DEVIN COPPINS, Applicant v. UNITED STEELWORKERS, LOCAL 7689, Respondent and POTASH CORPORATION OF SASKATCHEWAN, Respondent Employer

LRB File No. 085-16; November 3, 2016

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

For the Applicant:	Self Represented
For the Respondent:	Heather Jensen
For the Respondent Employer:	Amy Gibson

Duty of Fair Representation: Board considers the long standing principles governing a Union's Duty of Fair Representation of its members. Board reviews evidence and finds Union did not act in Bad Faith or in a Discriminatory manner.

Referral to General Membership Meeting: Board considers impact of the referral of whether a grievance should proceed to arbitration to a general membership meeting. Board finds that determination made by general membership meeting can be inherently arbitrary. Decision made by general membership may have been influenced by matters other than the merits of the grievance. Matter remitted to grievance committee to be dealt with.

REASONS FOR DECISION

Background:

[1] Kenneth G. Love, Q.C., Chairperson: Mr. Devin Coppins (the "Applicant") made application to the Board alleging that his bargaining representative, the United Steelworkers Union, Local 7689 (the "Union") had failed in its duty to represent him in respect of a grievance against his employer, the Potash Corporation of Saskatchewan ("PCS").

Facts:

[2] The Applicant was employed by PCS at its Allan Division potash mine. During his employment he was represented by the Union for collective bargaining with PCS. The evidence established that the Applicant had had a number of performance and attendance issues during the course of his employment. These included:

1. A meeting with management and a non-disciplinary warning letter concerning his high absenteeism on February 21, 2013;

2. A meeting with management and a non-disciplinary warning letter concerning his high absenteeism on July 26, 2013;

3. A meeting with management and a non-disciplinary warning letter concerning his high absenteeism on February 15, 2014;

4. A Step 3 reprimand for insubordination resulting in a one day suspension on July 7, 2014;

5. A Step 3 reprimand for a significant safety violation resulting in a three day suspension on January 9, 2015.

[3] The Applicant was terminated for cause by PCS on July 30, 2015 based upon the following alleged facts:

1. On June 28, 2015, the Applicant called in sick for his shift. It was later brought to PCS's attention that he had practice Kart racing times posted on the Saskatoon Kart Racers website for races on June 28, 2015 at 9:32 am and 12:23 pm.

2. On July 15, 2015, PCS met with a number of employees, including the Applicant concerning absenteeism. At that meeting, (although there was some difference of opinion as to what exactly had been said) PCS formed the view that the Applicant advised that he had been home sick the whole of June 28, 2015.

3. PCS again met with the Applicant on July 28, 2015. At that time, PCS advised the Applicant that they were aware that he had been Kart racing on June 28, 2015. At that time, the Applicant took the position that he had had a migraine headache earlier on June 28, 2015 when he called in sick, but after having taken medication, he felt better and decided to go to the Kart track around 10:00 or 10:30 am. He advised that since he was feeling better that he decided to race.

4. PCS provided him with a copy of his race results which showed he had raced at 9:23 am.

5. PCS requested that the Applicant provide a doctor's note for his absence on June 28, 2015 which the Applicant provided. That note, dated June 29, 2015 stated as follows:

> *Devin Coppins was seen in this office on the above noted date. They [sic] have indicated that they have been incapacitated since 06/28/2015.*
>
> *…*
>
> ☑ *I have satisfactory knowledge of this person during the current illness.*
>
> *…*
>
> *The estimated date of return is: 06/29/2015.*

[4] PCS terminated the Applicant on July 30, 2015. The Union filed a grievance against his termination. The grievance was processed by the Union in accordance with the Collective Bargaining Agreement (the "CBA") between the Union and PCS. The grievance procedure under the CBA is a four step process. The grievance was denied by PCS at the first three (3) levels of the grievance process. The final step in the process is a reference to arbitration between the parties to resolve the grievance.

[5] Mr. Todd Hewlin testified for the Union. He was a shop steward and a member of the Union's grievance committee. He testified that following the rejection of the grievance at step three, the Union was concerned about going to arbitration because they had recently submitted a similar matter to arbitration and had been unsuccessful. The grievance committee

considered the grievance and their chances of success. The committee requested a legal opinion prior to making any determination.

[6] The legal opinion obtained by the committee was not optimistic as to the chances of success at arbitration. The grievance committee considered their opinions and decided to recommend that the grievance not be referred to arbitration.

[7] The grievance committee decided to refer the question of whether or not to go to arbitration to a general membership meeting. Mr. Hewlin testified that this was not a requirement for the process and did not happen in every case. He testified that the referral was to allow the Applicant to have a chance to address the membership in respect of the grievance.

[8] The general membership meeting to discuss referring the grievance to arbitration occurred on November 5, 2015. While there was some disagreement as to when the meeting started and what occurred at the beginning of the meeting, the Applicant was permitted to address the members present at the meeting. There was also some concern raised by the Applicant as to who might be permitted to vote at the meeting. Nevertheless, at the conclusion of the meeting, the vote was tied and the chairperson of the meeting cast the final vote against proceeding with the reference to arbitration. Following the vote, a member of the union, who was present at the meeting, asked if he could submit a proxy vote on behalf of another member who was unable to attend the meeting. That request was denied by the chairperson of the meeting.

[9] As a result of the vote at the membership meeting, the grievance was not taken to arbitration and was withdrawn by the Union. The Applicant, in his application, claims that the Union breached its duty of fair representation as set out in section 6-59 of the *SEA*.

Relevant statutory provision:

[10] Relevant statutory provisions are as follows:

> ***Fair representation***
>
> ***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*

Appellant's arguments:

[11] The Appellant took issue with how the membership meeting at which the referral of his grievance to arbitration was conducted. He argued that the meeting had commenced prior to his arrival and was "restarted" when he arrived to allow him to speak. He argued that a member who had been given a proxy vote was not permitted to vote that proxy vote. He also argued that he was not permitted sufficient notice of the meeting so as to allow him to have persons favourable to his position in attendance to vote. He further argued that there was confusion as to what was being voted on.

[12] The Applicant also raised issues with respect to the legal opinion wherein he claimed he had never been consulted by the lawyer. He argued that the whole of the opinion should have been presented to the membership meeting rather than only extracts therefrom. Finally, he argued that he had not had the opportunity to review the legal opinion prior to the membership meeting.

Union's arguments:

[13] The Union argued that they had not breached the duty of fair representation. They further argued that the decision had not been arbitrary. They stated that if proxy votes had been permitted that it would have turned the process into a popularity contest which would *ipso facto* be arbitrary. The Union argued that the Board should show deference to the Union's determination not to take the matter to arbitration.

[14] The Union also argued that there was no evidence provided to show that the Union had acted in a discriminatory fashion or that there was any bad faith shown towards the applicant.

Employer's arguments:

[15] The Employer raised a preliminary objection to the jurisdiction of the Board to hear and adjudicate this application based upon the limitation contained in Section 6-111(3) of the *SEA*. The Employer argued that the termination of the Applicant had occurred on

November 5, 2015 and the application filed with the Board on April 11, 2016 which was more than the ninety (90) day period set out in section 6-111(3).

[16] The Employer also argued that the application must be considered under section 6-60 of the *SEA* not either section 6-58 or 6-60 as this was the section that the Applicant applied under and that no application had been made to the Board to have the matter considered under either or both sections.

[17] However, notwithstanding the objection to the Board dealing with the matter under section 6-59, they argued that the section had not been breached.

Analysis:

<u>Preliminary Objections:</u>

Was the application filed outside the time limit prescribed in section 6-111(3)?

[18] The preliminary objection taken by the Employer is denied. While more than ninety (90) days had elapsed between the date of the membership meeting on November 5, 2015 and the filing of the Application on April 11, 2016, there are two (2) principle issues to be considered.

[19] Firstly, section 6-111(3) deals specifically with unfair labour practices. While it may be said that the duty of fair representation initially was processed by this Board as a form of unfair labour practice, prior to the inclusion of the statutory duty within the legislation, its genesis is the decision of the Supreme Court of Canada in *Canadian Merchant Guild v. Gagnon*[1].

[20] At the time of the Supreme Court decision, there was no statutory duty of fair representation as there is now in the *SEA* and which was inserted into *The Trade Union Act*[2] following the Supreme Court decision in *Gagnon*. In that decision, the Court determined that duty arose out of an equitable duty owed to members by their collective bargaining representative to represent them in a fair manner as a trade-off for their ability to exclusively represent those employees, not as an unfair labour practice.

[1] [1984] 1 SCR 509, CanLII 18 (SCC)
[2] R.S.S. 1978 c. T-17

[21] If the legislature had wanted to preclude applications under the duty of fair representation provisions of the *SEA* being filed outside of a ninety (90) day window, section 6-111(3) would have included a specific reference to those provisions. It did not. As such, the interdiction provided for filing of unfair labour practice applications outside of that ninety (90) day window cannot, in my opinion, be extended to include duty of fair representation applications.

[22] Duty of Fair Representation complaints are filed under Division 11 of the *SEA* and Unfair Labour Practice complaints are filed under Division 12 of the *SEA.* There is a clear demonstration of the unique nature of each of these complaints.

[23] Also, in the event that I am determined to have erred with respect to the proper interpretation of section 6-111(3) and its applicability to duty of fair representation applications, the Board would nevertheless have allowed the application to proceed under section 6-111(4) of the *SEA*.

[24] In *Saskatchewan Polytechnic Faculty Association v. Saskatchewan Polytechnic*[3], Vice-Chairperson Mitchell adopted the guidelines for the exercise of our discretion as set out by the Board in *Canadian Union of Public Employees, Local 600-3 v. Government of Saskatchewan (Community Living Division, Department of Community Resources.*[4]

[25] From these cases, and the relevant statutory provisions, the following salient principles emerge:

> 1. *The 90-day time limit is a legislative recognition of the need for expedition in labour relations matters.*
>
> 2. *"Labour relations prejudice" is presumed to exist for all complaints filed later than the 90-day limit.*
>
> 3. *Late complaints should be dismissed unless countervailing considerations exist.*
>
> 4. *The longer the delay, the stronger must be the countervailing considerations before the complaint will be allowed to proceed. There is no separate category of "extreme" delay.*

[3] [2016] CanLII 58881 (SKLRB)
[4] [2009] CanLII 49649 (SK LRB), 2009 CanLII 49649, 178 C.L.R.B.R. (2d) 195

> *5. Without closing the categories of countervailing considerations that are relevant, the Board will consider the following questions:*
>
> *(a) Who is seeking relief against the time limit? A sophisticated or unsophisticated applicant?*
>
> *(b) Why did the delay occur? Are there extenuating circumstances? Aggravating circumstances?*
>
> *(c) Has the delay caused actual litigation prejudice or labour relations prejudice to another party?*
>
> *(d) And, in evenly balanced cases, what is the importance of the rights asserted? And what is the apparent strength of the complaint?*

[26] The delay in this case was not extensive. Nevertheless, as noted above, labour relations harm can be presumed unless there are countervailing considerations. Foremost among those countervailing considerations is the fact that the Applicant in this case is unsophisticated. Secondly, no warning was given to him that there would be an application brought as it was brought in argument at the commencement of the hearing. He would not have been prepared to bring forward any evidence with respect to the reasons for the delay in bringing his application to the Board.

[27] Nor was there any demonstration of any prejudice brought forward by the Employer. Additionally, this was a termination situation which involved serious consequences for the Applicant, whose grievance had been withdrawn.

[28] The Board finds that these countervailing considerations would override any prejudice (whether presumed or proven) to the Employer. This is particularly the case because of the provisions of the *SEA*[5] which permit the Board to provide for compensation in the event a complaint is upheld and a matter referred by the Board to arbitration.

What is the Operative Statutory Provision?

[29] In his application, the Applicant references section 6-60 as the statutory provision on which he relies to file his application. That section deals with the effects of a finding of a

[5] See Section 6-60(1)(c) and (2)

breach of the duty of fair representation as distinct from section 6-59 which establishes the statutory duty of fair representation.

[30] Section 6-112 of the *SEA* makes it clear that no technical irregularity will invalidate a proceeding before the Board. It specifically allows the Board to permit a party to amend its application so as to insure that the real questions in dispute between the parties are heard and determined.

[31] In this case, it is clear that the Applicant is claiming that the Union failed to properly represent him with respect to his termination grievance. As such, it is clear that the reference to section 6-60 is in error and must be corrected. Accordingly, the application by the Employer to have the application struck is denied and the application will be dealt with as an application under section 6-59 of the *SEA*.

Analysis and Decision:

[32] For the reasons which follow, the determination of whether or not the Applicant's grievance should proceed to arbitration or not, is returned to the grievance committee of the Union to be dealt with in accordance with the Board's Order remitting the matter to them.

[33] In its decision in *Billy-Jo Tebbott v. Construction and General Workers Union, Local 151 (CLAC)*[6], the Board confirmed that its previous jurisprudence with respect to duty of fair representation complaints established under *The Trade Union Act*[7] carried forward under the provisions of the *SEA*. That prior jurisprudence had defined the terms "arbitrary, discriminatory and bad faith" as used in section 6-59.

[34] The Board has often summarized its jurisprudence with respect to these terms. The first summary of these terms was set out in *Hargrave, et al. v. Canadian Union of Public Employees, Local 3833, and Prince Albert Health District*[8] at page 47 as follows:

> *[27] As pointed out in many decisions of the Board, a succinct explanation of the distinctive meanings of the concepts of arbitrariness, discrimination and bad faith, as used in s. 25.1 of the Act, was made in Glynna Ward v. Saskatchewan Union of Nurses, [1988] Winter Sask. Labour Rep. 44, LRB File No. 031-88, at 47, as follows:*

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[6] [2014] CanLII 93080 (SKLRB)
[7] R.S.S. 1978 c. T-17
[8] [1998] Winter Sask. Labour Rep. 44, LRB File No. 031-88

> *Section 25.1 of* <u>*The Trade Union Act*</u> *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.*

[28] In <u>*Toronto Transit Commission*</u>*, [1997] OLRD No. 3148, at paragraph 9, the Ontario Labour Relations Board cited with approval the following succinct explanation of the concepts provided by that Board in a previous unreported decision:*

> *. . . a complainant must demonstrate that the union's actions were:*
>
> *(1) "Arbitrary" – that is, flagrant, capricious, totally unreasonable, or grossly negligent;*
>
> *(2) "Discriminatory – that is, based on invidious distinctions without reasonable justification or labour relations rationale; or*
>
> *(3) "in Bad Faith" – that is, motivated by ill-will, malice hostility or dishonesty.*
>
> *The behaviour under review must fit into one of these three categories. …[M]istakes or misjudgments are not illegal; moreover, the fact that an employee fails to understand his rights under a collective agreement or disagrees with the union's interpretation of those rights does not, in itself, establish that the union was wrong – let alone "arbitrary", "discriminatory" or acting in "bad faith".*
>
> *The concept of arbitrariness, which is usually more difficult to identify than discrimination or bad faith, is not equivalent to simple errors in judgment, negligence, laxity or dilatoriness. In Walter* <u>*Prinesdomu v. Canadian Union of Public Employees*</u>*, [1975] 2 CLRBR 310, the Ontario Labour Relations Board stated, at 315:*
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> > *It could be said that this description of the duty requires the exclusive bargaining agent to "put its mind" to the merits of a grievance and attempt to engage in a process of rational decision making that cannot be branded as implausible or capricious.*

> *This approach gives the word arbitrary some independent meaning beyond subjective ill will, but, at the same time, it lacks any precise parameters and thus is extremely difficult to apply. Moreover, attempts at a more precise adumbration have to reconcile the apparent consensus that it is necessary to distinguish arbitrariness (whatever it means) from mere errors in judgment, mistakes, negligence and unbecoming laxness.*

. . . .

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

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

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

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

And further, at 194-95, as follows:

> *[219] In Rousseau v. International Brotherhood of Locomotive Engineers et al., 95 CLLC 220-064 at 143, 558-9, the Canada Labour Relations Board described the duty not to act in an arbitrary manner as follows:*
>
> > *Through various decisions, labour boards, including this one, have defined the term "arbitrary." Arbitrary conduct*

> *has been described as a failure to direct one's mind to the merits of the matter; or to inquire into or to act on available evidence; or to conduct any meaningful investigation to obtain the data to justify a decision. It has also been described as acting on the basis of irrelevant factors or principles; or displaying an indifferent and summary attitude. Superficial, cursory, implausible, flagrant, capricious, non-caring or perfunctory are all terms that have also been used to define arbitrary conduct. It is important to note that intention is not a necessary ingredient for an arbitrary characterization.*
>
> *Negligence is distinguishable from arbitrary, discriminatory or bad faith behaviour. The concept of negligence can range from simple negligence to gross negligence. The damage to the complainant in itself is not the test. Simple negligence may result in serious damage. Negligence in any of its variations is characterized by conduct or inaction due to inadvertence, thoughtlessness or inattention. Motivation is not a characteristic of negligence. Negligence does not require a particular subjective stage of mind as does a finding of bad faith. There comes a point, however, when mere/simple negligence becomes gross/serious negligence, and we must assess when this point, in all circumstances, is reached.*
>
> *When does negligence become "serious" or "gross"? Gross negligence may be viewed as so arbitrary that it reflects a complete disregard for the consequences. Although negligence is not explicitly defined in section 37 of the Code, this Board has commented on the concept of negligence in its various decisions. Whereas simple/mere negligence is not a violation of the Code, the duty of fair representation under section 37 has been expanded to include gross/serious negligence . . . The Supreme Court of Canada commented on and endorsed the Board's utilization of gross/serious negligence as a criteria in evaluating the union's duty under section 37 in Gagnon et al. [1984 CanLII 18 (SCC), [1984] 1 S.C.R. 509]. The Supreme Court of Canada reconfirmed the utilization of serious negligence as an element to be considered in Centre Hospitalier Régina Ltée v. Labour Court, 1990 CanLII 111 (SCC), [1990] 1 S.C.R. 1330.*

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

> *A union is not required to be correct in every step it takes on behalf of an employee. Moreover, mere negligence on the part of a union official does not ordinarily constitute a breach of section 68. See Ford Motor Company of Canada Limited, [1973] OLRB Rep. Oct. 519; Walter Princesdomu and The Canadian Union of*

Public Employees, Local 1000, [1975] OLRB Rep. May 444. There comes a point, however, when "mere negligence" becomes "gross negligence" and when gross negligence reflects a complete disregard for critical consequences to an employee then that action may be viewed as arbitrary for the purposes of section 68 of the Act. In Princesdomu, supra, the Board said at pp 464-465:

> *Accordingly at least flagrant errors in processing grievances--errors consistent with a "not caring" attitude--must be inconsistent with the duty of fair representation. An approach to a grievance may be wrong or a provision inadvertently overlooked and section 60 has no application. The duty is not designed to remedy these kinds of errors. But when the importance of the grievance is taken into account and the experience and identity of the decision-maker ascertained the Board may decide that a course of conduct is so, implausible, so summary or so reckless to be unworthy of protection. Such circumstances cannot and should not be distinguished from a blind refusal to consider the complaint.*

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

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

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

> *... similarly, the Board will be reluctant to find a breach of Section 7 by virtue of the manner in which particular grievances are pursued. As stated earlier, a complainant must demonstrate*

> *shortcomings in the union's representation beyond the areas of mere negligence, inadvertent errors, poor judgment, etc. The shortcomings must be so blatant as to demonstrate that the grievor's interests were pursued in an indifferent or perfunctory manner.*
>
> *Too often the intended purpose and limits of Section 7 are not well understood. A union is afforded wide latitude in the manner in which it deals with individual grievances; the Board will only find violations of Section 7 where a union's manner of representation of an individual grievor is found to be an obvious disregard for his rights or for the merits of the particular grievance. Broadening the scope of Section 7 beyond the areas described in earlier pages of this decision would not be in keeping with the purpose and objects of the Labour Code; it would encourage the filing of a myriad of unfounded and frivolous Section 7 applications to the Board and it could also force unions to untenable positions in grievance handling because of the weight they would have to give to possible Section 7 complaints hanging over their heads.*
>
> *. . .*
>
> *Each case must be decided on its own merits; suffice to say, however, that the Board may well find shortcomings in the manner in which the union dealt with a particular matter without finding that such shortcomings support a Section 7(1) complaint. The Board may well find that a union could have been more vigourous and thorough in its investigation of the facts in a particular case; it may even question the steps taken in dealing with a grievance and the ultimate decision made with respect to that grievance. However, that does not necessarily mean that a complaint under Section 7(1) will be substantiated. To substantiate a charge of arbitrariness, there must be convincing evidence that there was a blatant disregard for the rights of the union member.*

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

> *The Canada Labour Relations Board initially accepted the notion that, in the case of what were termed "critical job interests," the obligation of a trade union to uphold the interest of the individual employee affected would be close to absolute. What might constitute such critical job interests was not entirely clear, but loss of employment through discharge was clearly among them.*
>
> *The Board continued to hold the view that the seriousness of the interest of the employee is a relevant factor. In Brenda Haley v. Canadian Airline Employees' Association, [1981] 81 C.L.L.C. 16,096, the Canada Board made this comment, at 609:*

This concept (i.e. critical job interests] is a useful instrument to distinguish circumstances where the balance between the individual and union or collective bargaining system interests will tilt in one direction or another. A higher degree of recognition of individual interests will prevail on matters of critical job interest, which may vary from industry to industry or employer to employer. Conversely on matters of minor job interest for the individual the union's conduct will not receive the same scrutiny and the Board's administrative processes will not respond with the same diligence or concern. Many of these matters may not warrant an expensive hearing. Examples of these minor job interests are the occasional use of supervisors to do bargaining unit work, or isolated pay dispute arising out of one or a few incidents and even a minor disciplinary action such as a verbal warning.

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

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

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

> *It is not the Board's task to reshape union priorities, allocate union resources, comment on leadership selection, second guess its decisions, or criticize the results of its bargaining. It is our task to ensure it does not exercise its exclusive majoritarian based authority unfairly or discriminatorily. Union decision makers must not act fraudulently or for improper motives such as those prohibited by human rights legislation or out of personal hostility, revenge or dishonesty. They must not act arbitrarily by making no or only a perfunctory or cursory inquiry into an employee's grievance. The union's duty of fair representation does not guarantee individual or*

> *group union decision makers will be mature, wise, sensitive, competent, effectual or suited for their job. It does not guarantee they will not make mistakes. The union election or selection process does not guarantee competence any more than the process does for those selected to act in other democratic institutions such as Parliament or appointees to administrative agencies.*

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

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

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

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

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

> *prepared to accept a significant degree of responsibility for employees, especially if an employee's employment depends upon the grievance.*

Was the conduct of the Union Discriminatory?

[35] The onus falls upon the Applicant to provide evidence of discriminatory conduct on the part of the Union. That is, conduct which demonstrates that the Union discriminated for or against particular employees based on factors such as race, sex or personal favoritism. No such evidence has been provided by the Applicant and we can find no evidence to support any such discriminatory conduct.

Did the Union Act in Bad Faith?

[36] Again, the onus falls upon the Applicant to provide evidence of bad faith on the part of the Union. Bad faith means that the Union must act honestly and free from personal animosity towards the employee it represents. No such evidence was provided and we can find no evidence to support any claim of bad faith conduct.

Did the Union Act in an arbitrary fashion?

[37] In *Lucyshyn v. Amalgamated Transit Union, Local 615*[9], the Board described the minimum standard of care expected of a trade union in representing a member in relation to a grievance. That case set out the following expectations:

> *1. Upon a grievance being filed, there should be an investigation conducted by the Union to determine the merits or not of the facts and allegations giving rise to the grievance;*
>
> *2. The investigation conducted must be done in an objective and fair manner, and as a minimum would include an interview with the complainant and any other employees involved;*
>
> *3. A report of the investigation should go forward to the appropriate body or person charged with the conduct of the grievance process within the Union. A copy of that report should be provided to the complainant;*
>
> *4. The Union, Grievance Committee, or person charged with the conduct of grievances, should determine if the grievance merits being advanced. Legal advice may be sought at this time to determine the prospects for success based on prior arbitral jurisprudence;*

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[9] [2010] CanLII 15756 (SKLRB)

5. At this stage, the Union may determine to proceed or not proceed with the grievance. However, in making that determination, the Union must be cognizant of the duty imposed upon it by s. 25.1 of the Act;

6. At each stage of the grievance procedure, the Union will be required to make a determination as to whether to proceed with the grievance or not. Again, its decision to proceed or not must be made in accordance with the provisions of s. 25.1 of the Act; and

7. It must also be recognized that the Union has carriage of the grievance, not the grievor. There may be instances where the common good outweighs the individual grievor's interest in a matter. Where such a decision is made (i.e.: not to proceed with a grievance) which is not arbitrary, discriminatory, or in bad faith, that decision will undoubtedly be supported by the Board.

[38] However, in *Lucyshyn*, the Board also found that the Union had been arbitrary. In doing so, the Board relied upon a portion of the quote above from *Rousseau*[10] where the Canada Board said:

> *Through various decisions, labour boards, including this one, have defined the term "arbitrary." Arbitrary conduct has been described as a failure to direct one's mind to the merits of the matter; or to inquire into or to act on available evidence; or to conduct any meaningful investigation to obtain the data to justify a decision. It has also been described as acting on the basis of irrelevant factors or principles; or displaying an indifferent and summary attitude. Superficial, cursory, implausible, flagrant, capricious, non-caring or perfunctory are all terms that have also been used to define arbitrary conduct. It is important to note that intention is not a necessary ingredient for an arbitrary characterization.*

[39] In its decision in *Stewart Kelly Read v. Amalgamated Transit Union, Local 615 and the City of Saskatoon*[11], the Board noted its earlier decision in *Gordon W. Johnson v. Amalgamated Transit Union, Local 588*[12], wherein the Board had noted that the taking of a grievance to a membership meeting to determine if it should be submitted to arbitration was inherently arbitrary. In *Gordon W. Johnson*, the Board says:

> ***Mr. McCormick and the other members of the executive took what steps they could to ensure that the members of the bargaining unit were properly briefed prior to the vote, and that they understood that the executive was in favour of proceeding to arbitration.*** *The mechanism of the vote among the entire group of employees, many of whom had not participated in the discussion at the membership meeting, and some of whom may not have been in possession of any information*

[10] *95 CLLC 220-064 at 143*
[11] [2011] CanLII 75570 (SKLRB)
[12] L.R.B. File No. 091-96, [1997] Sask. L.R.B.R. 19

> *beyond what was on the notice was, in our opinion, inherently arbitrary as a means of making a decision about the fate of an individual employee, however useful it might be as a means of obtaining direction about issues of more general significance.* ***[emphasis added]***

[40] This concern is further highlighted by the arguments of both the Applicant and the Union. The Applicant argues he was denied the opportunity (due to the scheduling of the meeting) to have his supporters come out to the meeting to vote on his behalf. Similarly, the Union suggested that such a vote should not become a "popularity contest".

[41] There was no evidence to determine what the parameters were that the membership was voting on. Was it based on personal popularity, monetary concerns, or the strength of the legal opinion? No evidence was provided as to the exact nature of the question posed to the group present at the meeting.

[42] The evidence of Mr. Hewlin was that there was no requirement to take the question as to the referral to arbitration to a membership meeting, but nevertheless that was done. The recommendation from the membership committee was that the grievance should not be pursued to arbitration.

[43] The decision as to whether or not the grievance should proceed to arbitration was properly in the hands of the grievance committee and should have been resolved at that stage. Accordingly, I am remitting the question back to the grievance committee to be dealt with. When dealing with the matter, the grievance committee shall give not less than seven (7) days written notice to the Applicant of the date and time of the hearing. The Applicant shall be permitted to make submissions to the grievance committee regarding whether or not the grievance should proceed to arbitration.

[44] Should the grievance committee determine, following their review, that the matter should be referred to arbitration, then the Union and/or PCS may apply to the Board pursuant to section 6-60 for an order extending the time for taking this step in the grievance procedure as well as for the imposition of any conditions which the Board considers necessary in relation thereto.

[45] Our Order is enclosed with these reasons.

DATED at Regina, Saskatchewan, this **3rd** day of **November, 2016.**

LABOUR RELATIONS BOARD

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Kenneth G. Love, Q.C.
Chairperson