BRODIE BAUCK, Applicant v. CONSTRUCTION WORKERS UNION, LOCAL 151, Respondent Union and ALLIANCE ENERGY INDUSTRIAL INC., Respondent Employer

LRB File No. 178-13, 274-13 & 276-13; December 31, 2013
Chairperson, Kenneth G. Love, Q.C.; Members: Mr. Don Ewart and Mr. Maurice Werezak

For the Applicant:	Drew Plaxton
For the Respondent Union:	Richard Steele
For the Respondent Employer:	No one appearing

Duty of Fair Representation – Applicant hired as electrician at Potash mine – At time of hire he acknowledges that certain workplace safety requirements, including failure to follow the lock out/tag out procedures would result in immediate termination – Applicant found to have violated lock out/tag out procedures and was terminated by Employer.

Duty of Fair Representation – Employer, with support and assistance of another Union, files application alleging that certified union failed to properly represent him with respect to his termination – Applicant does not provide full report respecting the workplace incident which gave rise to his termination – Union conducts investigation based upon information provided and determines that a grievance would not likely be successful.

Duty of Fair Representation – Following a meeting with Union representatives concerning his grievance, and in the company of representative of other Union, Applicant agrees that he was aware of lock out/tag out procedures and agrees to submit resume for placement in other electrician positions with employers certified with Union.

Duty of Fair Representation – After meeting with representative Union, Applicant files complaint with support and assistance of another union – Complaint makes reference to incidents and events which were never discussed with or considered by representative Union – Applicant also testifies about events (the "sticker incident") which were never discussed with representative Union prior to his giving evidence.

Straw Man – Applicant found to be straw man for other union – Applicant apparently an attempt to by other union, to find fault with representation by certified Union.

Collective Agreement – Applicant claims that he was treated in a discriminatory manner because he was a probationary employee – Board finds that, notwithstanding provisions of collective agreement, Union does file grievances on behalf of probationary employees – Board confirms that provisions which provide for different access to the grievance procedure for probationary employees are contrary to the *Act* and should be ignored by representative unions.

Collective Agreement – Board determines that, notwithstanding the provisions of the collective agreement in this case, the reasons given for the failure to file or pursue a grievance were not based solely on the fact that the Applicant was a probationary employee – Board dismisses application.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Q.C., Chairperson:** Construction Workers Union, Local 151, (the "Union") is certified as the bargaining agent for a unit of employees of Alliance Energy Industrial Inc. (the "Employer") by an Order of the Board dated May 11, 2012, LRB File No. 118-11.

[2] Brodie Bauck, a journeyman electrician, was offered employment with the Employer, which he accepted. As a result of his termination from that employment, he filed this application pursuant to Sections 12 and 25.1 of *The Trade Union Act*[1] (the "*Act*").

[3] The Respondent Union filed a Reply to the application. It also brought an application for summary dismissal of the application.[2] The Applicant also brought an application for Production of Documents and Things.[3] These applications were heard on October 23, 2013. At the conclusion of that hearing, the Board ruled orally that the application was dismissed insofar as the complaint under Section 25.1 was concerned, but was allowed with respect to claims made pursuant to other sections of the *Act.* The Board also ordered production of certain documents by the Respondent Union.

[4] A hearing of the main application commenced on November 14 and 15, 2013. Final arguments were heard on November 27, 2013. These are the reasons for the preliminary

[1] R.S.S. 1978 c. T – 17.
[2] LRB File No. 276-13.
[3] LRB File No. 274-13.

oral decision given October 23, 2013 and in respect of the hearing of the application under Sections 25.1 and 32 of the *Act*. For the reasons which follow, the Application is denied.

The Preliminary Matters:[4]

The Summary Dismissal Application[5]

[5] The Board has recently restated its test for summary dismissal. In *International Brotherhood of Electrical Workers, Local 529 et al c. KBR Wabi et al.,*[6] the Board restated the test[7] as being:

> 1. *In determining whether a claim should be struck as disclosing no arguable case, the test is whether, assuming the applicant proves everything alleged in his claim, there is no reasonable chance of success. The Board should exercise its jurisdiction to strike on this ground only in plain and obvious cases and where the Board is satisfied that the case is beyond doubt.*
>
> 2. *In making its determination, the Board may consider only the application, any particulars furnished pursuant to demand and any document referred to in the application upon which the applicant relies to establish his claim.*

[6] In accordance with that test, the Board, for the purposes of the summary dismissal application reviewed only the application filed by the Applicant. In the heading of the application, several sections of the *Act* were referenced, being Sections 5(c), (d), (e) and (g), 5.3, 11(2)(c), 12, 18, 25.1 and 42.

[7] Of these referenced sections of the *Act*, Sections 5(c), (d), (e), and (g) are Sections granting the Board various powers. Section 5.3 authorizes the Board to make interim orders. Section 18 is also an empowering provision, as is Section 42.

[8] Section 25.1 is the provision of the *Act* which imposes a statutory duty of fair representation on trade unions who represent employees. Section 11(2)(c) is a provision which declares it to be an unfair labour practice for an employee, trade union or any other person to fail or refuse to bargain collectively. Section 12 is a general prohibition against aiding, abetting counseling or procuring an unfair labour practice or any violation of the *Act*.

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[4] See Note #2 and #3
[5] See Note #2.
[6] [2013] CanLII 73114 (SKLRB), LRB File Nos. 188-12, 191-12 to 193-12, 198-12 to 201-12.
[7] At para. 91.

[9] The Board was required to review the application to determine if an arguable case was made out with respect to Sections 11(2)(c), 12 or 25.1. After hearing argument from the Applicant and the Respondent Union, the Board determined that the summary dismissal application would be denied with respect to the claim under Section 25.1, but was allowed with respect to claims under Sections 11(2)(c) and 12.

[10] The Application is void of any reference to Sections 11(2)(c) or 12 in the body of the application apart from paragraph (xxiii) which references Section 11(2) in its entirety along with Section 25.1. That paragraph, however, provides no factual underpinning for any complaint under either Sections 11(2) or 12. The reference is simply that the Applicant is "a person entitled to the benefits of the obligations imposed by *The Trade Union Act*, including Sections 11(2) and 25.1".

[11] Paragraph (xxii) alleges that the Respondent Union negotiated provisions in its collective agreement which purported to "prevent probationary employees from accessing grievance arbitration proceedings". This provision, the Applicant argued, was a failure to bargain collectively and an unfair labour practice under Section 12(2)(c) of the *Act*. In *Ron Beatty v. Saskatchewan Government and General Employees Union and Northlands College,*[8] the Board dealt with a similar situation, where a collective agreement provided that probationary employees could not have access to the arbitration process. In reviewing that provision, the Board dealt with the matter under Section 25.1 of the *Act*. This Board would do the same. There is, therefore, no necessity to deal with this as an alleged breach of Section 11(2)(c).

[12] Additionally, the Board notes that there was no similar allegation made as against the Respondent Employer in the Application. Logically, since there would be two parties to the collective agreement, one would have anticipated a claim under Section 11(1)(c) as against the Respondent Employer, but no such allegation or claim was made.

[13] The Applicant also argued that the Respondent Union (and presumably the Respondent Employer, although no claim was made against the Respondent Employer), had not obtained proper authorization for deduction of dues by the Employer from the Applicant's wages, which dues were paid over by the Respondent Employer to the Respondent Union. The Board dealt with a similar claim in its decision in *Construction Workers Union (CLAC), Local 151 and*

[8] [2006] Sask. L.R.B.R. 440, LRB File No. 086-04.

Westwood Electric v. Nicole Wilson[9] with relation to a claim that the Respondent Union was a "company dominated organization".

[14] At paragraph [80], the Board noted:

> *The Applicant made much of this unauthorized deduction claiming that it was contrary to the provisions of The Labour Standards Act. If such is the case, the Board has no jurisdiction with respect to such matters. Complaints of a breach of the Labour Standards Act must be dealt with pursuant to that Act.*

[15] This case is somewhat different from the *Nicole Wilson* case, *supra*, insofar as in this case the Applicant was, during the period that he was employed by the Respondent Employer, covered by a certification Order from this Board and a collective agreement negotiated by the parties.

[16] While this lack of authorization may invoke Section 32 of the *Act*, the pleadings are silent with respect to any reference to Section 32, apart from a request in the prayer for relief that the Applicant seeks to have his dues, which were deducted, returned to him. Absent any evidence, but accepting the pleadings as true, there is an arguable case that dues may have been improperly deducted. The concern at this stage of the proceedings is our jurisdiction to deal with this item, that is, should it be dealt with by the Ministry of Labour Relations and Workplace Safety through the Labour Standards Office, by an arbitrator, or our Board. As a result, this Board concludes that it may be dealt with as a part of the Section 25.1 complaint regarding representation.

Production of Documents and Things[10]

[17] Having determined that an arguable case had been made out pursuant to Section 25.1 of the *Act*, the inquiry then turned to the request by the Applicant that the Respondent Union produce certain documents and things. In that application, the Applicant requested production of the following:

> *A. An order that the respondent be required to disclose and produce the following documents and things:*

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[9] LRB File No. 005-13, [2013] CanLII 47053 (SKLRB) at paragraph 76 *et seq.*
[10] See Note #3.

1. Copies of all collective agreements (voluntary recognition or otherwise), working agreements, working contracts or other agreements, understandings or other documents between CLAC and Alliance, or anyone on behalf of either of them, governing the terms and conditions of employment of employees of the said employer in Saskatchewan (other than the collective agreement dated September 1, 2011 to August 31, 2014 attached to CLAC's reply in the within matter), as well as;

copies of all correspondence (electronic or otherwise) passing between CLAC and Alliance or anyone on behalf of either of them, relating to negotiations leading up to the same, and;

copies of any notes or memoranda made in relation to any discussions or meetings held in relation to these matters or discussions or meetings concerning proposals or other terms and conditions of employment whether before or after certification of CLAC in the Province of Saskatchewan.

2. Copies of all collective agreements (voluntary recognition or otherwise), contracts or other agreements between CLAC and Alliance, or anyone on behalf of either of them, that are adopted or referenced in any of the agreements or other documents above referenced, as well as;

copies of all correspondence (electronic or otherwise) passing between CLAC, and Alliance, or anyone on behalf of either of them, relating to negotiations leading up to same, and; copies of any notes or memoranda made in relation to any discussion or meetings held in relation to these matters or discussions or meetings concerning proposals or other terms and conditions of employment, whether before or after certification of CLAC in the Province of Saskatchewan.

3. Copies of all notices of ratification or other meetings with members and/or employees of Alliance in relation to its Saskatchewan operations (or matters that may directly or indirectly affect same), sign-in sheets and tallies of any votes taken at the said meetings and minutes of same concerning the above-noted collective agreements or other documents evidencing terms and conditions of employment.

4. Copies of any dues deduction authorizations or other authorizations by Brodie Bauck allowing monies to be deducted from the employee's earnings and remitted to CLAC directly or indirectly, and;

copies of all notices of ratification or other meetings, and minutes of same concerning the above-noted collective bargaining agreements or other agreements relied upon to justify deduction of monies from wages.

5. Copies of payroll statements indicating what monies were deducted by the employer from the income of Brodie Bauck and remitted over to CLAC or anyone on behalf of CLAC and an indication of whether he was considered to be a "member" of CLAC, a "representee" or otherwise.

6. Copies of all policies and procedures documents of CLAC or of its parent organization, the Christian Labour Association of Canada relating to grievance handling, including handling grievances of probationary employees, and;

> *copies of policies and procedures re requesting employees join the union or sign union membership cards, and;*
>
> *copies of policies and procedures concerning deduction of dues or other monies from employees and remitting same to CLAC and obtaining employee authorization to do so.*
>
> *7. Copies of the constitution and/or bylaws and related documents of CLAC or its parent organization, the Christian Labour Association of Canada in force for the relevant period of time.*
>
> *8. Copy of CLAC's file maintained in relation to Brodie Bauck and copies of any notes, memoranda or other writings made in relation to CLAC's dealings with Brodie Bauck and dealings with the employer in relation to Brodie Bauck.*
>
> *9. Copies of all grievances filed at any time by CLAC in relation to Alliance's operations in the Province of Saskatchewan.*
>
> *10. Copy of the "zero tolerance activities resulting in immediate dismissal document" referred to in CLAC's reply.*
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> *[In this document "CLAC", unless indicated otherwise, means Construction Workers Union, Local 151. "Alliance" means Alliance Energy Industrial Inc.]*
>
> *B. This application applies to all documents and things whether created, communicated or received in the Province of Saskatchewan or otherwise.*

[18] After hearing argument from the parties, the Board ordered production of documents as follows:

1. Only the current collective agreement was relevant to these proceedings and is to be produced by the Applicant Union. Other correspondence and notes would be protected from production by Labour Relations privilege.

2. Collective Agreements from outside the province were not relevant to this proceeding and need not be produced.

3. As noted above, only the current Collective Agreement is relevant to this proceeding. No production of documents requested in paragraph 3 was ordered.

4. The Respondent Union was ordered to produce copies of any dues deduction authorizations provided to the Respondent Union by the Applicant. No other production was ordered under paragraph 4.

5. The Respondent Union was ordered to produce copies of any payroll statement they may have in their possession regarding the Applicant. No other production was ordered under paragraph 5.

6. The Respondent Union was ordered to produce copies of any policies and procedures relating to grievance handling, including grievance handling of probationary employees to the extent that those policies and procedures apply in the Province of Saskatchewan. The Board also ordered production of copies of policies and procedures concerning deduction of union dues and other monies from employees and remitting same to CLAC and obtaining employee authorization to do so. No other production was ordered under paragraph 6.

7. Production of the Constitution of the Respondent Union was ordered to be produced. No other production was ordered under paragraph 7.

8. Production of a copy of CLAC's file maintained in relation to the Applicant was ordered to be produced by the Respondent Union as set out in paragraph 8.

9. The documents requested in paragraph 9 were not ordered to be produced. The Board found that the request for those documents represented a "fishing expedition" on the part of the Applicant, were not relevant, or were protected by "labour relations privilege".

10. The production of the "zero tolerance activities resulting in immediate dismissal" was ordered to be produced.

The Application:

Facts:

[19] The Applicant is a journeyman electrician. He has worked extensively at industrial sites in Saskatchewan, including sites where employees are represented by the Respondent Union, sites that are not unionized, and sites at which employees are represented by the International Brotherhood of Electrical Workers ("IBEW"). He is a member of IBEW.

[20] The Respondent Union was certified to represent employees of the Respondent Employer by Order dated May 11, 2012. Prior to being certified as the bargaining agent, the Respondents had entered into a voluntary recognition collective agreement effective September 1, 2011, expiring on August 31, 2014.

[21] The Applicant applied for employment with the Respondent Employer through its Human Resources Department. He was hired to work for the Respondent Employer at its project at the Agrium Potash Mine in Vanscoy, Saskatchewan. The Applicant testified that he commenced work on April 18, 2013. However, on his first day of work, he executed documents during his orientation with J.V. Vault, who was responsible for the Agrium construction site, and who conducted the initial orientation briefing on site. Those documents were dated March 18, 2013.

[22] One of the documents that the Applicant signed on his start date was a document which outlined activities that would result in (a) Disciplinary Action, (b) Suspension and (c) Termination. The third page of this document outlined activities which would result in immediate termination. The Applicant signed all three (3) pages of this document. One of the activities which would result in immediate termination was “Contravention of the Lock Out/Tag Out procedure(s) and/or legislation”.

[23] Prior to the Applicant taking up his employment with the Respondent Employer, he discussed with Craig, the business agent for IBEW, the fact that he had obtained employment with the Respondent Employer. His testimony was that he got the “green light” from Craig to take the job.

[24] Notwithstanding his testimony concerning discussions with IBEW, the Applicant also testified that he was not told that the employees were represented by the Respondent Union.

[25] The Applicant testified that he presented for his first day of work. He testified that he was given an orientation by J.V. Vault representatives in the morning and after lunch he was given a brief orientation by the Respondent Union’s shop steward. He testified that while he did execute and deliver a bunch of documents to both J.V. Vault and the Respondent Union, he didn’t really look at them and wasn’t sure what he’d signed.

[26] He testified that on the first or second day of his employment, he and another employee were called to see the general foreman. When they attended to the office, they were told by the general foreman to remove some IBEW stickers from their hard hats. He testified that he asked why they had to remove the stickers, and was told, “the owner of Alliance didn’t want union stickers on hard hats”. He and the other employee complied with the request and removed the stickers.

[27] He noted as well that he did not bring this situation to the Respondent Union’s attention. He testified that he requested a shop steward to be in attendance, but was told that the shop steward had already been there and had left. He testified that he was unsure if he attempted to contact the shop steward with respect to this incident. Under cross examination, he admitted that he had never approached the shop steward concerning this “sticker” incident. Nor, he admitted, had he ever told anyone from the Respondent Union about it prior to his testimony.

[28] The Applicant’s employment was otherwise uneventful until May 16, 2013. On that day, he and an apprentice were working at Switch Room 11. They had been tasked with changing out some galvanized materials that were subject to corrosion in the environment of a Potash Mine. The galvanized materials were to be swapped out for stainless steel materials.

[29] The work was being conducted on lights that were mounted some 20 feet off the ground. They were using an aerial work platform to gain access to the work area. They had secured the area around the aerial work platform with caution tape. Prior to commencement of the work, the Applicant entered the switch room and moved the switch that controlled the light circuit (which was a three (3) position switch) to the “off” position. He described the switch as not a normal breaker panel box.

[30] While engaged in this work, they came across a photocell that the Applicant testified the Forman told him to switch out if they could find a stainless steel photocell. The Applicant testified that he went to the stores office to obtain a stainless steel photocell, but there was not one in stock. He then returned to the worksite, put his tools in the aerial basket and went to the lunchroom to have his lunch.

[31] When he returned from lunch he found the foreman, general foreman and the superintendent at Switch Room 11. He was immediately called to a meeting to discuss his failure to follow the proper lock out/tag out procedure in conducting his work at Switch Room 11.

[32] He testified that the foreman denied that he had told the Applicant to switch out the photocell. He also testified that the foreman had the ultimate responsibility for engaging the lock out/tag out procedures. He testified that he was in the office until about 2:30 PM and was then told to go back to work. At about 4:30 PM the foreman told him to grab his tools and go to the office.

[33] At the office, he was terminated for failure to follow the proper lock out/tag out procedures. A shop steward was present during the termination. He testified that he signed a statement that was returned to Brian Stewart, the man who was conducting the termination.

[34] Following his termination, he first contacted IBEW to advise that he had been terminated. He testified that IBEW told him to contact the Respondent Union to file a grievance concerning his termination.

[35] He testified that he went to the offices of the Respondent Union and met with Mr. Phil Polsom to explain what happened, to advise that he wanted to file a grievance and to see if the Respondent Union might be able to mitigate the penalty to something other than termination.

[36] The Applicant testified that he provided a written statement to Mr. Polsom and that Mr. Polsom said he would look into it. He testified that the meeting took 15 to 20 mins. He testified that Mr. Polsom did call him on another occasion, but he was unable to talk as he was driving and requested that Mr. Polsom email him. He testified that on June 5, 2013, by email, the Respondent Union advised that they would not file a grievance.

[37] Under cross examination, the Applicant acknowledged that he had never told anyone, including Mr. Polsom, that the foreman denied telling him to switch out the photocell. He also acknowledged that he had not approached the foreman about initiating a lock out/tag out for the work he had been doing.

[38] In cross examination, the Applicant advised that he had called IBEW on the evening of May 16, 2013 after being terminated. The Applicant said he contacted Deirdre Haley[11] of the IBEW, with who he had been in contact four (4) to five (5) times by telephone during the six (6) weeks he had been employed. The Applicant testified that he spoke or texted Ms. Haley every week to keep her up to date on what was happening in the worksite. He testified he had texted ten (10) times while employed with the Respondent Employer. The Applicant testified that he met Ms. Haley the day following his termination (May 17, 2013) at the IBEW offices.

[39] The Applicant also testified that he next met with Mr. Polsom after the long weekend. He said that Ms. Haley accompanied him to the meeting with Mr. Polsom representing herself as his spouse.

[40] He testified that, at the meeting with Mr. Polsom, he was told by Mr. Polsom that he didn't think the Applicant had an arguable case. The Applicant testified that at that meeting he acknowledged that he was familiar with lock out/tag out procedures. The Applicant also testified that he did not argue with Mr. Polsom about his conclusion that the grievance was weak. The Applicant further testified that he agreed to move on and to provide Mr. Polsom with a resume with which to find alternate employment.

[41] The Applicant testified that he didn't provide a resume to Mr. Polsom as promised. The Applicant said he got a call out from IBEW about a week later and went to work for an employer certified to IBEW elsewhere in the province.

[42] He testified that he was "not sure" who brought up the potential of filing this application. He acknowledged that IBEW was paying for counsel to conduct the application. He testified that he reviewed the application which was prepared for him. It was sworn by him on July 15, 2013.

[43] On July 16, 2013, the Applicant sent an email to Mr. Polsom asking "[I]s there an appeals process for the grievance?' and "[C]an they provide a copy of your dues authorization form?" In response to a question from the Board, he acknowledged that this message was cut and pasted from a message sent from the IBEW.

[11] The proper spelling of this name may not be correct.

[44] In cross examination, the Applicant admitted that he had never told Mr. Polsom that he was an IBEW member. It was also acknowledged that he had never advised Mr. Polsom about the "sticker" incident. He did acknowledge that he did discuss the "sticker" incident with Mr. Janetzki, a staff rep for IBEW, who had replaced Ms. Haley.

[45] The Respondent Union called Mr. Polsom to testify. Mr. Polsom testified that he was an experienced union representative having been employed as a rep by the Respondent Union for four (4) years. Prior to that, Mr. Polsom had been the President of CEP Local 890 at the Mosaic Potash mine in Esterhazy, Saskatchewan.

[46] Mr. Polsom testified as to the new employee orientation practices at the Agrium site. He testified that J.V. Vault represents the owner of the project (Agrium). He further testified that at times, there have been 225 – 250 employees on that site.

[47] Mr. Polsom described the orientation process as follows:

1. New employees meet at a designated place and are bused to the site.
2. J.V. Vault conducts an orientation which lasts eight (8) hours.
3. The Employer then provides a two (2) hour orientation.
4. Shop stewards get twenty to thirty (20) to (30) minutes to meet with new employees to describe the various benefit programs administered by the union.

[48] Mr. Polsom testified that employees are not required to join the union or sign a membership card and may participate in the benefit programs whether they are a member or not.

[49] Mr. Polsom's testimony regarding his contact with the Applicant varied significantly from that provided by the Applicant. He testified that his first contact with the Applicant was by telephone on May 17, 2013. He testified that he contacted the Applicant as a result of an email from the Applicant forwarded to him by Mr. Dennis Perrin.

[50] Mr. Polsom testified that during that conversation, he took notes which he produced at the hearing. Those notes indicated that the shop steward was present when the

termination occurred. His notes also indicate that the Applicant acknowledged that he did not lock out during the time he was working on the photocell.

[51] He testified that he attended to the worksite on May 21, 2013 which was the day following the Victoria Day holiday. On that date, he met with Mr. Blair Hamilton, who was a Human Resources representative for the Respondent Employer to discuss, among other things, the Applicant's termination. He testified that he was told that the termination was the result of both a failure to follow the lock out/tag out procedure and for leaving exposed wires hanging out of a box. He also discussed the option of the imposition of a lesser penalty, but was advised that the breach of the lock out/tag out procedure was an absolute, and automatic termination was the penalty.

[52] He testified that he also spoke to Ian Hornseth,[12] the shop steward involved in the incident. He testified that Ian advised that, " [E]verybody knows it is automatic termination".

[53] Mr. Polsom testified that, as a result of those meetings, he concluded in that week that there was no arguable case for a grievance to be filed. As a result, Mr. Polsom testified that he called the Applicant in to have a meeting with him. At that meeting, the Applicant appeared with a woman whom he testified that the Applicant described as his "wife". He testified that, at that meeting, he went through the results of his investigation, and that there was no case to go forward so the union would not be filing a grievance.

[54] Mr. Polsom also testified that at the meeting, the Applicant started to say that he hadn't been trained in the lock out/tag out procedures. He testified that he challenged the Applicant, saying that everyone knows about lock out/tag out procedures. At that meeting, he testified that the Applicant admitted that he was aware of lock out/tag out procedures.

[55] Mr. Polsom testified that he asked the Applicant for his Resume because there were at least two (2) companies he was aware of that were looking for electricians, Westwood Electric and Pyramid Electric. He testified that the Applicant said he didn't want to work for Westwood as he had worked for them in the past, but would be interested in Pyramid. The meeting adjourned with the Applicant agreeing to get his Resume to Mr. Polsom so as to obtain new employment as quickly as possible.

[56] Mr. Polsom also testified that at no time did the Applicant mention or tell him:

1. Any questions concerning dues deductions.
2. The “sticker” incident.
3. The Applicant’s claim that the foreman denied having told him to switch out the photocell in the termination meeting.
4. That he was a member of IBEW.
5. That the woman accompanying him was not his wife and that she was a representative with IBEW.

[57] Mr. Polsom testified that the Applicant did not demand or ask that a grievance be filed during the meeting. He took it that the matter was resolved and that the Applicant was moving on and looking for new employment. He says he was surprised to get an email on June 5, 2013 asking him to reply in writing as to the reasons for not recommending a grievance be filed. He testified that it was the first time any issue concerning the probationary period was mentioned.

[58] He testified that the fact that the Applicant was a probationary employee had no bearing on his decision. He testified that he had and would file grievances for probationary employees notwithstanding the provisions of the collective agreement.

[59] He also testified that he tried to contact the Applicant by telephone and email after receiving the email from him on July 16, 2013 regarding an appeal process and his dues authorization. In both messages, he asked the Applicant to call him, but received no response to those requests.

[60] Mr. Polsom provided copies of payroll records obtained by the Respondent Union from the Respondent Employer. Those records disclosed deductions for union dues from the wages of the Applicant as well as additional RSP contributions.

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[12] Spelling may not be accurate.

[61] Under cross examination, Mr. Polsom acknowledged that the union had no record of any dues authorization signed by the Applicant. He also acknowledged that he thought he had made additional notes, but that those notes could not be found.

[62]

Relevant statutory provision:

[63] Relevant statutory provisions are 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.*
> . . .
>
> *32(1) Upon the request in writing of an employee, and upon request of a trade union representing the majority of employees in any bargaining unit of his employees, the employer shall deduct and pay in periodic payments out of the wages due to the employee, to the person designated by the trade union to receive the same, the union dues, assessments and initiation fees of the employee, and the employer shall furnish to that trade union the names of the employees who have given such authority.*
>
> *(2) Failure to make payments and furnish information required by subsection (1) is an unfair labour practice.*

Applicant's arguments:

[64] The Applicant argued that the Board should find a twofold breach of the duty of fair representation owed to both the Applicant and the other employees employed by the Respondent Employer and represented by the Respondent Union. He argued that there was a duty owed to the employees as a whole as well as to the individual employees under Section 25.1 of the Act.

[65] Under the first prong of this argument, the Applicant alleged that there was a duty to ensure that the terms of a collective agreement negotiated for all employees represented by a union did not discriminate against one particular sector of employees. The Applicant argued that

the negotiation of a provision in the collective agreement which limited the right of probationary employees to grieve their discipline or termination was illegal and constituted a breach of Section 25.1. The Applicant cited the Board's decisions in *Beatty, supra*[13], *Roger Johnston v. Service Employees International Union, Local* 333[14] , *Young v. U.M.W. Local* 7606[15], *McEwan v. C.U.P.E., Local 1975 and University of Saskatchewan*[16], and *Mary Banga v. Saskatchewan Government Employees' Union*[17] in support.

[66] The Applicant argued that the provision of collective agreement dealing with probationary employee's access to the grievance procedure was arbitrary or discriminatory against that class of employees. He argued that the Board's definitions of "arbitrary" and "discriminatory" fit these circumstances.

[67] Insofar as the Applicant himself was concerned, he argued that Mr. Polsom was "going through the motions" and did not conduct a meaningful investigation of the incident. He argued that based upon his notes that Mr. Polsom had entered into the investigation with a fixed mind which he was not willing to change.

[68] The Applicant also raised issues with the evidence given by Mr. Polsom and his missing notes, suggesting that they were indicative of his fixed mind. He also raised the issue of the Applicant never being provided with a Constitution of the Union so that he would know the procedure whereby an appeal could be launched against the refusal to file a grievance.

[69] The applicant also invited the Board to draw an adverse conclusion from the fact that the Respondent Union did not call Mr. Dennis Perrins to testify suggesting that his testimony would not have supported the evidence given by Mr. Polsom.

[70] On the issue of dues deductions, the Applicant argued that Section 32 of the *Act* requires a written authorization before an employer can deduct dues from an employee. It argued that no such authorization was provided.

Respondent Union's arguments:

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[13] See Note #8.
[14] [2003] Sask. L.R.B.R. 7, LRB File No. 157-02.
[15] [1989] S.J. No. 229, 76 Sask. R. 102.
[16] [2007] Sask. L.R.B.R. 378, LRB File No. 001-06.
[17] [1993] 4th Quarter Sask. Labour Rep. 88, LRB File No. 173-93.

[71] The Respondent Union argued that the Applicant was merely as “straw man” for the IBEW. It argued that the case had little to do about the Applicant, but was an attempt by the IBEW to embarrass and undermine the Respondent Union. They argued that IBEW was attempting to obtain “a trophy for IBEW”.

[72] The Respondent Union noted that the Applicant had gone directly to the IBEW when he was terminated rather than contacting the Respondent Union. They argued that he only approached the Respondent Union as a result of coaching and control by the IBEW. They pointed as well to the July 16, 3013 email to Mr. Polsom which the Applicant acknowledged he had cut and pasted from an email to him from the IBEW.

[73] The Respondent Union also pointed to the “offensive behavior” of IBEW by sneaking one of their representatives into a meeting with Mr. Polsom as the Applicant’s wife and failing to disclose the Applicant’s relationship with IBEW prior to the hearing of this matter. They argued that the application had no merit as it has been overshadowed by the involvement of IBEW in the matter.

[74] The Respondent Union also noted that the burden of proof in this case rested with the Applicant. They argued that the Applicant had failed to satisfy this burden of proof.

[75] They argued that the Applicant had been disingenuous with the Respondent Union. At no time prior to the filing of this application did the Applicant advise anyone, particularly Mr. Polsom of any alleged illegal provisions in the collective agreement. They argued that much of the Applicant’s evidence should be disregarded as being inconsistent both with his own testimony and the testimony of Mr. Polsom. The Respondent Union argued that the evidence of Mr. Polsom, where it differed from the Applicant’s should be preferred.

[76] The Respondent Union argued that none of the issues raised in the application were raised with the Union prior to the application being filed. These issues included any reference to the “sticker” incident and the Applicant’s subterfuge by apparently acting as a salt for IBEW.

[77] The Respondent Union relied upon the Board's decisions in *Jacobs Industrial Services Ltd. (Re:)*[18], *Lucyshyn v. Amalgamated Transit Union, Local 615*[19] and *R.R. (Re:)*[20] in support of their argument that they had conducted a sufficient investigation of the matter before coming to a reasoned conclusion that a grievance would not be successful.

[78] The Respondent Union noted that at the meeting that Mr. Polsom had with the Applicant and his "wife", that at the conclusion of the meeting, and after the Applicant had been advised that no grievance would be filed, there was no insistence by the Applicant or his "wife", the agent of IBEW, to have a grievance filed, if only to preserve jurisdiction. They both seemed content, following the Applicant's admission that he knew about lock out/tag out procedures, that the matter was then resolved. They moved on at that point to look to finding alternate employment for the Applicant. The Respondent Union argued that there were no "loose ends" following that meeting.

[79] The Respondent Union argued that the Applicant was, following that meeting, being totally manipulated by IBEW. This was seen from his silence until July, 2013 when he cut and pasted the email from IBEW to Mr. Polsom. Then, he did not respond to both a telephone message and an email from Mr. Polsom wishing to discuss the matter. The Respondent Union argued that IBEW and by reflection, the Applicant, had not been open and honest in their approach to the matter. The Applicant didn't tell the Respondent Union the whole story.

[80] The Respondent Union also noted in their argument that the Applicant did not ever advise that the Applicant felt that the foreman had lied about having told the Applicant to switch out the photocell.

[81] The Respondent Union argued that the *Beatty, supra,* decision[21] was a case where there had been a total lack of representation by the union. They argued that was not the case here, as shown by Mr. Polsom's investigation and conclusion that there was no arguable case. Also, it noted that the Board should be cognizant of the remedies ordered by the Board in that case.

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[18] [2013] S.L.R.B.D. No 5, LRB File No. 044-12.
[19] [2010] CanLII 15756 (SKLRB), LRB File No. 035-09.
[20] [2011] S.L.R.B.D. No. 15, 200 C.L.R.B.R. (2d) 249, LRB File No. 057-10.
[21] *Supra* note 8.

[82] The Respondent Union argued that the probationary clause issue was a red herring. It suggested the Board should wary about striking out a clause in the collective agreement without having heard arguments from the Respondent Employer.

[83] In respect to the dues deduction issue, it argued that the issue was never raised by the Applicant prior to the filing of this Application. It argued that the Applicant had received value for money, insofar as he had received representation by the Respondent Union. It argued that the Rand formula provided that all employees who received representation were required to contribute to their bargaining agent by way of dues remittances.

[84] In respect of the suggestion of an adverse inference being drawn by the Board regarding the failure to call evidence from Mr. Perrins, they argued that they did not have the burden of proof and therefore had no requirement to call witnesses. They argued, conversely, that an adverse inference should be drawn with respect to the union's failure to call Ms. Haley in support of the evidence given by the Applicant.

Analysis:

[85] This case raised three distinct issues. Those are:

1. Did the Respondent Union act in a manner which was arbitrary, discriminatory or in bad faith with respect to its representation of the Applicant in respect to his termination from his employment?

2. Did the Respondent Union act in a manner which was arbitrary, discriminatory or in bad faith by its negotiation of a provision in its collective agreement which purported to disallow probationary employee's access to the grievance procedure?

3. Were union dues improperly deducted from the Applicant's wages?

The Application under Section 25.1 of the *Act*

1. Did the Respondent Union act in a manner which was arbitrary, discriminatory or in bad faith with respect to its representation of the Applicant in respect to his termination from his employment?

[86] In *Glynna Ward v. Saskatchewan Union of Nurses,*[22] the Board set out the distinctive meanings for "arbitrariness", "discrimination", and "bad faith".

> *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.*

[87] In *Toronto Transit Commission,*[23] the Ontario Labour Relations Board cited the following succinct explanation of the concepts of "arbitrary, "discriminatory" or "bad faith" as follows:

> *. . . 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 behavior 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".*

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[22] [1988] Winter Sask. Labour Rep. 44, LRB File No. 031-88, at 47.
[23] [1997] OLRD No. 3148.

> *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.*

[88] In *Radke v. Canadian Paperworkers Union, Local 1120,*[24] the Board said:

> *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.*

[89] The onus of proof that he has been treated in a manner which is arbitrary, discriminatory or in bad faith falls upon the Applicant. In our opinion, he has failed to satisfy this onus.

[90] The evidence provided by the Applicant was not, in our opinion, reliable. He was vague and imprecise, even during examination in chief. He did not have a firm grip on the chronology of events. He was evasive, and in respect of the meeting where he identified the

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[24] [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92, at 64 and 65.

IBEW representative as his wife, deceitful. For these reasons, the Board prefers the testimony of Mr. Polsom over that of the Applicant where there is any conflict.

[91] For the Applicant to be successful with respect to his claim that the Respondent Union failed to properly represent him with respect to his termination from his employment, he must show that the representation was arbitrary, discriminatory or not in good faith. IBEW has asserted that the representation was arbitrary, based upon their argument concerning the Board's decision in *Ron Beatty, supra.*[25] The Board will deal with that argument under the second portion of this analysis.

[92] The Respondent Union referenced the Board's decision in *Lucyshyn v. Amalgamated Transit Union, Local 615,*[26] which decision outlined the minimum that could be expected from a union in respect of its representation of employees.

[93] When the Applicant contacted the Respondent Union, Mr. Polsom contacted the Applicant and advised he would "look into it". He did, upon his visit to the worksite. He spoke with the Human Resources officer for the Respondent Employer, as well as the shop steward who was involved in the termination. He also attempted to have the penalty reduced, which efforts were rebuffed.

[94] There was no suggestion that the investigation was conducted in anything but a fair manner. The results of the investigation did not need to be provided to anyone else since Mr. Polsom had the responsibility to determine if a grievance had merit or not. He determined that it did not. At that stage of the inquiry, Mr. Polsom, having determined the grievance would not succeed, contacted the Applicant and arranged to meet with him.

[95] At that meeting, he advised the Applicant that the likelihood of success was minimal. Apparently, the Applicant agreed at that stage, by both acknowledging his understanding of lock out/tag out procedures and by agreeing to move on to look for alternative employment.

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[25] See Note #9.
[26] [2010] CanLII 15756 (SKLRB), LRB File No. 035-09.

[96] During the whole process, until the application was filed, there was no suggestion or even concern about the Applicant being a probationary employee. Mr. Polsom testified that he did, in fact, file grievances on behalf of probationary employees and testified that he had arbitrations scheduled on behalf of probationary employees. Apart from the issues raised concerning the provisions of the collective agreement, there was no evidence provided which suggested in any way that the Respondent Union had failed to represent the Applicant contrary to Section 25.1 of the *Act* with respect to his termination.

[97] The Applicant, in his argument, made much of the email from Mr. Polsom which referred to the Applicant having been a probationary employee as one of the reasons stated for his refusal to file a grievance. With respect, one has to remember, as noted above, that the issue of the Applicant being a probationary employee played no part in the initial determination by Mr. Polsom. While he may well have been aware that the Applicant was a probationary employee, his testimony made no reference to that being a determinant regarding his determination that the grievance would be unsuccessful, which determination he provided to the Applicant, without complaint, in the presence of an IBEW representative. His determination was made based upon the violation of a safety absolute which would have justified the termination of either a probationary or permanent employee. Furthermore, the Applicant acknowledged to him, in the presence of the IBEW representative, that he was aware of the lock out/tag out procedures.

[98] The Applicant testified[27] that the ultimate responsibility for the implementation of the lock out/tag out procedures fell to his foreman. With respect, the Board does not accept this explanation. The Applicant is a journeyman electrician. As such, the Board would expect that he would be sufficiently safety conscious that, if the ultimate responsibility fell to the foreman to implement the protocol, that he would have sought the foreman out to implement the protocol so as to ensure that safety procedures were followed before commencing the work.

[99] In our opinion, there was nothing in the conduct of the Respondent Union in its investigation of the incident or its dealings with the Applicant, that would in any way show the Respondent Union failed to properly represent him contrary to Section 25.1 of the *Act*.

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[27] He also testified that he was not aware of what the lock out/tag out procedures were on that site because he had never been trained in them.

Did the Respondent Union act in a manner which was arbitrary, discriminatory or in bad faith by its negotiation of a provision in its collective agreement which purported to disallow probationary employee's access to the grievance procedure?

[100] Following completion of the investigation by the Union, the Applicant, then made allegations that he (and the other probationary employees who worked for the Respondent Employer) had been dealt with arbitrarily by virtue of an illegal provision contained within the collective agreement which limited access to the grievance procedure by probationary employees. In respect of this argument, the Applicant relied principally on this Board's decision in *Ron Beatty, supra.*[28]

[101] The *Beatty* decision, *supra*, dealt with a similar provision in a collective agreement to that under consideration here. That provision, similar to the provision here, restricted access by probationary employees to the grievance procedure established pursuant to the collective bargaining agreement.

[102] In *Beatty, supra,* the Board conducted an analysis[29] of the provisions of the provisions of Section 25(1) and Section 25.1 of the *Act*. The Board concluded at paragraph 106 that a clause which restricted access to the grievance procedure by probationary employees was invalid. It said:

> *In our view, the analyses of the Canada Board and Ontario Board in the Elliston and Bradley cases, both supra, is equally applicable here in light of the fact that the legislation under consideration in those jurisdictions is substantially the same as in Saskatchewan, as are the probationary clauses under consideration, particularly that in the Bradley case, supra. Under s. 25(1) of the Act, all disputes or differences between the parties must be resolved through the grievance and arbitration provisions; thus the prohibition in article 8.1.3 of the collective agreement is invalid. This is so whether one considers (i) the protection afforded to employees in article 18 of the collective agreement which prevents dismissal without just cause; or (ii) that the parties have created a special status for newly hired employees (the probationary provisions in article 8) thereby allowing for the possibility of a "difference" arising concerning that status, yet the parties have removed the procedures to deal with issues of status when a probationary employee is dismissed. Our interpretation is consistent with the Board's recognition in the Off the Wall case and the Loraas Disposal case, both supra, that s. 25(1) of the Act has been interpreted by arbitration boards as prohibiting the practice of restricting probationary employees' right of access to grievance and arbitration procedures and led to the Board imposing as a term in a first collective agreement the right of a probationary employee to grieve a dismissal (albeit at a lower standard).*

[28] See Note #8.
[29] See paras. 99 – 105.

[103] The Board concurs with the analysis as set out in the *Beatty* decision, *supra*. A clause such as that found in this collective agreement should not be relied upon as the justification for the refusal to file a grievance on behalf of a probationary employee. The clause in this case provided as follows:

> *6.04 New Employees will be hired on a three (3) calendar month probationary period and thereafter will attain regular employment status subject to the availability of work.* ***The parties agree that the discharge or layoff of a probationary employee will not be the subject of a grievance or arbitration.*** *[emphasis added]*

[104] As noted by the Board in *Beatty, supra*, arbitrators have taken a similar approach with respect to the interpretation of similar clauses and have found that they are no bar to their jurisdiction under a collective agreement. Even Mr. Polsom agrees with this analysis as he testified that he did file grievances on behalf of probationary employees impacted by similar clauses and had taken such grievances to arbitration.

[105] Where the Applicant's argument base upon his analysis of the *Beatty, supra,* decision fails, is that in *Beatty*, *supra*, the provision of the collective agreement was the sole rationale for the union's refusal to file a grievance. That is not the case here. In the absence of any concern about probationary status or not, Mr. Polsom undertook an investigation of the events, attempted to negotiate a lesser penalty, and concluded that the filing of a grievance would be futile. In making this determination, he made no reference to the probationary status of the Applicant and only raised that issue when pressed for a written acknowledgement of the determination.

[106] The Board does not find that the inclusion of the invalid clause in the collective agreement played any pivotal role in the Respondent Union's determination that a grievance would not be well founded. That determination was made primarily on the basis that the facts of the situation were that an employee had breached a safety absolute which justified termination.

Were union dues improperly deducted from the Applicant's wages?

[107] Section 32 of the *Act* authorizes an employer to deduct periodic dues payable to a union representing its employees. However, that provision is subject to the employee having

authorized such deduction in writing. Absent such an authorization, a union may collect union dues from its employees, but such dues may not be checked off from those employees who have not authorized the deduction.

[108] This provision is distinguishable from the provisions found in other Trade Union legislation such as the *Canada Labour Code*[30] which incorporates the Rand Formula for payment of union dues, which is that all employees, regardless of whether they are members of the union or not must pay dues. In such case, that statutory provision provides for the inclusion of such a clause in the collective agreement and the deduction and remittance of dues by the employer.

[109] Section 32 provides for a revocable authorization, that is, employees may revoke the authorization for deduction of dues. However, this section coupled with Section 36 of the *Act* establishes union security through a "closed shop", that is, all employees who become employees after the date of certification, following a demand by the union, must become and remain members of the union. If they fail to do so, they may be terminated at the behest of the union.

[110] Section 36, of course, applies only to employees hired after the date of certification and the request by the union for union security. It does not apply to employees who were employed at the time the certification occurred, and before union security was requested.

[111] The Board has no evidence that the union requested union security under Section 36 following its certification. Not surprisingly, since the collective agreement was a voluntary recognition agreement entered into prior to certification, there is no union security provision in the collective agreement. Nor was the Board provided any information to show that a demand for union security under Section 36 was made by the Respondent Union.

[112] The evidence of Mr. Polsom was that the Respondent Union did not insist upon employees becoming members of the union. This is consistent with the lack of a union security provision in the collective agreement and the lack of a demand for union security under Section 36.

[113] Had the Respondent Union made a demand for union security under Section 36 following their certification, the issue of deduction of union dues may have been different. However, it did not.

[114] Even under Section 36, the difference between a requirement to pay union periodic dues under Section 36 and the deduction of those dues and their remittance to the union by the employer is clear. In order to have dues deducted and remitted to a union, in Saskatchewan, based on Section 32, there must be a written authorization directed to the employer to permit that deduction. For that reason, union membership cards in Saskatchewan routinely include a dues check off authorization which provides the necessary authorization to the employer to deduct and remit dues to the union.

[115] An argument could be made, but was not made, by the Respondent Union that the provisions of the collective agreement which authorized dues deductions and remittances by the Employer, since they were ratified by the employees, is a sufficient authorization for those due deductions. The Board does not agree. The Board does not know, for example, if those employees who chose not to become members are able to vote on the collective agreement. Nor does the Board know if employees hired after the ratification of the collective agreement are individually canvassed to ensure they are aware of the provision in the collective agreement and thereby authorize the deduction.

[116] It is clear from the evidence that the Applicant did not provide any authorization to the Respondent Union or to the Respondent Employer to authorize the deduction of dues from his wages.

[117] The Board dealt with this issue previously, in the context of an application to declare the Respondent Union to be a "company dominated organization".[31] In the *Wilson* case, *supra*, the Board determined that the deduction and remittance of dues, absent a written direction under Section 32, did not give rise to the union being a "company dominated organization".

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[30] R.S.C. 1985 c. L-2 (Section 70).
[31] See Note #9.

[118] Alternatively, the Board would also dismiss this application insofar as it is motivated by IBEW, based upon the reasons which follow. The Board was invited by the Respondent Union to determine if the Applicant was a straw man for the IBEW, and if so, the impact of that determination upon this application.

[119] In the *Wilson* case, *supra*, the Board said the following with respect to the dues issue:

> *The Applicant made much of this unauthorized deduction claiming that it was contrary to the provisions of The Labour Standards Act.*[32] *If such is the case, the Board has no jurisdiction with respect to such matters. Complaints of a breach of the Labour Standards Act must be dealt with pursuant to that Act.*

[120] While no determination was made in the *Wilson* case, *supra*, as to the impact of improper deductions offending the duty of fair representation under Section 25.1 of the *Act*, the Board is invited by the Applicant to declare that such deductions by the Employer and the remittance of those monies to the Union was somehow arbitrary, discriminatory or in bad faith.

[121] No road map was provided by the Applicant as to how the Board should come to the conclusion he suggests in his application. Section 25.1 requires fair representation by a Union "in grievance and rights arbitration". Arguably, the Applicant is saying that the Respondent Union should have filed a grievance on his behalf to have the dues deductions stopped. There are two primary flaws in this argument.

[122] Firstly, the Applicant would only have to provide notice to the Respondent Employer that it had not authorized any dues deductions under Section 32. Upon receipt of that notification, the Employer would have no authority to make further deductions. Secondly, the Applicant never raised the issue of dues deductions with the Respondent Union until he filed this application.

[123] More importantly, as noted in the *Wilson* case, supra, the Labour Standards Branch of the Ministry of Labour Relations and Workplace Safety has the jurisdiction to recover monies improperly deducted from an employee's wages.

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[32] R.S.S. 1978 c.L-1.

[124] The Board was invited by the Applicant to utilize its authority under Section 5(g) to determine the amount improperly deducted and to order its return. Given that another process exists for the recovery of these funds, the Board declines to exercise any authority under Section 5(g). In doing so, the Board will defer to the Labour Standards Branch of the Ministry of Labour Relations and Workplace Safety, to make that determination, upon proper application to them.

[125] Simply put, a breach of Section 32, in deduction and remittance of dues by the Respondent to the Respondent Union cannot, in these circumstances amount to a breach of Section 25.1 of the *Act.* This conclusion is consistent with the Board's earlier determination in *Bobowski v. United Food and Commercial Workers International Union, Local 248-P.*[33] In that case, at paragraph [16] the Board concluded:

> **[16]** *With respect to the Applicant's complaint that the Union failed to provide him with information to calculate and deduct union dues, this is not a matter that falls within the Board's jurisdiction, pursuant to s. 25.1 of the Act. Rather, this is an internal Union matter which should be dealt with by the Union and its members.*

The involvement of IBEW in this matter

[126] A straw man can be described as being someone who acts as a front for others who actually incur the expense and obtain the profit of a transaction.[34] Straw men are usually used by litigants for the purpose of shielding them from any costs associated with that litigation. However, the Courts have found that such behavior is an abuse of process which is often punished by an award of costs against the actual litigants.

[127] In this case, however, the issue is whether the use of a straw man to promote litigation should, in a labour relations context, be considered an abuse of the Board's process, and if so, what remedy should be applied.

[128] The Respondent Union argued that the real applicant in this case was the IBEW, not Mr. Bauck. They argued that Bauck, by his conduct at the meeting with Phil Polsom, and in the company of an IBEW representative, accepted that a grievance would be fruitless and agreed that the best solution would be to find alternative employment. Furthermore, they argued that following that meeting, the Applicant apparently lost interest in the matter and pursued it only

[33] [2003] CanLII 62855 (SK LRB), LRB File No. 028-03 & 057-03.

on the behest of the IBEW as was shown by the Applicant simply forwarding, without even making any edits, an email from IBEW, to Phil Polsom on July 16, 2013. The Union noted as well, that the Applicant went directly to the IBEW following his termination, not to his certified bargaining agent.

[129] The Board agrees with the Respondent Union that the motivating force behind this application is the IBEW and not the Applicant. From our viewing of the Applicant when he testified and his lack of specificity on a number of issues, including the date of his employment, show that he had little interest in the application or his testimony before us. It appeared that he was "going through the paces", as distinct from being highly motivated to pursue a grievance as against his Employer. The target here was not the Respondent Employer and its actions, but rather the actions taken by the Respondent Union in its representation of the Applicant in a broad sense.

[130] This impression is enhanced by the fact that the Applicant failed to mention to Mr. Polsom much of what he then complained about in his application, such as the improper deduction of union dues and the provisions of the collective agreement with respect to probationary employees. Furthermore, much of the Applicant's evidence before us included facts never made known to the Respondent Union, such as the "sticker" incident and the purported lie by the foreman regarding whether or not the photocell was to be swapped out.

[131] This lack of candor was also apparent in the Applicant's apparently clandestine activities while employed with the Respondent Employer. He met, telephoned and texted the IBEW on a regular basis, but failed to explain the nature or reason for that regular contact. His counsel suggested that he was engaged in a salting activity; however, the Board has no evidence from anyone regarding such an activity.

[132] The chronology of this application makes it clear that the application was not something that the Applicant wished to pursue on his own. Rather, from the outset, in our opinion, he was merely a puppet of the IBEW to bring this application forward. This chronology is as follows:

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[34] See West's Encyclopedia of American Law, 2d Ed. 2008.

1. Prior to embarking on his employment with the Respondent Employer, the Applicant meets with IBEW to get their approval for him to go to work there.

2. During the time he is employed, he regularly contacts Ms. Haley from IBEW to report on worksite activities.

3. On May 16, 2013 after his termination, the Applicant contacts IBEW.

4. IBEW instructs him, following a face to face meeting with Ms. Haley, to contact the Respondent Union.

5. He contacts the Respondent Union (Dennis Perrin) by email. That email is forwarded to Phil Polsom.

6. Phil Polsom contacts the Applicant by telephone on May 17, 2013. Mr. Polsom advises that he will investigate and follow up with him the following week.

7. Mr. Polsom investigates the incident, determines there is no arguable case for a grievance and contacts the Applicant to meet with him.

8. The Applicant meets with Mr. Polsom, bringing with him a representative of IBEW, whom he identifies as his wife. During that meeting, Mr. Polsom advises the Applicant that there is no arguable case for a grievance. In the presence of the IBEW rep and Mr. Polsom, the Applicant acknowledges that he is aware of the lock out/tag out procedures. He agrees to submit his resume to obtain new employment and move on.

9. He does not submit his resume to Mr. Polsom, but within weeks he is dispatched by IBEW to another jobsite.

10. On June 5, 2013, he sends another email to Dennis Perrin inquiring about what is happening with the grievance, that he had talked to Phil

Polsom about on Friday, May 19, 2013.[35] Mr. Perrin responded that Mr. Polsom would follow up.

11. On June 5, 2013, Mr. Polsom emailed the Applicant and advised him in writing that the Respondent Union would not be filing a grievance. He gave two (2) reasons. The first was that the termination was for breach of a safety absolute and secondly, because of the provision of the collective agreement which restricted access to the grievance procedure for probationary employees.

12. On July 15, 2013 the Applicant files this application. He acknowledges in his testimony that he did not prepare the application, but reviewed it prior to signing it.

13. On July 16, 2013, he sends an email to Mr. Polsom which is something that was sent to him by IBEW to send to the Respondent Union regarding access to an appeal procedure (something which had never been discussed earlier) and raising the issue of his union dues (again, something which had never been raised earlier).

[133] As noted above, a finding that someone is acting as a straw man is normally punishable with an award of costs as against that person for abuse of the processes of the Court. Our Board has no such provisions, but does have the authority to curtail abuses of the Board's processes.

[134] The Board reviewed its authority to dismiss applications found to be an abuse of process in *Metz v. Saskatchewan Government Employees' Union.*[36] In that decision, at paragraph 41, the Board determined that its jurisdiction to apply the doctrines of both *res judicata* and abuse of process derived from its jurisdiction to hear and determine an application.

[35] This date was symptomatic of the imprecision of the Applicant's testimony. May 17, 2013 was the Friday. May 19, 2013 was the Sunday prior to the Victoria Day holiday.
[36] [2007] CanLII 68747 (SK LRB), LRB File Nos. 126-06 & 127-06.

[135] In a recent case[37] before the Ontario Labour Relations Board, the Ontario Board determined that a rival trade union could not bring an application under the Ontario provisions for fair representation. In that case, a rival union sought to bring an application under the Duty of Fair Representation provisions of the *Ontario Act* where the Union who represented the employee refused to do so.

[136] The Ontario Board found that the rival Union had no standing to bring the application on behalf of the employee against the rival union. They held that the statutory provision did not allow those with an indirect interest in employee representation to seek redress for a member which it does not represent. While that case is not directly applicable here, our finding that the Applicant here was a straw man for the IBEW brings it closer on point.

[137] All of the peripheral issues related to the purported illegality of the contractual provisions dealing with probationary employees and the issue of due deductions are matters which were never raised by the Applicant with the Respondent Union prior to the launch of this application. They are, in the Board's opinion, brought solely by the Union in an attempt to broaden the issue beyond that which was raised by the Applicant with the Respondent Union, and which the Respondent Union undertook to identify and resolve for the Applicant. The Respondent Union thought that they had achieved a resolution when the Applicant agreed to move on and to submit his resume for other available electrical work. However, it appears that IBEW did not concur and persisted to bring up these other allegations.

[138] For these reasons, the Board finds that the IBEW, as the sponsor of this application, had no standing to bring up issues separate and apart from those that the Applicant had disclosed to the Respondent Union in his telephone conversations and meetings with Mr. Polsom. In the Board's opinion, they were trying, as counsel for the Respondent Union suggested, to embarrass the Respondent Employer and were somewhat disingenuous in doing so. The issues they sought to have the Board find fault on were never raised by the Applicant as noted above.

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[37] *Labourers' International Union of North America, Ontario Provincial District Council and Canadian Union of Skilled Workers and Valard Construction LP* [2013] 231 C.L.R.B.R. (2d) 32.

[139] For these reasons, the Board dismisses any allegations regarding the contractual provisions of the collective agreement regarding probationary employees, which allegations were not brought forward by the Applicant, as an individual, but by IBEW.

[140] Notwithstanding our determinations set out above, the Board would also dismiss the application for these reasons. An appropriate Order dismissing this application will accompany these reasons.

DATED at Regina, Saskatchewan, this **31st** day of **December, 2013.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson