Site ban by Owner on employee – Employer has no other work for employee – Union investigates facts surrounding Owner's determination to ban employee – Union unsuccessfully attempts to negotiate reduction in ban to permit employee to return to work – Union finds employee new work as soon as possible.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Q.C., Chairperson:** The United Brotherhood of Carpenters, Local 1985, (the "Union") is certified as the bargaining agent for a unit of employees of WBD Holdings Ltd. o/a South East Construction (the "Employer"). Richard Perry (the "Applicant") was an employee of the Employer for a period prior to July 19, 2012. The Employer was a contractor on the expansion of the Potash mine operated by Mosaic Potash Company ("Mosaic").

[2] The application was heard by Kenneth G. Love, Q.C. Chairperson of the Board sitting alone pursuant to s. 4(2.2) of the *Act* on November 26, 2012 in Regina, Saskatchewan.

Facts:

[3] On July 19, 2012, the Applicant was driving to his workplace, which was the Farfield site north of Esterhazy, Saskatchewan, where Mosaic is expanding its Potash mining business. He was traveling along municipal grid road #637 in the Rural Municipality of Stockholm. The grid road surface is gravel and is maintained by the Mosaic Potash Company through an agreement with the Rural Municipality of Stockholm. The posted speed limit on this road is 80 km per hour.

[4] Prior to the Applicant reaching his workplace, he encountered another vehicle driven by Mr. Raymond Rorquist, the K2 Mill Expansion Engineering Manager for Mosaic, and, according to a statement given by Mr. Rorquist, was traveling at "a speed that was no doubt beyond the rules of the road and showed no sign of consideration by slowing down by meeting us".

[5] As a result of this encounter, Mr. "Rorquist, in his statement says that he requested that the general contractor on the site (AMEC) "find the vehicle and responsible person/contractor and inform them that if the individual worked at our [Mosaic's] Farfield site, the person was no longer welcome to work there as the person obviously has a problem driving in a manner that is respectful to the public".

[6] The vehicle which was identified as being responsible for this incident belonged to the Applicant. He was advised by his foreman, Sherridon Godwin, at 3:00 P.M. that day that he was fired and was escorted off the property with his tools.

[7] On July 20, 2012, the Applicant attended at the Union's office in Regina to complain about his abrupt termination from his employment. He spoke with Kelvin Goebel, the Business Manager for the Union, and Colin Weist, the Organizer/Representative for the Union. At that meeting, the Union representative undertook to look into the matter and advise the Applicant as to his rights.

[8] In addition, the Union also took steps to find re-employment for the Applicant. He was dispatched to another job opportunity at a potash mine near Saskatoon. For reasons which were not fully explained to the Board, this job opportunity did not work out and the Applicant was

dispatched to another job which lasted some weeks and he later was dispatched to the position which he was working in at the time of this hearing.

[9] Mr. Weist took steps to contact the foreman with the Employer to obtain a statement from him as to what occurred. He also asked the foreman speak to Mosaic and obtain a statement from the complainant at Mosaic.

[10] It took some time to obtain the statements, but they were eventually provided to Mr. Weist who reviewed those statements and discussed them with Kelvin Goebel. Kelvin Goebel recommended that, before they proceeded further, they should obtain a legal opinion in regards to their position.

[11] That legal opinion was obtained on October 15, 2012 from counsel for the Union. That opinion stated, in part, "[F]urther to our recent conversation regarding Mr. Perry and after receiving additional information, it is my opinion that, in short, we cannot assist Mr. Perry unfortunately with returning to work with South East Construction". Mr. Perry was permitted to review and read the opinion, but he was not allowed a copy of the opinion.

Relevant statutory provision:

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

Analysis and Decision:

[12] The case law that the Board consistently follows with respect to the duty of fair representation owed by the Union to a member as set out in s. 25.1 of the *Act* was extensively reviewed in *Dwayne Lucyshyn v. Amalgamated Transit Union, Local 615*[1]. At paragraph 30 of that decision, the Board provided this summary of the case law that the Board consistently follows with respect to the duty of fair representation owed by the Union to a member as set out in s. 25.1 of the *Act* was extensively reviewed in *Dwayne Lucyshyn v. Amalgamated Transit Union, Local 615*[2]. At paragraph 30 of that decision, the Board provided this summary of the Board's jurisprudence with respect to the duty of fair representation:

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

[30] In *Hargrave, et al. v. Canadian Union of Public Employees, Local 3833, and Prince Albert Health District*, [2003] Sask. L.R.B.R. 511, LRB File No. 223-02, the Board set out the principles applicable to an analysis of the duty of fair representation, with a particular focus on arbitrariness and the scope of the Union's duty. The Board stated at 518 to 526:

> *[27] As pointed out in many decisions of the Board, a succinct explanation of the distinctive meanings of the concepts of arbitrariness, discrimination and bad faith, as used in s. 25.1 of the Act, was made in Glynna Ward v. Saskatchewan Union of Nurses, [1988] Winter Sask. Labour Rep. 44, LRB File No. 031-88, at 47, as follows:*
>
> > *Section 25.1 of The Trade Union Act obligated the union to act "in a manner that is not arbitrary, discriminatory, or in bad faith". The union's obligation to refrain from acting in bad faith means that it must act honestly and free from personal animosity towards the employee it represents. The requirement that it refrain from acting in a manner that is discriminatory means that it must not discriminate for or against particular employees based on factors such as race, sex or personal favoritism. The requirement that it avoid acting arbitrarily means that it must not act in a capricious or cursory manner or without reasonable care. In other words, the union must take a reasonable view of the problem and make a thoughtful decision about what to do.*
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> *[28] In Toronto Transit Commission, [1997] OLRD No. 3148, at paragraph 9, the Ontario Labour Relations Board cited with approval the following succinct explanation of the concepts provided by that Board in a previous unreported decision:*
>
> > *. . . a complainant must demonstrate that the union's actions were:*
> >
> > *(1) "Arbitrary" – that is, flagrant, capricious, totally unreasonable, or grossly negligent;*
> >
> > *(2) "Discriminatory – that is, based on invidious distinctions without reasonable justification or labour relations rationale; or*
> >
> > *(3) "in Bad Faith" – that is, motivated by ill-will, malice hostility or dishonesty.*
> >
> > *The behaviour under review must fit into one of these three categories. …[M]istakes or misjudgments are not illegal; moreover, the fact that an employee fails to understand his rights under a collective agreement or disagrees with the union's interpretation of those rights does not, in itself, establish that the union was wrong –*

> *let alone "arbitrary", "discriminatory" or acting in "bad faith".*
>
> *The concept of arbitrariness, which is usually more difficult to identify than discrimination or bad faith, is not equivalent to simple errors in judgment, negligence, laxity or dilatoriness. In Walter Prinesdomu v. Canadian Union of Public Employees, [1975] 2 CLRBR 310, the Ontario Labour Relations Board stated, at 315:*
>
> > *It could be said that this description of the duty requires the exclusive bargaining agent to "put its mind" to the merits of a grievance and attempt to engage in a process of rational decision making that cannot be branded as implausible or capricious.*
> >
> > *This approach gives the word arbitrary some independent meaning beyond subjective ill will, but, at the same time, it lacks any precise parameters and thus is extremely difficult to apply. Moreover, attempts at a more precise adumbration have to reconcile the apparent consensus that it is necessary to distinguish arbitrariness (whatever it means) from mere errors in judgment, mistakes, negligence and unbecoming laxness.*

. . . .

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

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

> *significance for those employees of the interests which may be at stake.*

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

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

And further, at 194-95, as follows:

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

> *Through various decisions, labour boards, including this one, have defined the term "arbitrary." Arbitrary conduct has been described as a failure to direct one's mind to the merits of the matter; or to inquire into or to act on available evidence; or to conduct any meaningful investigation to obtain the data to justify a decision. It has also been described as acting on the basis of irrelevant factors or principles; or displaying an indifferent and summary attitude. Superficial, cursory, implausible, flagrant, capricious, non-caring or perfunctory are all terms that have also been used to define arbitrary conduct. It is important to note that intention is not a necessary ingredient for an arbitrary characterization.*
>
> *Negligence is distinguishable from arbitrary, discriminatory or bad faith behaviour. The concept of negligence can range from simple negligence to gross negligence. The damage to the complainant in itself is not the test. Simple negligence may result in serious damage. Negligence in any of its variations is characterized by conduct or inaction due to inadvertence, thoughtlessness or inattention. Motivation is not a characteristic of negligence. Negligence does not require a particular subjective stage of mind as does a finding of bad faith. There comes a point, however, when mere/simple negligence becomes gross/serious negligence, and we must assess when this point, in all circumstances, is reached.*
>
> *When does negligence become "serious" or "gross"? Gross negligence may be viewed as so arbitrary that it reflects a complete disregard for the consequences. Although negligence is not explicitly defined in*

> *section 37 of the Code, this Board has commented on the concept of negligence in its various decisions. Whereas simple/mere negligence is not a violation of the Code, the duty of fair representation under section 37 has been expanded to include gross/serious negligence . . . The Supreme Court of Canada commented on and endorsed the Board's utilization of gross/serious negligence as a criteria in evaluating the union's duty under section 37 in Gagnon et al. [[1984] 1 S.C.R. 509]. The Supreme Court of Canada reconfirmed the utilization of serious negligence as an element to be considered in Centre Hospitalier Régina Ltée v. Labour Court, [1990] 1 S.C.R. 1330.*

[36] In North York General Hospital, [1982] OLRB Rep. Aug. 1190, the Ontario Labour Relations Board addressed the relation of negligence to arbitrariness as follows, at 1194:

> *A union is not required to be correct in every step it takes on behalf of an employee. Moreover, mere negligence on the part of a union official does not ordinarily constitute a breach of section 68. See Ford Motor Company of Canada Limited, [1973] OLRB Rep. Oct. 519; Walter Princesdomu and The Canadian Union of Public Employees, Local 1000, [1975] OLRB Rep. May 444. There comes a point, however, when "mere negligence" becomes "gross negligence" and when gross negligence reflects a complete disregard for critical consequences to an employee then that action may be viewed as arbitrary for the purposes of section 68 of the Act. In Princesdomu, supra, the Board said at pp 464-465:*
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> > *Accordingly at least flagrant errors in processing grievances--errors consistent with a "not caring" attitude--must be inconsistent with the duty of fair representation. An approach to a grievance may be wrong or a provision inadvertently overlooked and section 60 has no application. The duty is not designed to remedy these kinds of errors. But when the importance of the grievance is taken into account and the experience and identity of the decision-maker ascertained the Board may decide that a course of conduct is so, implausible, so summary or so reckless to be unworthy of protection. Such circumstances cannot and should not be distinguished from a blind refusal to consider the complaint.*

[37] In a subsequent decision, Canada Packers Inc., [1990] OLRB Rep Aug. 886, the Ontario Board confirmed this position as follows, at 891:

> *A review of the Board's jurisprudence reveals that honest mistakes, innocent misunderstandings, simple negligence, or errors in judgment will not of themselves, constitute arbitrary conduct within the meaning of section 68. Words like "implausible", "so reckless as to be unworthy of protection", "unreasonable", "capricious", "grossly negligent", and "demonstrative of a non-caring attitude" have been used to describe conduct which is arbitrary within the meaning of section 68 (see Consumers Glass Co. Ltd., [1979] OLRB Rep. Sept. 861; ITE Industries, [1980] OLRB Rep. July 1001; North York General Hospital, [1982] OLRB Rep. Aug. 1190; Seagram Corporation Ltd.. [1982] OLRB Rep. Oct. 1571; Cryovac, Division of W.R. Grace and Co. Ltd., [1983] OLRB Rep. June 886; Smith & Stone (1982) Inc., [1984] OLRB Rep. Nov. 1609; Howard J. Howes, [1987] OLRB Rep. Jan. 55; George Xerri, [1987] OLRB Rep. March 444, among others). Such strong words may be applicable to the more obvious cases but may not accurately describe the entire spectrum of conduct which might be arbitrary. As the jurisprudence also illustrates, what will constitute arbitrary conduct will depend on the circumstances.*

[38] The British Columbia Labour Relations Board has taken a similar view with respect to matters of process. In Haas v. Canadian Union of Public Employees, Local 16, [1982] BCLB No. L48/82, that Board stated as follows:

> *... similarly, the Board will be reluctant to find a breach of Section 7 by virtue of the manner in which particular grievances are pursued. As stated earlier, a complainant must demonstrate shortcomings in the union's representation beyond the areas of mere negligence, inadvertent errors, poor judgment, etc. The shortcomings must be so blatant as to demonstrate that the grievor's interests were pursued in an indifferent or perfunctory manner.*
>
> *Too often the intended purpose and limits of Section 7 are not well understood. A union is afforded wide latitude in the manner in which it deals with individual grievances; the Board will only find violations of Section 7 where a union's manner of representation of an individual grievor is found to be an obvious disregard for his rights or for the merits of the particular grievance. Broadening the scope of Section 7 beyond the areas described in earlier pages of this decision would not be in keeping with the purpose and objects of the Labour Code; it would encourage the filing of a myriad of unfounded and frivolous Section 7 applications to the Board and it could also force unions to untenable positions in grievance handling because of the weight they would have to give to possible Section 7 complaints hanging over their heads.*

. . .

> *Each case must be decided on its own merits; suffice to say, however, that the Board may well find shortcomings in the manner in which the union dealt with a particular matter without finding that such shortcomings support a Section 7(1) complaint. The Board may well find that a union could have been more vigourous and thorough in its investigation of the facts in a particular case; it may even question the steps taken in dealing with a grievance and the ultimate decision made with respect to that grievance. However, that does not necessarily mean that a complaint under Section 7(1) will be substantiated. To substantiate a charge of arbitrariness, there must be convincing evidence that there was a blatant disregard for the rights of the union member.*

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

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

matters may not warrant an expensive hearing. Examples of these minor job interests are the occasional use of supervisors to do bargaining unit work, or isolated pay dispute arising out of one or a few incidents and even a minor disciplinary action such as a verbal warning.

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

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

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

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

> *Parliament or appointees to administrative agencies.*

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

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

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

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

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

> *especially if an employee's employment depends upon the grievance.*

[13] The Applicant argues that the Union failed to fairly represent him with respect to his termination due to Mosaic banning him from the worksite. Furthermore, he maintained that the information that Mosaic relied upon was erroneous.

[14] The Union in Reply argued that it conducted an independent examination of the allegations and found that they were substantiated by the statement of Mr. Rorquist. Furthermore, it argued that it had attempted, through Mr. Godwin, to have Mosaic modify its ban on Mr. Perry from all Mosaic sites in Saskatchewan. That attempt was also unsuccessful, they argued.

[15] The Union also argued that it arranged for the Applicant to be placed in a new position outside of Saskatoon (which unfortunately did not work out), but that they obtained new employment for the Applicant as soon as possible. Finally, they argued that they had taken legal advice on the matter and determined that there was no prospect of success should a grievance be filed.

[16] As pointed out in *Chabot v. C.U.P.E. Local 477,* [2007] Sask. L.R.B.R. 401, LRB File No. 158-06 at para. 71:

> *The Board does not sit in appeal of decisions made by unions, does not decide if a union's opinion of the likelihood of success of a grievance was correct and does not minutely assess and second guess every union action.*

[17] For the Applicant to be successful, it is necessary for him to show that the Union's representation of him, and the decision not to proceed to file a grievance in this case was "arbitrary, discriminatory, or in bad faith." He bears the onus in this respect.

> *The Applicant failed to provide any evidence to the Board that the actions of the Union were arbitrary. In fact, the evidence was to the contrary. The Union conducted an independent investigation, received legal advice from counsel. They attempted to mitigate the penalty imposed on the Applicant, and when that was unsuccessful, they took steps to insure he was re-employed as quickly as possible.*

[18] Nor was there any evidence presented that the decision not to file a grievance was in any way marred by discriminatory activities by the Union against the Applicant. The decision was based upon a recommendation of counsel who had reviewed the facts and formed the opinion that the case would be difficult to win.

[19] The Applicant also did not provide evidence of bad faith by the Union. The Union conducted an independent investigation of the facts, some of which the Applicant took exception to. However, none of the factual exceptions gave rise to any bad faith on the part of the Union in the manner in which it undertook its investigation.

[20] There is one aspect of this matter which remains troubling. While not referenced by the Applicant, it was the principle basis on which the Union relied in its determination that a grievance would be unsuccessful. Counsel for the Union provided a copy of his opinion to the Board as a part of the evidence submitted by the Union. In that opinion, counsel says, in part:

> *However, based on the information provided, it is clear that the property owner/general contractor has no such relationship [being a party to a collective agreement] working at the job site, and accordingly, South East was forced to terminate Mr. Perry. Additionally, you have indicated that South East has no other available work for Mr. Perry at present. As a result, there is no recourse for Mr. Perry, except to wait for available work with South East, or search work [sic] elsewhere with other contractors at other job sites. Accordingly, we cannot assist Mr. Perry other than to find work elsewhere through the hiring hall through the usual process.*

[21] In support for this conclusion, counsel for the Union cited paragraph 7:7510 of *Canadian Labour Arbitration*[3]. That paragraph deals with Termination of Employees at the instance of third parties[4] and at the behest of Insurers and contractors[5].

[22] Arbitrators, particularly in Ontario, have recognized that employees may be terminated due to the actions of third parties. For example, a pilot must retain his or her pilot's license in order to keep his employment as an airline pilot. Similarly, truckers must maintain their appropriate licenses if they are to maintain their employment as drivers. Tradespersons are required to maintain their licenses and permits, including such things as safety training requirements, in order to maintain their employment.

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[3] Canada Law Book 4th Ed. Brown & Beatty Volume 1
[4] Paragraph 7:7500
[5] Paragraph 7:7510

[23] The above are all examples of third party regulatory requirements that generally speaking are the individual responsibility of the employee to maintain in good standing. There is normally nothing arbitrary about these requirements, that is the license or authority is determined on standardized criteria universally applied.

[24] However, there are other instances, such as an employee being banned from a site by an owner, as was the case here, where elements of arbitrariness might be discovered. What is the duty of the Union in cases where the conduct of the owner, general contractor or other authority displays elements of arbitrariness and the employer is nevertheless required to terminate that employee?

[25] The Union also cited the Ontario Labour Relations Board decision in *Quality Control Council of Canada v. Axiom NDT Corporation*[6]. This case dealt with a grievance filed by the Union, Quality Control Council of Canada against the Employer, Axiom NDT Corporation ("Axiom") in respect of two employees who had been terminated from their employment at the Bruce A Nuclear Power Station. Axiom was a subcontractor to Atomic Energy of Canada Limited ("AECL") on a refurbishment project at the power station. The two employees were terminated by the employer at the request of AECL.

[26] This case recognized the conflict faced by an employer who is reliant upon either the owner or the general contractor for present and future work and its obligations vis a vis its employees. The Ontario Board in this case, concluded that the complaint was unfounded, but that the information which was relied upon to justify the termination of the employee was "objectively reasonable".

[27] Both the references to Brown and Beatty and the *Axiom* case, *supra*, were arbitration cases, not applications under the duty of fair representation provisions of the Ontario Labour Relations Act[7]. However, the Alberta Labour Relations Board has dealt with this issue several times, most recently in *Thomas v. International Brotherhood of Electrical Workers, Local Union 424*[8].

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[6] [2010] 191 LAC (4th) 230, CanLII 2571 (ON LRB)
[7] 1995 SO c 1, Sch A

[28] In the case before the Alberta Board, Mr. Thomas was terminated from his employment with Suncor Energy Services Inc. ("Suncor") and banned from all Suncor sites for using a video camera to film videos on Suncor property which he subsequently posted to his blog on the internet. These videos were accompanied by comments by Mr. Thomas that were disparaging to Suncor and the camp at which he worked.

[29] The Alberta Board referenced earlier decisions of the Board in which site bans on an employee resulted in the termination of that employee. At paragraph 19 of that decision, the Alberta Board says:

> *[19] Site bans are not an uncommon or unusual occurrence, particularly on industrial sites, and most of the building trades unions are aware of them and the decisions of this Board and of arbitrators that deal with them. Some of the Board's decisions dealing with this topic include: Peters v. Boilermakers Lodge 146 [2003] Alta. LR.B.R. LD-054 at para [8]; Mogden v. Carpenters Local 1325 [2007] Alta. L.R.B.R. LD-034, at para [4]; and Romalatti v. Labourers Local 92 [2010] Alta. L.R.B.R. LD-013, at para [6].*

[30] The Board reviewed the facts in that case, and determined that the Union had not breached its duty of fair representation in that case. The facts in *Romalatti v. Construction and General Workers Union, Local 92, supra*, are more in line with the facts in this case. In *Romalatti*, he was terminated by his Employer, Transfield Asset Management Services Ltd. as a result of "his having been removed from camp and banned from the work site by Suncor, the site owner".

[31] As was the case here, the applicant, Romalatti disputed the allegations that was the rationale for the ban and requested that the Union file a grievance, which the Union refused to do. As in this case, in the Romalatti case, the Union responded that there was no grievance under the collective agreement that can be brought to challenge Suncor's actions.

[32] At paragraph [10] of its decision, the Alberta Board says:

> *Having regard to the materials before us, we are satisfied this duty of fair representation complaint has no reasonable prospect of success. The particulars alleged do not suggest the Union acted in a way that was arbitrary, discriminatory, in bad faith, or seriously negligent. In other words, it does not suggest the kind of conduct necessary to prove a breach of the duty of fair representation. The Union was faced with a third party site ban that it could not*

[8] [2011] CanLII 62467 (AB LRB)

> *challenge under the collective agreement. And, while it might have brought a grievance challenging the Employer's decision to terminate the Complainant's employment for cause, there was a rational basis for viewing that grievance as one that would be difficult to win. A duty of fair representation complaint is not an appeal from a union's decision. The Board reviews the fairness of the representation. A union has considerable discretion as to how and whether to proceed with a grievance.*

[33] That rationale is equally applicable here. As noted above, the Applicant has provided no evidence that the Union's decision in refusing to file a grievance regarding his termination was arbitrary, discriminatory, or in bad faith. The Union considered and investigated the situation, attempted to ameliorate the site ban imposed by Mosaic, and found alternate employment for the Applicant as soon as possible. Nothing more was required of it under s. 25.1 of the *Act.*

[34] For these reasons, the application is dismissed.

DATED at Regina, Saskatchewan, this **28th** day of **November, 2012.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson