**LARRY HERNANDEZ, Applicant v. TEAMSTERS LOCAL UNION 395, Respondent Union and SAPUTO DAIRY PRODUCTS CANADA G.P., Respondent Employer**

LRB File No. 242-14; August 12, 2015

Chairperson, Kenneth G. Love, Q.C, sitting alone pursuant to Section 6-95(3) of *The Saskatchewan Employment Act*, S.S. 2013, c. S-15.1

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| For the Applicant: | Self Represented, but assisted by Tina Abellero who acted as an interpreter for the Applicant |
| For the Respondent Union: | Jana Stettner |
| For the Respondent Employer: | Timothy Hawryluk |

**Duty of Fair Representation – Employee involved in numerous incidents where Employer imposed discipline – Union grieved two incidents of discipline – Employee terminated in culminating incident for failure to complete quality assurance checks.**

**Duty of Fair Representation – Union initially grieved earlier suspension and Applicant's termination – Applicant made no objection to the withdrawal of the first grievance regarding the suspension – In respect of his termination grievance, which was withdrawn - Applicant appealed the withdrawal of grievance to the Union's Executive Committee.**

**Prior to providing response to appeal to Executive Committee, Union President and Union Secretary Treasurer contacted Employer to explore the possibility of severance payment to Applicant. Union was unsuccessful in obtaining severance payment and advised Applicant that withdrawal of grievance was supported by Executive Committee**

**Onus of Proof – Applicant has onus of proof that Union acted in an arbitrary, discriminatory or bad faith manner – Applicant failed to discharge this onus.**

## REASONS FOR DECISION

**Background:**

**[1]** **Kenneth G. Love, Q.C., Chairperson:** Larry Hernandez (the "Applicant") is a former employee of Saputo Dairy Products Canada G.P. ("Saputo"). He was represented, while employed with Saputo, by Teamsters Local Union 395**,** (the "Union"). The Union was certified to represent the employees of Saputo by Board order dated May 13, 2003.

**[2]** For the reasons that follow, the application is dismissed.

**Facts:**

**[3]** This matter relates to a culminating incident involving the Applicant at his workplace in Saskatoon, Saskatchewan where the Applicant had been employed for more than 18 years. He was employed as a Packaging Machine Operator at Saputo's dairy products production plant.

**[4]** On June 24, 2014, the plant in which the Applicant worked was the subject of a Quality Control Inspection. This inspection was an announced inspection. Employees were advised that the inspection would occur and were instructed to insure that they performed all safety checks and followed prescribed operating procedures on the day of the inspection.

**[5]** Following the inspection, the Applicant was found not to have completed (or at least he had not initialed the appropriate documents to indicate the check was completed) a pre-op inspection form for the sanitation ATS filler.

**[6]** As a result of this failure, the Applicant was first sent home on June 24th. Subsequently, he was directed to report to the Manager in charge of his department on June 27, 2014 at which time he was terminated.

**[7]** When he was sent home on June 24th, the Applicant was contacted by or made contact with the Union. Mr. Dave Phipps, the President of the Union's grievance committee was advised of the meeting on June 27th and attended the meeting with the Applicant.

**[8]** Mr. Phipps conducted an investigation into the incident which gave rise to the Applicant's termination. He spoke to the Applicant, he spoke to the Human Resources Department of Saputo, and attempted to contact other employees of Saputo whom the Applicant advised could supply information to support the Applicant's assertion that he had, in fact, completed the check, but had neglected to initial the appropriate checklist.

**[9]** Mr. Phipps requested and received from Saputo a record of prior incidents of discipline regarding the applicant. He was aware of an incident which occurred on May 27, 2013 which had resulted in a 2 day suspension for the Applicant because the Union had been involved in filing a grievance regarding that incident. There were numerous other incidents of both discipline and coaching noted on the report, including a written warning given to the Applicant on October 10, 2012 and a verbal warning given on January 18, 2012.

**[10]** The Union filed a grievance with Saputo regarding the Applicant's termination on July 1, 2014. This Grievance was processed by the Union, but the grievance was denied by Saputo.

**[11]** Mr. Phipps testified that he attempted to contact the other union members that the Applicant said would support his position, but he found that the persons he contacted would not speak to him. He considered the prior incidents of discipline of the Applicant as well as other discipline incidents. He testified that even though the collective bargaining agreement provides for a 24 month sunset on prior discipline, that his experience was that arbitrators had construed that provision to require that there be a break of at least 24 months between discipline events and that there was a possibility that the whole of the Applicant's discipline record may be brought in by the arbitrator.

**[12]** His analysis revealed that Saputo had followed progressive discipline in its termination of the Applicant. He concluded that the chances of success on arbitration were not positive. Accordingly, he wrote to the Applicant on July 15, 2014 to advise that the union would not be proceeding to arbitration with the grievance.

**[13]** In his letter, Mr. Phipps advised the Applicant that he had the right, under the Union's constitution to appeal this decision to the Union Executive Board. The Applicant availed himself of this opportunity. A hearing before the Executive Board of the Union was arranged for September 13, 2014 in Davidson, SK.

**[14]** At that hearing, the Applicant had the assistance of a translator from the Saskatoon Open Door Society. He provided his evidence and arguments to the Executive Board with the assistance of this translator. Prior to this meeting, the Applicant had never advised the Union that he had any language difficulty.

**[15]** During the hearing, the issue of a possible settlement was raised and the Applicant agreed that the Union should attempt to secure a settlement as he was not looking forward to a return to the workplace if arbitration proved to be successful in returning him to his previous position.

**[16]** Mr. Phipps initially attempted to contact the local management to discuss a severance payment, but was rebuffed. Mr. Powers, the Secretary-Treasurer of the Union then attempted to go to a higher level, but ultimately was also unsuccessful.

**[17]** During the time the potential for settlement was being pursued, the Union kept the Applicant reasonably informed as to their progress. Ultimately the response was "No". On October 27, 2014, the Union advised the Applicant that the Executive Board concurred in the recommendation that the grievance not be proceeded with.

**[18]** The Applicant then filed this application alleging that the Union had failed to fairly represent him.

**Relevant statutory provision:**

**[19]** Relevant statutory provisions are as follows:

> ***6-59****(1)An employee who is or a former employee who was a member of the union has a right to be fairly represented by the union that is or was the employee's or former employee's bargaining agent with respect to the employee's or former employee's rights pursuant to a collective agreement or this Part.*
>
> *(2)Without restricting the generality of subsection (1), a union shall not act in a manner that is arbitrary, discriminatory or in bad faith in considering whether to represent or in representing an employee or former employee.*

**Applicant's arguments:**

**[20]** The Applicant's arguments focused on the investigation completed by Mr. Phipps. The Applicant argued that the investigation was not thorough enough because he never did talk

to the employees that the Applicant felt would support him. The Applicant argued that he should have contacted the employees at work rather than trying to contact them at home.

**[21]** The Applicant also argued that the Union should have pursued the maintenance records for the machinery which he operated. He argued that he had repeatedly advised of problems with the equipment which were not remedied.

**[22]** He argued that the he had asked that a grievance be filed in respect of his earlier discipline events, but that none had been filed. He also argued that the Union should have obtained his performance reviews to show his good performance.

**[23]** He also argued that he signed discipline letters not knowing what they were and not understanding the reasons for them.

**Union's arguments:**

**[24]** The Union provided a written Brief which we have reviewed and found helpful. In support of its position that it had not failed to properly represent the Applicant, it cited *Michael Beitel v. Unifor, Local 1-S and Direct West Corporation*[1], *Lucyshyn (Re:)* [2] and *Marius Piniliciuc v. Communications Energy and Paperworkers Union, Local 649 and SaskEnergy*[3].

**[25]** The Union argued that the onus of proof rested on the Applicant in this matter and that the Applicant had not discharged this onus.

**[26]** The Union argued that it acted at all times honestly and with good faith towards the Applicant. In support it cited *Banks v. CUPE and SFL*[4]. The Union also argued that it did not discriminate against the Applicant and treated his case as it would any other member.

**[27]** The Union also argued that it did not act arbitrarily towards the Applicant. It argued that arbitrariness is something more than a simple mistake, error in judgment, negligence or laxity. It argued that it conducted a meaningful investigation and directed its mind to the merits of the situation.

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[1] [2105] CanLII 8868 (SKLRB)
[2] [2010 CanLII 15756 (SKLRB)
[3] [2015] CanLII 19982 (SKLRB)
[4] [2013] CanLII 55451

**[28]** The Union argued that it had some latitude in the manner with which it deals with individual grievances and there must be an obvious disregard for a member's rights for a breach to be found. It also argued that even when critical job interests are at stake (such as in the present case where the Applicant was terminated), that any higher standard required in such circumstances had been met by the Union.

**[29]** Finally, the Union argued that the Board should not sit in appeal of the Union's decision insofar as the grievance is concerned. It is the Union's decision as to what the likelihood of success of a grievance may be, not that of the Board.

**Employer's arguments:**

**[30]** Saputo did not provide argument, but supported the views expressed by the Union.

**Analysis:**

**[31]** The Board's jurisprudence with respect to Section 6-59 of *The Saskatchewan Employment Act*[5] (the "*SEA*") is well established, and where there is no significant difference in the factual situation which may require the Board to examine the provision more closely, the Board's earlier decisions with respect to Section 25.1 of *The Trade Union Act*[6] *are applicable.* In *Glynna Ward v. Saskatchewan Union of Nurses,*[7] 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.* [Emphasis added]

[5] S.S. 2013 c. S-15.1
[6] R.S.S. 1978 c. T-17 (now repealed by the *SEA*.
[7] [1988] Winter Sask. Labour Rep. 44, LRB File No. 031-88, at 47.

**[32]** In *Toronto Transit Commission,*[8] 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".*
> >
> > *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.*

**[33]** In *Radke v. Canadian Paperworkers Union, Local 1120,*[9] the Board said:

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[8] [1997] OLRD No. 3148.
[9] [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92, at 64 and 65.

> *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.*

**[34]** The Applicant bears the onus of proof under Section 6-59 of the *SEA*. It is necessary for the Applicant to show that the Union has acted "in a manner that is arbitrary, discriminatory or in bad faith in considering whether to represent or in representing an employee or former employee." In this case, the Applicant has failed to discharge this onus.

**[35]** In this case, the Applicant focused his arguments and evidence on his view of what the Union should have done to complete its investigation of the incidents which gave rise to his termination and to his prior incidents of discipline. However, the Board has consistently ruled that it is not the merits of the grievance which it seeks to adjudicate, nor to second guess the Union with respect to decisions made in its representation of its member. The duty of fair representation arose out of the Supreme Court of Canada decision in *Canadian Merchant Guild v. Gagnon.*[10] The Board has often discussed this duty. One of those occasions was in in *Laurence Berry v. SGEU.*[11]

**[36]** In that decision, the Board says at pages 71-72:

> *This Board has discussed on a number of occasions the obligation which rests on a trade union to represent fairly those employees for whom it enjoys exclusive status as a bargaining representative. As a general description of the elements of the duty, the Board has indicated that it can do no better than to quote the principles outlined by the Supreme Court of Canada in the case of Canadian Merchant Services Guild v. Gagnon, [1984] 84 CLLC 12,181:*
>
> > *The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*
> >
> > *1. The exclusive power conferred on a union to act as a spokesman for the employees in a bargaining unit entails*

[10] [1984] 1 S.C.R. 509
[11] [1993] S.L.R.B.D. No. 62. LRB File No. 134-93

> *a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
>
> *2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
>
> *3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*
>
> *4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*
>
> *5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employees.*

**[37]** The evidence presented by the Applicant fell well short of satisfying the definitions of “arbitrary”, “discriminatory” or “bad faith” as outlined above. Even when the factor of the critical job interests is taken into account, the Union was not arbitrary in its handling of the grievance on the Applicant’s behalf. The Union clearly put its mind to the merits of the grievance and its probability of success at arbitration. Its conclusion was that since progressive discipline had been followed, and that prior discipline events may become engaged, supported its view that the arbitration would not likely succeed. This decision was not in any way negligent or more importantly, grossly negligent. Nor was it implausible or capricious.

**[38]** The Union acknowledges that there is a requirement for it to investigate an incident and act on the available evidence. The Union, being, at law, responsible for the outcome, has the carriage of this investigative process, not the Applicant. Unless it can be shown that the investigation conducted was flagrant, capricious, totally unreasonable, or grossly negligent, the Board would not interfere in how that investigation was conducted. What is important is that a fair investigation occurs, and that any decision taken be based upon facts as found in that investigation.

**[39]** There was also no evidence of discrimination whereby the Applicant was treated differently from any other union member. Discrimination in this context does not usually (but can) mean traditional forms of discrimination which occur such as discrimination based upon race, colour, creed, religion, sex or other forms of discrimination prescribed by Human Rights Codes, but usually means that one member receives preferential or differential treatment from his union with respect to his or her representation. That was not the case here.

**[40]** Nor was there any evidence of bad faith towards the Applicant. There was no evidence of ill-will, malice, hostility or dishonesty in the Union's dealings with the Applicant or the processing of his grievance. The decision made not to proceed with the grievance was not influenced by any bad faith considerations.

**[41]** For these reasons, the application is dismissed. An order dismissing the application will accompany these reasons.

**DATED** at Regina, Saskatchewan, this **12th** day of **August**, **2015.**

**LABOUR RELATIONS BOARD**

Kenneth G. Love, Q.C.
Chairperson