July 28, 2017

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Attention: Mr. David A. de Groot

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400 – 1900 Albert Street
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Attention: Mr. Samuel I. Schonhoffer, Student-at-Law

Dear Mr. Schonhoffer and Mr. de Groot:

Re: LRB File No. 222-16 – Stephen Nichols v Construction Workers Union (CLAC), Local 151 and Westwood Electric Ltd. – Employee-Union Dispute Application

A. Introduction

[1] On September 30, 2016, Mr. Stephen Nichols [Applicant], pursuant to section 6-59 of *The Saskatchewan Employment Act*, SS 2013, cS-15.1 [*SEA*], filed with this Board an application alleging that the Construction Workers Union (CLAC), Local 151 [Union] failed to represent him fairly, or at all, in his dispute with his employer, Westwood Electric Ltd. [Employer] respecting his termination ostensibly for reasons of a work slowdown.

[2] The Union is certified as the collective bargaining agent for the Applicant.

[3] In his formal application, the Applicant asserts at paragraph 4, the following:

> *I was laid-off due to a shortage of work, then discovered that new employees were hired 3 days later. My lay-off came shortly after a harassment claim, against a Westwood employee, was filed by me. My CLAC rep. refused to intervene on my behalf.*

[4] Both the Union and the Employer filed formal Replies. Each denied most of the allegations made by the Applicant.

[5] In its Reply dated October 12, 2016, the Employer acknowledged that it had employed the Applicant from July 25, 2016 to August 25, 2016 to work at the EVRAZ Spiral Mill Project. At the time of his release, the Applicant was a probationary employee. The Employer also explained that the new hires referred to by the Applicant in his application related to an entirely different project named the Steel Mill. In relation to the Applicant's allegation that he had been terminated because he had initiated a harassment complaint against a co-worker, the Employer asserted:

> *The fact that Mr. Nichols was laid-off a few days later had nothing to do with the harassment claim. This lay-off was driven by our customer's (Evraz) schedule and we tried to reduce the impact and delay it as much as we could. When we lay people off, we look at keeping our strongest individuals to finish the job, based on safety, workmanship, production and teamwork. Mr. Nichols was a probationary employee and his over-all performance was reviewed when considering the lay-off.*
>
> *With regards to harassment, we take great pride in our Health and Safety Program which includes our Workplace Respect Program. When Mr. Nichols brought his concern forward it was taken seriously and handled promptly and professionally by our site supervision. The Foreman, Tim Reeves received coaching and in a follow-up meeting, Mr. Nichols told Paul Campbell things were better. [References omitted.]*

[6] In its Reply dated October 17, 2016, the Union acknowledged that "[a]t all material times, Local 151 was Nichols' bargaining agent". This reply was filed by Mr. Chris Gillings, a Union representative for Local 151. He asserted that he had looked into the Applicant's complaint. After his discussions with Mr. Jamie Eck, the Employer's Human Resources supervisor, he concluded that the Applicant was one of 16 employees laid off at the worksite because of a work slowdown, and, further that his personnel file disclosed that the Applicant had not filed a formal harassment complaint. Subsequent to his discussion with Mr. Eck, Mr. Gillings stated that on September 16, 2016 he sent an e-mail to the Applicant advising him of what he had learned, and requested the Applicant to telephone him to discuss the matter and, if possible, to provide him with further information about his complaint . The Applicant never did.

[7] This application came before me on January 30, and February 3, 2017. The Applicant was represented by Mr. Samuel Schonhoffer, Student-at-Law. The Union was represented by Mr. David de Groot. Mr. Eck appeared as agent for the Employer. Following completion of the formal hearing, Mr. de Groot sought leave of the Board to file a written response to some of the oral submissions made by Mr. Schonhoffer. The Board granted Mr. de Groot's request, and these formal written submissions were received on February 6, 2017.

[8] At the conclusion of the formal hearing, the Board reserved its decision. This Letter Decision explains why it is the Board's considered view that the Applicant's claim under section 6-59 of the *SEA* should be dismissed.

B. Factual Background in Brief

[8] At the hearing, each of the parties called one (1) witness. The Applicant testified on his own behalf. The Union called Mr. Gillings, and Mr. Eck testified for the Employer. What follows is a summary of the most salient evidence received from these witnesses.

1. The Applicant's Evidence

[9] At the hearing, the Applicant testified on his own behalf as follows:

- He is a Journeyman Electrician who currently resides in Regina.
- He was employed by the Employer to do work at Evraz from July 25, 2016 to August 25, 2016. The Employer had previously hired him for approximately two (2) months in 2013 to perform work at the Boundary Dam site near Estevan, Saskatchewan.
- He experienced difficulties with his immediate supervisor, Mr. Tim Reeves who was the foreman. During the last two (2) weeks of his employment, Mr. Reeves would not give him any specific assignments. He believed he was being treated unfairly by Mr. Reeves who gave specific work assignments to other employees but not to him.
- On or about the third week of 2016, he approached the Local 151 Steward with his concerns about Mr. Reeves. He believed that Mr. Reeves was harassing him.
- The Steward advised him to raise his concerns about Mr. Reeve with management representatives.

- As advised, he raised his concerns with Mr. Ben Swan. Several days later he was called to a meeting with representatives of the Employer, Mr. Carey Painchaud, Mr. Paul Campbell and Mr. Ben Swan to discuss this situation. At the meeting, no Local 151 representative was in attendance. Nor was Mr. Jamie Eck, the Employer's Human Resources Director.
- At that meeting, he was told the problem with Mr. Reeves was a "case of miscommunication".
- After this meeting, Mr. Reeves would not speak to him.
- A few days after this meeting, the Applicant "wishing to break the ice" approached the foreman and told him "he appreciated the change" in the workplace atmosphere. He testified that he felt the meeting had resolved the difficulties he had experienced with Mr. Reeves.
- On or about August 25, 2016, the Employer laid off the Applicant along with a number of other employees. The Record of Employment [ROE] issued by the Employer stated that "Shortage of Work/End of contract or season" was the reason for the lay-off, and further indicated that an expected date of recall was unknown.[1]
- Sometime after September 1, 2016, he learned from a co-worker that the Employer had hired new workers.
- On September 12, 2016, the Applicant e-mailed Mr. Kent Kornelson, one of CLAC's National Representatives.[2] He advised Mr. Kornelson that: he had been laid off; the Employed had hired new employees two (2) days after his lay-off; he had made a harassment complaint against the foreman, and he wanted the Union to file a termination grievance on his behalf.
- On September 14, 2016, he received a voice-mail from Mr. Chris Gillings, another CLAC National Representative. Mr. Gillings advised him that he had contacted the Employer to learn more about the circumstances surrounding the Applicant's lay-off. In the course of the voice-mail, Mr. Gillings indicated that the Employer expressed some reservations about the Applicant's job performance.
- That same day, the Applicant e-mailed Mr. Gillings advising him that he had been laid off due to a work shortage, and that the Employer had never raised its concerns about his job performance. He reiterated his request that the Union file a grievance on his behalf.[3]
- On September 16, 2016, Mr. Gillings e-mailed the Applicant advising him of what he learned from his conversation with Mr. Eck, a representative of the Employer. He indicated that the Applicant had been one (1) of a number employees laid off at that

[1] Exhibit A-1 – Record of Employment dated September 1, 2016.
[2] Exhibit A-2 – E-mail dated September 12 2016 to Kent Kornelson from Stephen Nichols.
[3] Exhibit A-3 – E-mail dated September 15, 2016 to Chris Gillings from Stephen Nichols.

time. Of the laid-off employers, some laid-off employees, "at least 10+ were rehired". The Applicant was among the group of employees not rehired as the Employer deemed them to be "not suitable for rehire". He also indicated that at the time of his lay-off, the Applicant was a probationary employee. The ROE should have reflected the fact that it was a probationary termination and not because of a work shortage. Mr. Gillings indicated as well the Employer had advised him that it would consider re-hiring the Applicant for other projects but not the Evraz project. He concluded the e-mail by asking the Applicant to contact him by telephone at his convenience.

- The Applicant testified that following receipt of Mr. Gilling's e-mail, he thought the matter was left with the Employer.
- Following his lay-off, the Applicant managed to obtain a short-term contract. He stated that at the time of the hearing, he had not worked since November 1, 2016.

[10] On cross-examination, the Applicant testified as follows:

- On August 26, 2016, the day he was laid-off, between 14 to 16 employees were brought into the lunch room and advised of the lay-offs. The Applicant acknowledged that he did not feel singled out on that occasion.
- After his lay-off, the Applicant was without work for approximately 15 days. He started a new contract on or about September 10, 2016.
- He acknowledged that the Employer took his harassment complaint seriously. It had been "pushed up the management chain", and the Employer's Project Manager for Saskatchewan, Mr. Carey Painchaud was in attendance at the meeting.
- He indicated that no CLAC representative attended this meeting with him because he didn't know he could ask for one.
- The Applicant stated that he never filed a formal harassment complaint nor did the Employer discipline him for raising the matter.
- After this meeting, the Applicant noticed an improvement at the worksite, so he went to speak to Mr. Reeves because he wanted to improve their relationship and because he wanted to "make amends".
- He stated he had no personal knowledge of who had been rehired or when. He indicated he "had his suspicions but not concrete information".
- He acknowledged that he received Mr. Gilling's voice-mail on September 14. The problem was he was working at that time and could only speak to Mr. Gillings in the evening.
- He acknowledged that Mr. Gillings had on two (2) occasions, requested that he contact him. He did not call him back because Mr. Gillings did not provide him with a cellphone number to contact him after hours.
- Sometime after this, he spoke with a friend of his, Mr. Chris Unser who knew something about labour law. He referred him to the law firm of Gerrand Rath Johnson LLP which assisted him in filing this application, and is representing him at this hearing.

2. The Union's Evidence

[11] At the hearing, Mr. Chris Gillings testified on behalf of the Union. He testified as follows:

- He is a local representative for CLAC and has held that position since 2012.
- The Union's Collective Agreement with the Employer had been introduced into evidence.[4] He noted that Article 6.04 of this agreement reads as follows:

> *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, except where The [sic] Union can demonstrate contravention of Article 1.04. [Emphasis added.]*

- Article 1.04 of the Collective Agreement reads as follows:

> *Neither the Employer nor the Union shall act in a manner that is arbitrary, discriminatory, in bad faith, or that violates applicable human rights legislation.*

- The Employer would notify the Union of any lay-offs in accordance with Article 10.02 of the Collective Agreement.
- Mr. Kornelson forwarded the Applicant's September 12, 2016 e-mail to Mr. Gillings. Mr. Gillings turned his attention to this e-mail the next day.
- On September 14, 2016, Mr. Gillings contacted Mr. Jamie Eck. Mr. Gillings' handwritten notes of the telephone conversation were admitted into evidence.[5] This conversation related to other Union members who had been laid-off as well. Mr. Eck advised him that approximately 16 workers were laid-off due to a shortage of work. He told Mr. Gillings that there was no record of a harassment complaint by the Applicant on file. The Employer had identified work performance issues with the Applicant. As a result, the Employer was not prepared to hire him back to work on the Spiral Mill Project.
- Mr. Gillings acknowledged that the Employer had not complied with Article 6.05 of the Collective Agreement which stipulated probationary employees should be given feedback about work performance. However, he concluded that because the project was short-term, it was likely that feedback would have been of little assistance to the Applicant.
- Shortly after concluding his telephone conversation with Mr. Eck, Mr. Gillings attempted to contact the Applicant by telephone. He was unable to connect with him at that time. His handwritten note memorializing this attempted

[4] Exhibit A-5 – Collective Agreement.
[5] Exhibit U-3 – Mr. Gillings' handwritten note of conversation with Mr. Eck dated September 14, 2016, 2:35 p.m.

contact was admitted into evidence.[6] It indicated that he had wanted to speak to the Applicant "to better explain [his conversation with Mr. Eck] and to see if there is anything else to discuss."

- Mr. Gillings stated that the fact the Applicant had found employment did not affect his investigation.
- On September 16, 2016, Mr. Gillings followed up with an e-mail to the Applicant detailing his conversation with Mr. Eck and, again, requested the Applicant to contact him by telephone.[7]
- Mr. Gillings testified that he did not file a grievance on behalf of the Applicant because (1) there was no evidence to support a breach of Article 1.04 of the Collective Agreement; (2) it was a probationary termination and covered by Article 6.04 of the Collective Agreement, and (3) it would be especially difficult to provide in light of the fact that the Applicant was one (1) of approximately 15 or 16 employees who had been laid off at the same time.
- Mr. Gillings testified that he had no personal animosity towards the Applicant or was biased in how he handled the Applicant's complaint. He stated that he did not know the Applicant.

[12] On cross-examination, he testified as follows:

- He reiterated that after receiving the Applicant's e-mail from Mr. Kornelson, he contacted Mr. Eck. In that conversation Mr. Gillings was only wanting general details about the terminations. Mr. Eck walked Mr. Gillings through the contents of the Applicant's filed, he did not provide copies of the documents in that file to Mr. Gillings.
- He indicated he was familiar with the timelines in the Collective Agreement for filing a grievance. However, he would have filed a grievance outside of those timelines had there been sufficient evidence to support it.

3. The Employer's Evidence

[13] At the hearing, Mr. Eck testified on behalf of the Employer as follows:

- He had been the Employer's Human Resources supervisor for approximately (3) years.
- Evraz had contracted the Employer to complete work on a couple of projects. Evraz was a "very aggressive customer" that "dictated all the moves". The Employer started the project with 31 employees and Evraz negotiated the Employer down from there. Mr. Eck testified that if the Employer did not comply with Evraz's demands it would have been replaced.
- The difficult relationship between Evraz and the Employer was not widely shared with project managers.

[6] Exhibit U-4 – Mr. Gillings' handwritten note dated September 14, 2016, 3:15 p.m.
[7] Exhibit A-4, E-mail from Mr. Gillings to the Applicant dated September 16, 2016.

- Mr. Eck testified that the Employer did not place a "ban" on the Applicant. The Employer would consider employing the Applicant again on a future project provided he had the requisite skills for the job.

C. Relevant Statutory Provisions

[14] The provision of the *SEA* most relevant to the Applicant's duty of fair representation application reads 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 consider whether to represent or in representing an employee or former employee.*

D. Onus

[15] This Board most recently identified the onus resting on an applicant in duty of fair representation claims in *Wade Zalopski v Canadian Union of Public Employees, Local 21 and City of Regina*, LRB File No. 009-16 at paragraphs 42-44. At paragraph 44 of *Zalopski*, *supra*, the Board stated as follows:

> *[44] Accordingly, the Board must determine if the Applicant has demonstrated through clear, convincing and cogent evidence that it is more likely than not the Union failed to represent him in respect of his supervisory promotional grievance? If the Applicant satisfies this onus, the Union must be found to have violated section 6-59 of the SEA.*

E. Brief Summary of Relevant Legal Principles

[16] This Board's jurisprudence respecting a union's duty of fair representation is well-known. Both counsel for the Applicant and for the Employer set out various Board decisions where this jurisprudence is reviewed, often at some length. In *Pintiliciuc v*

Communications, Energy and Paperworkers Union, Local 649 v SaskEnergy, LRB File No. 083-14 [*Pintiliciuc*], for example, Chairperson Love rehearsed the relevant principles. A portion of his helpful review is reproduced below:

> *[15] The Board's jurisprudence with respect to Section 6-59 of The Saskatchewan Employment Act…is well established from the Board's earlier decisions with respect to Section 25.1 of The Trade Union Act. In Glynna Ward v Saskatchewan Union of Nurses [[1988] Winter Sask Labour Rep 44, at 47], 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 person 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 word, the union must take a reasonable view of the problem and make a thoughtful decision about what to do. [Emphasis added.]*
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> . . . . . .
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> *[17] In Radke v Canadian Paperworkers Union, Local 1120 [[1993] 2nd Quarter Sask Labour Rep 57, at 64-5], the Board said:*
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> > *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 interest 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.*
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> . . . . . .
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> *[19] As is often the case in applications of this nature, the evidence from the Applicant focuses on establishing that the Applicant had a good case, which the Union should have pursued to his advantage. 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 nature of this duty arises out of the Supreme Court of Canada decision in Canada Merchant Guild v Gagnon [[1984] 1 SCR 509]. The Board has often discussed this duty. One of the those occasions was in the decision cited by the Union in Laurence Berry v SGEU [LRB File No. 143-93, [1993] SLRBD No. 62].*

> *[20] In that decision, the Board says at pages 71-72:*
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> *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…:*
>
> *The following principals, 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 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 exercises 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. [Emphasis in original.]*

F. Submissions of the Parties

1. The Applicant's Submissions

[17] The Applicant filed an extensive and well written Brief of Law. In it, the Applicant identifies 10 deficiencies with Mr. Gilling's performance as his union representative that cumulatively, he asserts, demonstrate on a balance of probabilities that the Union breached its statutory obligation owed to him under section 6-59 of the *SEA*. These deficiencies are:

a. The Union failed to meaningfully investigate the events leading up to, and including, the Applicant's lay off. In particular, he asserts that Mr. Gillings spoke to only one person, Mr. Eck who was an employer representative;
b. The Union relied only on the Employer's version of events;
c. The Union dismissed the potential effect the Applicant's harassment complaint had on his termination;
d. The Union improperly ignored the Employer's failure to comply with Article 6.05 of the Collective Agreement which requires the Employer to provide feedback to employees about performance issues;
e. The Union failed to consider whether there was any truth to the Employer's assertions that the Applicant had performance issues;
f. The Union improperly ignored that the Employer's reason for terminating the Applicant, *i.e.* work shortage, was invalid;
g. The Union did not investigate the reason behind the Employer's decision not to rehire the Applicant or, as he characterizes it, ban him from working for the Employer again;
h. The Union failed to meaningfully investigate the reasons for the Applicant's termination because he had found other employment, and was a "former employee";
i. The Union treated the Applicant's complaint summarily when it refused to grieve on his behalf pending further investigation;
j. The Union failed to provide the Applicant with after-hour contact numbers; to follow up with the Applicant, and to advise him of his appeal rights and the time limitations for filing of a grievance.

[18] Counsel for the Applicant relied on a number of this Board's Decisions most notably, *Petite v International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 555 and Babcock & Wilcox Canada Ltd.*, LRB File No. 158-05, 2009 CanLII 27858 (SK LRB) [*Petite*]; *Luchyshyn v Amalgamated Transit Union, Local 615*, LRB File No. 035-09, 2010 CanLII 15756 (SK LRB) [*Luchyshyn*], and *Tebbott v Construction and General Workers Union, Local 151 (CLAC), and PCL Energy Inc.*, LRB File No. 264-14, 2015 CarswellSask 296 [*Tebbott*].

2. The Union's Submissions

[19] The Union submitted that the Employer had two (2) ongoing projects at the relevant time period. The first was the Spiral Mill Project for which the Applicant was employed. The second was the Steel Mill Project which was unrelated to the Spiral Mill Project.

[20] The Union noted that the Applicant did not request representation at the meeting respecting with management respecting his complaint against Mr. Reeves. Counsel pointed to Article 22.05 of the Collective Agreement which stipulates that a job steward or other representative will attend every disciplinary meeting. This meeting was not a disciplinary meeting so as a consequence union representation was not required, unless requested by the Applicant. The Applicant did not request any representation. Furthermore, counsel noted that the Applicant testified he was happy with the results of that meeting, including an improved workplace environment.

[21] As the bulk of the Applicant's complaint focused on the deficiencies of Mr. Gilllings' representation, counsel began addressing those arguments by noting that this matter was complicated by the fact that the Applicant was one of 16 employees laid off at the same time. Nevertheless, counsel submitted the Union had fulfilled its duty to represent the Applicant for the following reasons:

a. The Applicant's e-mail to Mr. Kornelson about his lay-off was immediately referred to Mr. Gillings. Mr. Gillings began to investigate the complaint shortly after he received the e-mail from Mr. Kornelson;
b. Mr. Gillings telephoned Mr. Eck who was his contact with the Employer. Mr. Eck advised him of the contents of the Applicant's file which did not contain any reference to a formal harassment complaint being filed by the Applicant. Mr. Gillings did not cross-examine Mr. Eck further on this because in his view it could impair labour relations with the Employer;
c. Mr. Eck advised Mr. Gillings that the Employer did not "ban" the Applicant for future employment. Mr. Eck believed the Applicant misinterpreted the Employer's decision not to rehire him for the project as a "ban" on any future employment. That was not the case.
d. Mr. Gillings was content to leave the reason for termination as it was described on his ROE, namely "shortage of work". He did not want to compromise the Applicant's ability to qualify for Employment Insurance;
e. Mr. Gillings had filed grievances on behalf of members in other matters outside the time-limits in the Collective Agreement. However, he needed further information from the Applicant in order to establish grounds for initiating such a grievance in this case;
f. Mr. Gillings communicated with the Applicant and asked him to contact him so as to discuss the matter, and, if possible, to provide him with further information. Subsequently, he sent an e-mail to the Applicant reiterating his request. Mr. Gillings acknowledged that he did not provide his personal cell-phone number to the Applicant, the Applicant did have his e-mail address;
g. Mr. Gillings knew that the Applicant had obtained alternative work;

h. This application was a veiled attempt by the International Brotherhood of Electrical Workers [IBEW] to embarrass the Union. Counsel pointed to the fact that the Applicant obtained advice on how to make this application from Mr. Chris Unser, an IBEW representative, and was represented before the Board in this matter by the law firm that represents IBEW.

[22] Counsel for the Union relied upon a number of authorities from this Board and from the Alberta Board, most notably: *Bauck v Construction Workers Union, Local 151 and Alliance Energy Industrial Inc.*, [2013] SLRBD No 32, 238 CLRBR (2) 237 [*Bauck*]; *Beatty v Saskatchewan Government and General Employees Union and Northlands College*, LRB File No. 086-04, 128 CLRBR (2d) 299 [*Beatty*]; *Re Filgas*, [2002] ALRBD No. 14; *International Association of Bridge Structural Ornamental and Reinforcing Iron Workers Local Union No. 720*, [2016] ALRBD No. 61 [*Local 720*], and *Pintiliciuc*, *supra*.

G. Analysis and Decision

[23] The Applicant has the burden to prove on a balance of probabilities that the Union's representation of his interests was so inadequate that it amounted to a breach of section 6-59 of the SEA. See: *Zalopski*, *supra*, at paragraph 44. On the basis of evidence presented to this Board, the Applicant has failed to satisfy his burden and, as a consequence, his application must be dismissed for the following reasons.

1. Introductory Comments

[24] At the outset of the Board's analysis, it is useful to make two (2) comments. First, Article 6.04 of the Collective Agreement between the Union and the Employer expressly stipulates that no grievance will be filed on behalf of a probationary employee unless either the Employer or the Union acts "in a manner that is arbitrary, discriminatory, in bad faith, or that violates human rights legislation". The quoted language is found in Article 1.04 of the Collective Agreement and parrots language found in subsection 6-59(2) of the *SEA*.

[25] In the context of this proceeding, the effect of these two (2) Articles is somewhat circular. As the Applicant was a probationary employee, the Union could not file a

grievance on his behalf unless there was evidence that he had been treated arbitrarily, in bad faith or discriminatorily by the Employer. The Applicant now asserts before the Board that the Union treated him in a manner that is arbitrary, discriminatory or in bad faith by failing to file a grievance against the Employer for exactly those reasons.

[26] For purposes of this application, the Board will ignore this anomaly except to note that it exists.

[27] Second, the Board acknowledges that in the context of a mass lay-off like the one which occurred in this case, a union's obligation to represent its members fairly becomes more difficult. Here, along with approximately 15 other employees, the Applicant was laid off at the same time, and ostensibly for the same reason, *i.e.* a shortage of work. In circumstances such as these, it may be difficult for the union to differentiate among the various affected employees, and to take into account their individual interests. It cannot be denied that this reality places an additional burden on the union. Nevertheless, if an employee asks for assistance in such a circumstance, a union cannot ignore this request and must take it seriously. Yet, the following comments of LeBel J. in *Noël v Société d'energie de la Baie and United Steelworkers of America, Local 6833* [2001] 2 SCR 207, 2001 SCC 39 [*Noël*], at paragraph 50 are particularly apposite in these circumstances:

> *[The union] must investigate the complaint, review the relevant facts or seek whatever advice may be necessary; however the employee is not entitled to the most thorough investigation possible. The association's resources, as well as the interests of the unit as a whole, should be taken into account. The association thus has considerable discretion as to the type and extent of the efforts it will undertake in a specific case. [Emphasis added, citation omitted]*

2. Did the Union Treat the Applicant in a Discriminatory Manner?

[28] The Board finds no evidence that the Union treated the Applicant in a discriminatory manner. In *Ward v Saskatchewan Union of Nurse*, [1988] Winter Sask Labour Rep 44, at 47, this Board stated:

> *The requirement that [a union] 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 person favoritism*.

[29] In *Noël*, the Supreme Court said this in respect of discriminatory conduct at paragraph 49:

> *The law also prohibits discriminatory conduct. This includes any attempt to put an individual or group at a disadvantage where this is not justified by the labour relations situation in the company. For example, an association could not refuse to process an employee's grievance, or conduct it differently, on the ground that the employee was not a member of the association or for any other reasons*

[30] There was no evidence presented at the hearing that would suggest the Union, and more particularly, Mr. Gillings, discriminated against the Applicant. There is nothing to suggest that the Union's conduct in dealing with the Applicant's complaint was motivated by a prohibited ground of discrimination such as age, race, sex, personal favouritism or political affiliation. Moreover, this Board is unable to find that the Union was attempting to disadvantage the Applicant in any way, let alone in a way "not justified by the labour relations situation" at the Employer's workplace.

[31] Accordingly, for these reasons, the Board concludes that the Union did not treat the Applicant in a discriminatory manner.

3. <u>Did the Union Act in Bad Faith</u>?

[32] Respecting the "bad faith" aspect of a duty of fair representation claim, this Board In *Ward*, *supra*, stated at page 47:

> *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.*

[33] In *Noël*, *supra*, LeBel J. asserted at paragraph 49 that the concept of bad faith "presumes intent to harm or malicious, fraudulent, spiteful or hostile conduct". He conceded at paragraph 48 that "[in] practice, this element alone would be difficult to prove".

[34] The Board finds nothing in the evidence that remotely suggests the Union or Mr. Gillings exhibited bad faith towards the Applicant. Indeed, during his examination-in-chief, Mr. Gillings candidly stated that he did not know the Applicant, and harboured no ill-will towards him. His testimony was not shaken on cross-examination, and the Board has no reason to doubt its veracity. Accordingly, the Board concludes that the Union did not act in bad faith in relation to the Applicant.

4. Did the Union Treat the Applicant Arbitrarily?

[35] The Applicant's principal argument on this application is that the Union dealt with his complaint in an arbitrary manner. As summarized above, the Applicant identified 10 reasons for alleging that respecting his complaint against the Employer, the conduct of the Union and, more particularly, Mr. Gillings was arbitrary. These allegations may be conveniently grouped into three (3) general areas: (1) the narrow scope of Mr. Gillings' investigation; (2) Mr. Gilling's alleged failure to communicate with the Applicant, and (3) Mr. Gillings' failure to determine whether there were performance issues with the Applicant, and why the Employer failed to comply with Article 6.05 of the Collective Agreement.

[36] Prior to addressing these allegations, it is useful to identify what qualifies as arbitrary action on the part of the union in a duty of fair representation claim. This Board's Decision in *Hargraves v Canadian Union of Public Employee, Local 3833 and Prince Albert Health District*, [2003] SLRBR 511, LRB File No. 223-02 contains an extended discussion of what constitutes arbitrariness. In that case, the Board quoted from many authorities, including the decision of the Canadian Labour Relations Board in *Rousseau v International Brotherhood of Locomotive Engineers et al*, 95 CLLC 220-064. There the Canadian Board described arbitrary conduct as follows, at 143:

> *Through various decisions, labour relations 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 inquire into 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. [Emphasis added.]*

(a) The Narrow Scope of the Union's Investigation

[37] The Applicant asserts that the Union's investigation was wholly inadequate because Mr. Gillings spoke to only one (1) person – Mr. Eck – who was a representative of the Employer. The Applicant maintains that Mr. Gillings should have sought out and interviewed other individuals not so closely aligned to the Employer.

[38] In the Board's opinion, it was reasonable for Mr. Gillings to commence his investigation into the Applicant's complaint by speaking with Mr. Eck. Mr. Gillings testified that Mr. Eck was his direct contact with the Employer, and they appeared to have a good working relationship. In the course of his conversation with Mr. Eck, Mr. Gillings learned that the Applicant was one (1) of a number of employees who had been laid off at the same time. Apart from some vague comments about the Applicant's work performance issues, there was nothing to set him apart for the other employees who had been laid off at the same time.

[39] The Board acknowledges that it may have been advisable for Mr. Gillings to speak to other representatives of the Employer such as the Applicant's foreman, for example. Yet, it should not be forgotten that the foreman was the individual whom the Applicant alleged had harassed him. The authorities are clear, however, that a union member cannot expect a "perfect" investigation of his or her complaint against an employer. In light of this, Mr. Gillings cannot be faulted for attempting to obtain further information directly from the Applicant about the circumstances surrounding his lay-off before he investigated the matter further.

(b) The Union's Alleged Failure to Communicate with the Applicant

[40] The Applicant alleges that Mr. Gillings failed to communicate with him and, more significantly, Mr. Gillings failed to provide him with his cell-phone number so that he could contact him after regular work hours. This allegation raises a number of issues.

[41] First, it is generally accepted that inadequate communication by a union with a grievor, in and of itself, does not constitute a breach of a union's duty to represent its member fairly. See *e.g.*: *Re Canada Post Corporation*, 2010 CIRB 521, at paras. 48-51, and *Virginia McRae-Jackson v CAW-Canada*, 2004 CIRB 290, at para. 40.

[42] Second, the evidence demonstrates that the Applicant possessed Mr. Gillings' e-mail co-ordinates. They had exchanged e-mails in early September, and it would have been a simple matter for the Applicant to e-mail Mr. Gillings again and ask him either for his cell-phone number or request him to call him in the evening when he was home from his work. The Applicant did not do so. As a consequence, it is not accurate for the Applicant to contend that he had no way of contacting Mr. Gillings in order to discuss the contents of his e-mail dated September 14, 2016 or to provide him with additional information.

[43] Third, the authorities make it clear that a grievor cannot remain passive in the context of the grievance process. The Union cited two (2) decisions of the Alberta Board that underscore this point: *Re Filgas*, *supra*, and *Re Local 720*, *supra*. In *Re Filgas*, in particular, the Alberta Board said this at paragraphs 18 and 19:

> *We encourage the Complainant to cooperate with the Union and its representatives. The duty of fair representation imposes a corresponding duty on the employee to act cooperatively with the union. Employees who want the assistance of their union respecting their collective agreement rights must be prepared to communicate with the union about their concerns and provide the documents and information the union needs to deal with any grievance or potential grievance.*
>
> *What this means is that the Complainant should take steps to contact his Union as soon as possible to inquire what information and assistance he needs to provide in order for the Union to give further consideration to his concerns. And, he should continue to cooperate with the Union throughout the processing of his grievances. [Emphasis added.]*

[44] Applying these principles to the Applicant's complaint, the Board concludes that following his initial contact with Mr. Kornelson and reply e-mail to Mr. Gillings, he ceased all further contact with the Union's representative and effectively removed himself from participating any further in the grievance process. As a consequence, there is no merit to his assertion that the Union failed to communicate with him.

(c) Failure to Investigate Applicant's Alleged Performance Issues and Workplace Ban

[45] The Applicant asserts that the Union failed to investigate vague allegations of his poor work performance made by Mr. Eck during his telephone conversation with Mr. Gillings. In particular he points to Article 6.05 of the Collective Agreement which states that "where possible", the Employer should provide constructive feed-back to an employee on performance issues which might allow the employee to rectify these issues prior to a possible termination. The Applicant says Mr. Gillings' failure to press Mr. Eck on why the Employer did not comply with this particular Article is yet another example of the arbitrary manner in which the Union treated his complaint.

[46] The Board does not agree with this argument. It is true that the Employer did not abide by the strict letter of Article 6.05. However, the Article in question contemplates that this obligation arises in circumstances when it would be possible to provide feedback to an employee in a timely way so that he or she would have the opportunity to improve his performance. Mr Gilllings testified that because the project was not of a long duration, it was unlikely there would have been enough time for any remediation. Furthermore, he testified that having "work shortage" identified in the Applicant's ROE as the reason for the Applicant's termination would assist him to obtain Employment Insurance, should he choose to do so. In other words, Mr. Gillings chose to leave well enough alone.

[47] On balance, the Board finds Mr. Gilllings' explanation of his actions on this aspect of the Applicant's complaint to be reasonable in these particular circumstances, and concludes it does not demonstrate arbitrariness on the Union's part as that concept is understood in the authorities.

[48] The Applicant also maintains that Mr. Gillings did not attempt to find out why the Employer had permanently banned him from the worksite or any of its other worksites. At the hearing, Mr. Eck testified candidly that the Employer had not banned the Applicant from working for it again in the future. Indeed, he went so far as to state he would be prepared to hire the Applicant again provided he had the right skill set for the job in question.

[49] It is apparent to the Board that there was a misunderstanding between the Employer and the Applicant about what his lay-off meant. The Applicant appears to have assumed that because he was told there were no more employment opportunities for him at the EVRAZ work site, the Employer effectively was telling the Applicant that he would be permanently "banned" from working for it again. While this misunderstanding was unfortunate, the Applicant should now understand that he might be hired again by the Employer.

(d) Conclusion on Arbitrariness Issue

[50] For these reasons, the Board concludes that the Applicant has failed to satisfy his burden to prove that the Union acted arbitrarily in the manner in which it deal with complaint against the Employer.

4. Conclusion

[51] In view of the Board's conclusion that the Applicant's duty of fair representation application must be dismissed, it is not necessary to consider other issues raised on this application, most notably whether this matter was similar to *Bauck v Construction Workers Union, Local 151 and Alliance Energy Industrial Inc.*, LRB File Nos. 178-13; 274-13 & 276-13, 238 CLRBR (2d) 237 (SK LRB).

H. Decision and Order

[52] For the foregoing reasons, the Board concludes that the Applicant's claim brought pursuant to section 6-59 of the *SEA* must be dismissed, and so orders.

[53] The Board extends its appreciation to counsel for their written materials and oral submissions. They were of great assistance.

[54] A formal Board Order will accompany these Reasons for Decision.

Yours very truly,

Graeme G. Mitchell, Q.C.
Vice-Chairperson

Encl.