Lyle Brady, Applicant v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771 and Jacobs Industrial Services Ltd., Respondents

LRB File No. 130-15; July 13 , 2018

Chairperson, Kenneth G. Love Q.C.; Members: John McCormick and Allan Parenteau

For the Applicant:	Larry Kowalchuk
For the Respondent Ironworkers:	Gary Caroline and Lyndsay Watson
For the Respondent Jacobs:	Alison Adams

Section 6-58 of *The Saskatchewan Employment Act.* Board reviews jurisdiction of Board to hear and decide a matter which involves a lack of dispatch of member of Union.

Section 6-58 of *The Saskatchewan Employment Act*. Board reviews previous jurisprudence with respect to former section 36.1 of *The Trade Union Act*

Section 6-58 of *The Saskatchewan Employment Act*. Board finds that imposition of a penalty by a union upon a member regarding a condition that he be fit for work is discriminatory if such condition is not imposed upon other members of the Union. Board finds breach of section 6-58.

Section 6-59 of *The Saskatchewan Employment Act*. Board reviews prior jurisprudence regarding section 6-59. Board finds evidence does not support finding of a breach of section 6-59.

Practice and Procedure – Remedy for breach – Breach of section 6-58 renders decision void. Member ordered reinstated with compensation for lack of dispatch from time of suspension.

REASONS FOR DECISION

Background:

[1] This case an example of the "wheels of Justice" grinding slowly. The events which give rise to this case began in June, 2014. Mr. Lyle Brady, ("Brady") filed his application with the Board on July 2, 2015. The International Association of Bridge, Structural, Ornamental

and Reinforcing Iron Workers, Local 771 (the "Union") filed an application for summary dismissal on July 28, 2015. The Board commenced a hearing of both Brady's application and the summary dismissal application on December 10, 2015. At that hearing, Jacobs Industrial Services Ltd. ("Jacobs") and the Union argued that the Board should adjourn the hearing pending a determination of another matter filed by the Applicant, pursuant to the Occupational Health and Safety provisions of *The Saskatchewan Employment Act* (the "*SEA*") as the matters were similar in substance. The Board granted the requested adjournment.

[2] A determination was made by adjudicator Anne Wallace, Q.C. in respect of the Occupational Health and Safety issue on August 1, 2016. In her ruling, Adjudicator Wallace dismissed the Applicant's claim under the Occupational Health and Safety provisions of the *SEA,* as being filed outside the statutory timelines for filing of Appeals pursuant to section 4-8 of the *SEA*. Mr. Brady filed an appeal against that decision. That appeal was subsequently withdrawn by Brady prior to it being heard by the Board.

[3] The Board then dealt with the application for summary dismissal[1] by the Union and dismissed that application. Subsequently, the parties requested that the Board provide guidance to the parties, which it did in another decision[2] dated December 15, 2017. Now, after 3 years, the Board has heard all of the parties' evidence along with their arguments and is now able to render its decision.

Facts:

[4] Brady was a member of the Union for many years prior to the events which give rise to this complaint. He was regularly dispatched through the Union's hiring hall to job sites when ironworkers were requisitioned by unionized employers. He was dispatched by the Union on March 28, 2014, to a job with Jacobs at the Mosaic Colonsay potash mine commencing on March 31, 2014. He remained at that jobsite until June 14, 2014. The work performed by Jacobs at the Mosaic Colonsay potash mine was fully completed on or about July 19, 2014. The following facts have been distilled from the considerable evidence heard and the large number of documents entered into evidence. Additional facts may be referenced, as necessary, in the analysis section of this decision.

[1] 2017 CanLII 68781 (SK LRB)
[2] 2017 CanLII 85456 (SK LRB)

A Little History:

[5] Prior to beginning his work at Colonsay, the evidence established that Brady had been involved in some events of which the Union took note. These events will be referenced later, and are presented here by way of background to the events that occurred following Brady's dispatch to the Colonsay site. The Union, in its reply to the application by Brady suggested that these events showed a "history of Mr. Brady being fired and banned by iron worker employers". The evidence did not suggest any links between these events.

[6] Sometime between December 1997 and March, 1998, Brady was injured in a workplace accident at the Agrium potash mine at Vanscoy, Saskatchewan. He suffered a back injury when a scaffold collapsed while he was working on it. As a result of that accident and events which followed, Brady became a strong advocate for workplace safety.

[7] In August, 2012, while working for Balzer's Canada, Mr. Brady drove the Company truck he had been assigned, while impaired, resulting in the truck and the tools inside it being impounded when he was arrested. The impounding of the truck and tools caused considerable expense and inconvenience to Balzer's Canada.

[8] In November of 2012, while working for PCL, Brady threatened to hurt himself. As a result, he was fired from that job. He was also suspended from working for PCL, or its family of companies, for an indefinite period of time.

[9] In January, 2014, Brady was fired by BFI Constructors for poor job performance (bad welds) and violation of BFI's respect in the workplace policy. He was also banned from that site.

The Events at the Colonsay site:

[10] Brady was dispatched by the Union to the Colonsay mine site on March 28, 2014 for a commencement date of March 31, 2014. His dispatch was as a welder, but he was appointed to be a shift foreman. At the time of his dispatch, Jacobs was operating two shifts at Colonsay.

[11] While working at the Colonsay mine site, Brady testified that he noted numerous safety issues with respect to a "gallery" structure[3] on which Jacobs had been hired to do maintenance work. This gallery structure was used to transport raw potash ore from the mine to a processing facility via a moving belt. The steel structure was open to the elements and was exposed to highly corrosive potash.

[12] Brady found that the gallery was coated with potash which had to be removed before they could begin restoration work. As they removed the potash, they found that the steel members which held up the gallery were badly corroded. Mr. Brady testified that he found the condition of those steel members to be unsafe.

[13] Mr. Kevin Posnikoff, ("Posnikoff") the superintendent for the Jacobs job in Colonsay, also testified with respect to the condition of the gallery. His evidence was that the condition of the steel was "what they expected" and that was the damage they were hired to remedy. His evidence was that the work was being performed under the supervision of SNC Lavallin Consulting Engineers. He acknowledged that the gallery was in poor condition, but not so bad that it needed to be shut down.

[14] Posnikoff testified that the process that was followed when unexpected damage was found or if safety concerns arose was to refer the concern to the owner via an RFI (Request for Information) process. The owner would then take the necessary steps to investigate the issue and if found to be a concern, would authorize Jacobs to take additional remediation or other steps to ensure proper maintenance and a safe working environment.

[15] Brady also described an incident at Colonsay which occurred on June 12, 2014, when a person working on the site received an electrical shock while welding high above the floor. Fortunately, the incident did not result in any injury to the worker. Brady assisted the worker. The worker was taken to the on-site nurse who cleared him to return to work.

[16] As a part of the safety plan at the Colonsay jobsite, Foremen were required to hold a "safe start" meeting at the beginning of a shift, to do a mid-shift check-in, and to provide a shift end review. These processes were documented in a daily report, which included a

[3] Brady provided photographs documenting the conditions found in respect of the gallery

space to report any "Safety Concerns".[4] Posnikoff produced the reports provided to Jacobs by Brady while he was on site.

[17] On May 13, 2014, Brady reported as a safety issue "Heavy potash build up on floor had to be removed prior to rigging and welding". He also noted that the toolbox meeting topic that day was "Potash dust on deck. If it gets wet it becomes very slippery. Loose cords and cables wear belts".

[18] On May 14, 2014, Brady noted as a safety concern, "Heavy Build up of potash on new plates". On May 15, 2014, he reported as a safety concern, "Cleaned up garbage in entire yard. Moved out unneeded materials & garbage (tarps, steel, ect.!)". On May 20, 2014, he noted, "soft floor demo side. gas line to be marked out. open holes Demo side".

[19] On May 22, 2014, he noted, "80' JLG down for repairs (Machine on site now) On May 24, 2014 he noted "Heavy rain morning until 12:00". On May 28, 2014 he noted, "Air compressors failed. United rentals changed out machines". On May 29, he noted, "Hard rap up of weekend. Crew off duty". On June 3, 2014 he noted, "full PPE & Life line inspection today".

[20] On June 4, 2014, he recorded under the "questions" section of the report rather than the section for safety concerns, that he had done a gallery inspection with the engineer. On June 5, 2014, he reported as a safety concern that the night shift was having trouble with power cords & lights. He noted "Days to set up equip to secure". On June 6, 2014 he noted that new harnesses had been issued that day to his crew. On June 7, 2014, he noted that, "need a battery for united rentals welder".

[21] On June 12, 2014[5], he reported as safety concerns that, "Flu has hit several members of the full Jacobs crew (all trades). Need tape around JLG moving from basket to iron and back procedures". On June 13, 2014 his note was simply, " Empty the garbage".

[22] On June 14, 2014, Brady left the Colonsay jobsite. In his evidence, he testified that he left as a result of the safety concerns he had witnessed in respect of the gallery and the incident in which the worker received an electrical shock. Posnikoff testified much differently. He testified that he had asked Brady to provide his paperwork to him especially timecards for members of his crew. He said that Brady came into the office which he shared with others to

[4] See exhibit EE-3
[5] We have presumed this date from the order in which the reports were provided as the original is undated.

provide that paperwork. He noted that Brady started running down other trades on the site. He initially left the office, but came back and put his handbook and access (swipe) card on the desk and said he would be leaving. He testified that he asked Brady if he was sure he wanted to leave, but Brady left the office.

[23] Posnikoff testified that he called his manager to report that Brady was leaving. He testified that the manager undertook to call Brady to find out what was up. Posnikoff testified that he didn't ask Brady to sign anything and that he recorded the incident in his journal.

[24] Posnikoff also provided, through his testimony, excerpts from Brady's foreman's book. A careful review of those notes made by Brady at the time he was working as a foreman on the Colonsay jobsite do not reveal any concerns regarding safety related to the gallery. There are references to visits by the site engineers to review the structure, references to new welding procedures, which he suggested, and which were approved for use in respect of how to fasten steel decking and to reinforce the "bends" or column supports. He refers to issues related to performance by the night shift and having to repair improper or incomplete work. However, there is silence with respect to any of the safety related issues which he testified about in his examination-in-chief.

[25] Posnikoff provided an excerpt from his work log in relation to Brady's departure. It reads as follows:

> *Lyle Brady quit this morning. He doesn't feel like he can stop fighting and disagreeing with the decisions made from upper management and Mosaic.*

[26] In his testimony, Posnikoff testified that he had no issues with Brady's job performance and that he would be welcome to return to work for Jacobs at any time.

Events after Brady left the Colonsay site:

[27] In a statement[6] given to Mr. Kent Rhodes ("Rhodes") for an Occupational Health and Safety complaint which will be discussed later, Mr. Jeff Hay, the Union's dispatcher provided the following:

[6] Exhibit E-2 in these proceedings

To Kent Rhodes

I am writing you concerning Lyle Brady working at Colonsay for Jacobs. I unfortunately do not know what day it was that he called me, but I do remember him calling me to put his name back on the list. I asked him why as we were just manning up for the shutdown with Jacobs at Colonsay Potash Mine. He told me he had quit because he was having problems with the cross shift foreman (Terry Bergman). I said ok and put his name back on the list.

In cross-examination, Brady testified that he did not recall any such conversation with Jeff Hay.

[28] In his particulars filed with his application, which were not sworn by him, Brady provides the following in respect to his activities after leaving the Colonsay jobsite. We have taken the liberty of providing only a precis of his particulars by date:

June 16, 2014 – Brady says that he met with four members of the Union's Executive Board, Wayne Worrall, President, Ryan Tappin, Vice-president, Colin Daniels, Business Manager, and Jeff Hay, Business Manager/Dispatcher. He says that he advised those present that he had a grievance with Jacobs regarding safety at the Colonsay site. He stated that he proposed to the Union that the ironworkers should look at replacing Jacobs as the prime contractor and suggested that South East Construction would be a good choice to replace Jacobs.

June 17, 2014 – Brady says that he again attended the Union's offices and again presented safety problems at Jacob's Colonsay site. He advised he would speak to the Mines Inspector and that he would talk to South East Construction and Mosaic about the proposed change in prime contractor.

June 19, 2014 – Brady says he spoke to the Mines Inspector in Saskatoon and he reported that they wanted to see him. At meeting was set for June 23, 2014. He says he told the Union about the meeting that day and also advised he would meet with South East Construction's owners, Darryl Tucker and Mike Silvernagel on June 23rd in Saskatoon as they were expected to be there that day.

June 20, 2014 - Says that he made an appointment to see Mr. Gordon Prince of Mosaic Potash on July 3, 2014.

June 23, 2014 – Says he met with the Mines Inspector as scheduled. He provided the Mines Inspector with photos of the Colonsay site. Says he also advised about the June 12, 2014 electric shock incident. He also says

that he met Daryl Tucker and Mike Silvernagel for lunch and informally discussed them taking over the prime contractor role at Colonsay.

June 26, 2014 – Says he submitted an 8 page report[7] regarding Jacobs to the Union as requested by Colin Daniels.

July 3, 2014 – Says he met with Gordon Prince of Mosaic as scheduled. He advised that he had spoken to the Mines Inspector about his safety concerns. He says he proposed the change in Prime Contractor to Prince.

July 4, 2014 – Says he met with the Union to explain his discussions with Gordon Prince. He says that he said that Prince was waiting for a response from the Union regarding Jacobs. He says that he asked the Union when he could expect to return to work at Colonsay. He says that he was told that the Union was working on it but would need a few days.

July 7, 2014 – He says that he was contacted by Jeff Hays about the dispatch to McClean Lake. He says he met at the Union office and was told by Wayne Worrell not to contact Occupational Health and Safety any more. He says he told him that he had already met with Occupational Health and Safety Mines Inspector as well as Mosaic and that Mosaic was awaiting his call back. He says he finally agreed to stop contacting Occupational Health and Safety and/or Mosaic. He then met with Jeff Hays and was dispatched to McClean Lake.

July 17, 2014 – He says that he again contacted the Union and met at the Union hall with Colin Daniels, Wayne Worrall, Ryan Tapping and Joh Haasen. He says that he was again directed to leave the Jacobs thing alone.

July 21, 2014 – He says he called the Union office to see where he was at on the Jacobs project/grievance. He says the Ironworkers called back to advise him he was being sent out to a project with Icon Contruction effective the next day.

July 28, 2014 – He says he was advised by Icon Construction that he was being pulled off that job and was to return home.

July 29, 2014 – He was summoned to a Union Executive Meeting. He says he was told by Colin Daniels that he was "unemployable, you have post traumatic [sic] *stress disorder". He was then escorted out of the building. Daniels told him that he had been contacted by Mike Brodziak of Mosaic concerning his contact with the Mines Inspector. He was also told that Jacobs had been awarded another contract at the Colonsay site and was requisitioning more manpower for that job.*

[7] That report is also a separate exhibit in these proceedings (See tab 3 ("C") of Exhibit U-1

[29] The evidence from the Union's witnesses was contrary to what was set out in Brady's particulars above, particularly with respect to the Union's knowledge or support for his contacts with the Mines Inspector, Mr. Prince of Mosaic and Daryl Tucker and Mike Silvernagel of South East Construction. Colin Daniels, ("Daniels") the Business Agent for the Union testified that he became aware that someone had contacted the Mines Inspector when he received a telephone call from Mike Posniak ("Posniak") of Jacobs who told him that someone from his Union had made a complaint regarding Jacobs to the Mines Inspector. He testified that Posniak was very upset with the Union. He testified that the Union supplied a good number of ironworkers to Jacobs.

[30] It was at that point, Daniels had Brady recalled from the ICON Construction jobsite and met with him at the Union's office. Brady's un-contradicted evidence is that at that meeting Daniels accused him of having Post Traumatic Stress Disorder. Daniels testified that he asked Brady if he had been in contact with the Mines Inspector. Brady initially denied having made any contact with the Mines Inspector, but later acknowledged that he had made the complaint. Daniels also testified that he had had a second telephone call from Posniak who advised him that he too had determined that Brady was the source of the complaint.

[31] Daniels also testified that he contacted South East Construction to find out what was going on. He testified that he was told by South East Construction that they didn't know either Brady or Darryl Tucker, the person that Brady had purportedly met with.

[32] We have concluded that the evidence of the Union is to be preferred in respect of these events. Firstly, Brady's particulars are unsworn and were not repeated directly in his testimony before us. Secondly, while we can accept that Brady may have made the contacts with the persons he identified, we cannot accept that he was authorized by the Union or encouraged by the Union to do so. We certainly had no testimony to that effect. While he was a member of the Union, he was not a part of the Union's executive and would, we believe, have no authority to engage in the activities he claimed he did with the Union's blessing. Furthermore, he would have no authority to bind the Union if any agreement to replace Jacobs were reached.

[33] Finally, it seems unlikely that the Union would want to sacrifice a source of good, well-paying jobs with Jacobs if it were to successfully replace Jacobs on the Mosaic jobsite.

Nor is it likely that Mosaic would be willing to abandon Jacobs in favour of South East Construction without serious consideration and study. Mosaic and Jacobs had a strong business relationship as was shown by the extension of a subsequent contract to them.

The August 29, 2014 Executive Board Meeting:

[34] Brady's particulars say that at the commencement of the Executive Board Meeting he was "frisked" before being allowed to enter the meeting. His phone was turned off and he was not allowed to write anything down.

[35] Daniels testified that, after the July 29, 2014 meeting after Brady was pulled off the ICON job, and where it was determined that Brady was the source of the complaint to the Mines Inspector, he told the dispatcher that Brady was not to be dispatched. He testified that he did not think that Brady could do a "professional job" and that he "made the call" not to dispatch him. He was, therefore, suspended by Daniels pending the Executive Board meeting on August 29, 2014.

[36] Prior to the August 29, 2014 meeting, Daniels also asked Wayne Worrall ("Worrall") to review Brady's file and compile a list of issues from the file for the Executive Board. That report was provided to the Board in the Union's exhibit U-1.[8] That report was discussed at the Executive Board meeting. Daniels testified that Brady was given the report at the meeting and was allowed an opportunity to respond at the meeting. Brady testified to the contrary that he was not given a proper opportunity to respond.

[37] The Executive Board minutes of that meeting[9] provide as follows:

> *Due to recent events involving Lyle Brady. We have called him infront [sic] of the executive Board. LU771 is [sic] offered him help, if he wants it. He wishes to pursue a career in Safety. Told to call Human solutions to seek assistance. Offered CSO training. LU771 was to help Lyly obtain rehabilitation to go back to work. Human Solutions will have to deem him fit for work. It is the decision of the executive board that until he is deemed fit for work he will not be dispatched by LU771. The message was heavily*

[8] At Tab 8
[9] Exhibit U-1, Tab 9

> *inforced [sic] that LU771 is here to help him get the help. Lyle says he'll give his answer on Tuesday, Aug 2/2014.*[10]

This resolution was passed by the Executive Board by a vote of 8-0.

Events following the Executive Meeting on August 29, 2014:

[38] Brady was not dispatched by the Union for work following his suspension by Worrall on July 29, 2014. He remains out of work and suspended to this day and has been suspended by the International Union for failure to remit dues.

[39] Brady did attend counselling with Human Solutions as directed. He testified that he attended 4 counselling sessions over a period of 4 weeks. He testified that those counselling sessions were paid for by the Union and that he left a clearance report on Worrall's desk in a brown envelope. His counsel gave the Board an undertaking to supply a copy of that report[11], which he did. That report is dated June 23, 2015, and was apparently sent to the Union by Brady at 5:25 PM, on that date, attached an electronic copy of the clinical record from Homewood Health Solutions.

[40] Both Worrall and Daniels denied, during their testimony, having received any such records or communication regarding his attendance at counseling. Their explanation was that the Union was experiencing server issues at the time.

[41] In this case, we prefer the evidence of Brady regarding this incident. The Union had knowledge of his attendance at counselling as they paid the bill for it. Also, the explanation given by both Daniels and Worrall, in our opinion, lacks credibility. They also denied having been aware that Brady had also been provided a clean bill of mental health by a Psychiatrist which had been produced as one of the documents in the Occupational Health and Safety hearing, which hearing will be dealt with later.

[42] Brady provided uncontradicted evidence that he had sent the document and no challenge was made to its authenticity. We accordingly conclude that the Union had knowledge that he had successfully completed counselling, as directed by the Executive Board on June 23, 2015 at the latest.

---

[10] Counsel for the Union, at the hearing corrected this date as being September 2, 2014. No objection was taken to the correction and it seems appropriate given the meeting was on August 28, 2014.

[11] Marked as exhibit E-13

[43] The Union also made reference in their testimony to a quality assurance document which was signed with employers and which individual members of the Union were required to sign. The Union relied upon this document as justification for the imposition of the "fitness" requirement. However, when pressed in cross-examination regarding this document, which they testified was posted on their website, they were unable to provide the Board with a copy. Nor did we get a copy of any such document signed by Brady.

The Occupational Health and Safety Complaint:

[44] On August 21, 2014, Brady attended to the Ministry of Labour Relations and Workplace Safety, Occupational Health and Safety Division ("OH & S") in order to file a complaint of discriminatory action by Jacobs in respect of the safety issues he noted at the Colonsay site. He filed his complaint on October 14, 2014 after he had completed the counselling sessions referenced above.

[45] Kent Rhodes, an OH & S officer investigated the complaint and concluded that "Lyle Brady self-terminated his employment with Jacobs which was not an unlawful discriminatory action contrary to section 3-35 of *The Saskatchewan Employment Act*". That decision was appealed to an adjudicator selected by the Board. The adjudicator, Anne Wallace, determined that Brady's appeal was not within the time frames established for lodging appeals and Brady's appeal was dismissed by Ms. Wallace by her decision dated August 1, 2016. Brady subsequently filed an appeal against Ms. Wallace's decision to this Board, but that appeal was subsequently withdrawn by him.

The Complaint to this Board:

[46] On July 2, 2015, Brady filed his application with this Board. As noted above, the hearing of his application was delayed as a result of the Board deferring his application pending a determination of the OH & S appeal he had launched. Once that decision had been rendered, the Board continued with the hearing of the application. The first matter to be considered was an application for summary dismissal brought by the Union. By our decision dated July 24, 2017[12], the Board dismissed the application for summary dismissal

[12] 2017 CanLII 68781 (SK LRB), LRB File No. 151-15

[47] The Board began hearing the appeal proper on November 1, 2017 and concluded its hearing on June 19, 2018. During this period, the Board issued a further decision at the request of the parties in respect of changes in wording between what is now section 6-59 of the *SEA* and section 25.1 of the former *Trade Union Act* as well as the differences between section 6-58 of the *SEA* and section 36.1 of *The Trade Union Act*. That decision was rendered December 15, 2017.[13]

Involvement of Michael J. Carr:

[48] Mr. Carr ("Carr") is the Deputy Minister of the Ministry of Labour Relations and Workplace Safety. Brady contacted Carr by letter in January 2015 in relation to his suspension by the Union and its failure to dispatch him. In his letter he noted a concern regarding both his suspension from dispatch and the safety of his accumulated pension benefits with the Union.

[49] Prior to contacting Carr, Brady had written to then Premier Brad Wall about his situation. His letter to Premier Wall was directed to the Minister responsible and the Minister referred the letter to Carr. He testified that Carr told him that he had the letter and would deal with it.

[50] Brady testified that he met with Carr, whom he referred to as "Mr. Safety Saskatchewan" expecting that he would take steps to clean up the situation with the Jacobs jobsite. He testified that he spoke to Carr about the safety issues he noted at the Colonsay jobsite. He testified that he wanted to have Carr contact the Mine Inspectors, who were responsible to Carr, to go to the Colonsay site to insure that people got first aid and could work in a safe environment.

[51] He testified that Carr took it upon himself to write a letter to Dr. Olabisi, a consultant in general psychiatry to provide an opinion concerning Brady's mental health. The letter to Dr. Olabisi was written by Carr on his Government of Saskatchewan, Deputy Minister letterhead[14] and signed by him. That letter also enclosed a medical release form signed by Brady[15] authorizing the release of medical information to Carr.

---

[13] 2017 CanLII 85456 (SK LRB), LRB File No. 150-15
[14] See Exhibit EE-2, Tab 5
[15] See Exhibit EE-2, Tab 6

[52] Carr also wrote a letter for Brady, dated May 25, 2015, to the Union complaining about Brady not being dispatched by the Union. That letter was written on plain paper and signed by Brady[16]. The Union responded to Mr. Brady's letter on June 16, 2015[17]. In that letter, Daniels again raised the issues regarding his history of behavior which were raised at the Executive Board meeting, but added the following:

> *When we met last summer, I asked you to provide (i) proof that you were mentally and physically able to perform safety sensitive work and (ii) reasonable grounds on which to conclude that the misconduct described above will not happen again.*

[53] Dr. Olabisi responded[18] to Carr on May 22, 2015. In the response, he confirmed that Brady "does not have features suggestive of post-traumatic stress". He expressed the opinion "… that he is fit to work as a welding foreman/supervisor. There is no diagnosed mental disorder preventing him from being dispatched or from gainful employment in his chosen profession."

[54] Brady testified that as soon as the above medical opinion was received by Carr, that Carr would no longer return his phone calls or take meetings with him. He testified that he relied upon Carrs to forward the medical opinion to the Union as he had promised he would do

[55] While Carr was subpoenaed by Brady to testify, he was not called. We have no information as to his actions and whether or not he forwarded the medical opinion to the Union. We do, however, have testimony from the Union that they said that they did not receive the medical opinion from Carr, something which we will comment on later.

Receipt of the Medical Opinion:

[56] As noted above there is some issue with respect to when, and if, the Union ever became aware of the medical opinion from Dr. Olabisi. Both Daniels and Worrall testified that they had not seen the medical opinion at any time. Brady, and it was acknowledged by counsel for the Union and Jacobs, stated that the medical opinion was introduced as a part of the proceedings before Anne Wallace in the OH & S appeal. The Wallace decision does not specifically address the Olabisi letter. However, it is clear to us that the Union, through its

[16] See Union Reply at Attachment "A"
[17] See Union Reply at Attachment "B"
[18] See Exhibit E-15

counsel was aware of the Olabisi letter no later than the dates of the hearing before Adjudicator Wallace on June 2, and June 29, 2015.

Relevant statutory provision:

[57] The following provisions of the *SEA* are relevant in these proceedings.

> ***6-58****(1) Every employee who is a member of a union has a right to the application of the principles of natural justice with respect to all disputes between the employee and the union that is his or her bargaining agent relating to:*
>
> *(a) matters in the constitution of the union;*
>
> *(b) the employee's membership in the union; or*
>
> *(c) the employee's discipline by the union.*
>
> *(2) A union shall not expel, suspend or impose a penalty on a member or refuse membership in the union to a person, or impose any penalty or make any special levy on a person as a condition of admission to membership in the union if:*
>
> *(a) in doing so the union acts in a discriminatory manner; or*
>
> *(b) the grounds the union proposes to act on are that the member or person has refused or failed to participate in activity prohibited by this Act.*
>
> ***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.*

Brady's arguments:

Section 6-58

[58] Brady argued that he was engaged in a dispute with his union over being dispatched to work in his trade. He argued that by refusing to dispatch him for work, and insisting on medical clearance of fitness to work, he was both discriminated against and was

penalized by the Union by not being dispatched. Brady argued that the evidence at the hearing suggested that Jacobs was satisfied with his job performance and would be prepared to have him work with them again.

[59] Brady argued that Employers who had signed the President's Agreement[19] were entitled to have workers dispatched to them on their requisition. Article 11.000[20] makes provision for the dispatch of tradesmen as required. The President's Agreement has no specific qualifications for tradesmen other than they be "qualified"[21].

[60] Nor do the terms of dispatch utilized by the Union[22], Brady argued, contain any reference to workers being mentally or physically fit to do the job. Again, under the terms of dispatch, the only requirement is that the tradesman be "qualified".

[61] Brady argued as well, that he met all the required conditions for dispatch and was discriminated against when the Union imposed criteria not applied to other ironworkers for him to be dispatched. While the Union, Brady argued, in its evidence tried to point to another document that justified its discriminatory conduct towards him, when asked to produce the reference document, the Union was unable to do so, even though Union witnesses stated it could be found on the Union's website.

[62] Brady argued that this was not merely an issue of failure to dispatch as was considered by the Saskatchewan Court of Appeal in *McNairn v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 179*[23]. Furthermore, Brady argued, the Board's authority under section 6-59 had been broadened since the decision in *McNairn*.

Section 6-59

[63] Brady argued that he had a dispute with Jacobs over jobsite safety and the Union failed to afford him fair representation pursuant to section 6-59 of the *SEA*. Brady argued that he did not "quit" when he left the Colonsay worksite, but rather was participating in a safety shutdown as a result of the safety issues he discussed in his evidence.

---

[19] Which was the collective agreement which governed the Colonsay project
[20] See Exhibit U-1 at tab 1
[21] See Article 11.203
[22] See Exhibit U-1, tab 2
[23] 2004 SKCA 57 (CanLII)

[64] He argued that the Union was aware that he had a "grievance' with Jacobs over safety and failed to file a grievance against Jacobs in respect thereto. He argued that the reason that the Union refused to assist him was as a result of their belief that he was suffering from a mental disability. In so doing, Brady argued that the Union was being discriminatory.

[65] Brady argued that the Union should have represented him at the OH & S hearing rather than taking a position contrary to his. He argued that if the President's Agreement incorporated the OH & S provisions of the *SEA* that safety violations as noted by him could, and should have been grieved by the Union.

Union's Arguments:

Section 6-58

[66] The Union argued that this Board was without jurisdiction to engage with respect to the failure to dispatch issue, citing the Court of Appeal decision in *McNairn*[24] and *Stinson v. Teamsters Local Union No 395*[25]. The Union argued that section 36.1 of *The Trade Union Act* referenced in those decisions was sufficiently similar to the current provision the *SEA* so as to make those decisions applicable in this case. The Union also argued that view was espoused in our earlier decision on this file in December of 2017[26]. It was the Union's position that it has satisfied all of the requirements of natural justice in all of its dispatch-related dealings with Brady.

Section 6-59

[67] The Union relied upon the Board's decision in *Banks v. CUPE, Local 4828*[27] as the outline of the Board's current jurisprudence with respect to applications under section 6-58 of the *SEA*. It argued that the Union's actions were neither "arbitrary", "discriminatory", or in "bad faith" as defined in that decision. They argued that the Union's treatment of Brady was beyond reproach in every respect.

---

[24] Supra
[25] 2012 CanLII 101194 (SK LRB)
[26] Supra footnote 2
[27] 2013 CanLII 55451 (SK LRB)

[68] The Union argued that Brady had failed to provide any evidence or particulars in his application which would engage the Board's jurisdiction under section 6-59. They noted that Brady's complaint did not arise out of the collective bargaining agreement or out of the collective bargaining relationship, but rather arose out of issues related to safety under the OH & S provisions of the *SEA*, something that the Board, in this context had no involvement. The Union argued that rights under the OH & S provisions of the *SEA* were individual rights and the Union had no role to play unless invited to participate by the member and agreeing to do so.

[69] The Union also argued that at no time had Brady specifically requested a grievance to be filed under the collective bargaining agreement. Furthermore, they argued, even if such request had been made, the Union enjoyed some discretion as to whether or not to file such a grievance or to prosecute it. The Union also noted that there were no provisions in the collective bargaining agreement dealing with the issues raised by Brady.

Employer's arguments:

Section 6-58

[70] Jacobs says that it is not involved in the Union's decision not to dispatch Brady. They acknowledged Posnikoff's evidence that Brady "is and was fit to work". They agreed that they had no particular issues with Brady or his job performance. Jacobs did, however, support the Union regarding its right to assess whether its members are fit for dispatch, both mentally and physically. The work, it noted, was safety sensitive and an employee's fitness to perform such work should be evaluated.

Section 6-59

[71] Jacobs adopted the arguments of the Union in respect of Section 6-59 of the *SEA*.

Other Matters Raised

[72] Jacobs also argued that Brady had no legal or factual basis for any complaint against Jacobs. Jacobs argued that Brady was seeking to re-litigate the OH & S complaint which had been dismissed by Adjudicator Wallace. They noted that the evidence did not support any suggestion by Brady that safety concerns were made known to Jacobs or that he participated in a "safety shutdown" when he left the jobsite on June 14, 2014.

Analysis:

Issues in this Appeal:

[73] We will begin with what this case is not about. It is not about this Board making determinations regarding the alleged safety issues at the Colonsay jobsite which comprised a good deal of Brady's evidence in this case. Nor does this Board, in this instance[28], sit in review or appeal of any decision of Adjudicator Anne Wallace's determination in respect of Brady's OH & S appeal.

[74] This application by Brady seeks the Board's opinion with respect to whether Brady was not fairly represented by his Union pursuant to section 6-59 of the *SEA* or if he was not accorded "natural justice" or discriminated against under section 6-58 of the *SEA*.

[75] We provided the parties with some direction in respect to these provisions in our earlier decision in December, 2017. It is, we think, worthwhile to review the conclusions from that decision.

[76] At paragraphs [58] to [62] we said:

> ***[58]*** *Based upon the Board's review of the former provisions versus the current provisions, there appears to be no substantive difference in the provisions to warrant any change in the Board's analysis of these provisions.*
>
> ***[59]*** *The Board agrees in some respects with the Ironworkers as to the scope of the Duty of Fair Representation. In their argument, they described the duty as being that the duty of fair representation must be limited to or linked with matters arising from its exclusive rights to bargain collectively on behalf of those employees which it represents. The Ironworkers argued that this duty should not be extended by the Board to cover other statutory rights arising out of other legislation or parts of the SEA other than Part VI.*
>
> ***[60]*** *As noted above, the duty is linked to the exclusive right to bargain collectively as more clearly described in Gagnon. However, as noted above, the duty may be extended when statutory rights are enshrined in a collective agreement or collective agreement terms ameliorate*

[28] The Board is the appellate body for Adjudicator's decisions pursuant to section 4-8 of the *SEA*. Brady filed an appeal under that provision, but withdrew his appeal. As such, we are without jurisdiction to deal with any such appeal.

> *statutory rights. Additionally, a duty may arise when a union voluntarily undertakes to represent members with respect to statutory rights. However, neither of these two extensions arise in this case.*
>
> ***[61]*** *Secondly, the issue of being dispatched by the union and the application of the dispatch rules falls outside the scope of the Board's authority as defined in McNairn and Stinson. However, That does not, in the Board's view, prevent the Board from an inquiry with respect to whether or not a Union acted in conformity with the rules of natural justice in its refusal to dispatch or in respect to the dispute arising between the union and its member related to his fitness for dispatch and the process related to such refusal to dispatch.*
>
> ***[62]*** *What the Board must do, as directed by McNairn, supra, is to determine what is the "essential character" of the dispute. That is, is the dispute one that arises out of the dispatch rules, or one which arises out of a breach of natural justice in relation to the dispute. That essential character will have to be framed by the evidence and arguments in the case before us.*

Section 6-59

[77] As noted in the December 15, 2017 decision, other statutory schemes, such as labour standards provisions, or OH & S provisions under the *SEA*, can be the subject of collective bargaining between a trade union and an employer when such provisions provide betterment to the statutory rights granted by the statute.

[78] In this case, the collective bargaining agreement incorporates changes from the labour standards provisions of the *SEA* in respect of such items as work shifts, rates of pay and holiday payment amounts. It also contains some First aid, Safety provisions in Article 29.

[79] Also, as noted in our January 15, 2017 decision, rights granted under the OH & S provisions of the *SEA are* general rights granted to all employees until the occurrence of a triggering event. When a triggering event occurs, then the right granted becomes personal to the person effected.

[80] As we noted at paragraph [49] of our December 15, 2017 decision:

> *[49] While it may be difficult for individuals to understand and take action to protect their rights under legislation such as Part III of the SEA, that, in and of itself, does not give rise to a duty of representation, let*

> *alone a duty of fair representation of a union member. That is not to say, however, that such a duty would not arise if a union voluntarily agrees to assist a member with an appeal filed by that member under another statutory scheme. The effect of that voluntary representation and the duty of care assumed by the union is outside the scope of this analysis.*

[81] In this case, the Union did not volunteer to assist Brady with respect to his OH & S complaint and, in fact, took a position in opposition to it. In so doing, in our opinion, it did not act in a manner which was arbitrary, discriminatory, or in bad faith, as those terms have been defined by this Board and outlined in *Banks.*

[82] Brady argues, however, that the Union failed to file a grievance on his part with respect to the safety issues he was concerned about at the Colonsay site. The Union argues that it had no ability to file such a grievance under the collective bargaining agreement.

[83] Again, as we noted in the December 15, 2017 decision, the duty of fair representation arises as a balance to the exclusive right given to the Union to bargain collectively on behalf of the represented employees[29]. The Union cannot discriminate against a particular employee or group of employees, be arbitrary in it conduct toward an employee or group of employees, or act in bad faith with respect to an employee or group of employees.

[84] Mr. Brady, in his particulars filed with the Board in support of his application continuously referenced having a "grievance" against Jacobs which in his testimony he suggested that he asked the Union to enforce by filing a grievance under the collective agreement. However, the use of the term "grievance", in the context that it was used does not, in our view, describe a grievance under the collective agreement[30], but rather a 'disagreement", "difference of opinion", or "beef" with Jacobs over what he perceived as safety issues on site.

[85] Brady argued that he was discriminated against by the Union due to their perception of his mental disability and that their failure to file a grievance was coloured by this perception and discrimination. With respect, we cannot agree. In this case, there was no grievance which could be filed under the collective agreement. The avenue to address the safety issues noted by Brady was through the OH & S provisions of the *SEA*. The Union was under no obligation to assist him in respect of what would be a personal right under the *SEA*.

---

[29] See Brady v. Iron Workers. Local 771 and Jacobs 2017 CanLII 85456 (SK LRB) @ paragraphs 18-21

[30] There are no provisions in the collective agreement which would allow the filing of a grievance by the Union in respect to workplace safety. Those provisions are under the OH &S provisions of the *SEA*.

[86] We heard little evidence regarding what evaluation process, if any, the Union followed with respect to the grievance that Brady says he wanted filed against Jacobs. That is perhaps understandable when the Union witnesses testified that Brady never asked for a grievance to be filed. The evidence and testimony which we heard support that view. As noted above, Brady's "grievance" against Jacobs was not a grievance in the traditional sense arising under the collective agreement.

[87] We cannot find that the Union failed to file a grievance or, in this case violated section 6-59 of the *SEA*. There was no evidence to show the actions of the Union were in any way discriminatory, arbitrary or in bad faith. The application under section 6-59 is denied.

Section 6-58

[88] Section 6-58 differs from section 6-59 insofar as it provides that a trade union must insure that the rules of natural justice are followed when there is a dispute between a member of the union and the union.

[89] In *Westfield v. CUPE, Local 8443*[31], a complaint was brought to the Board alleging that the union acted improperly in reviewing and reversing a decision to refer a grievance to arbitration. At paragraph [16] & [17] of that decision, the Board quoted from its earlier decision in *Jefferies v. SGEU*[32], regarding what constitutes natural justice as follows:

> ***[16]*** *The Board has recently provided some guidance with respect to the application of section 6-58. In Jefferies v. Saskatchewan Government and General Workers Union, the Board dealt with an issue concerning the interpretation of the text of a long term disability program administered by the Union for the benefit of its members. At paragraph 28, the Board quoted from the textbook, Principles of Administrative Law to describe, in brief, what constitutes natural justice. At page 179, the authors say:*
>
> > *"Natural Justice" connotes the requirements that administrative tribunal, when reaching a decision, must do so with procedural fairness. If they err, the superior courts will step in to quash the decision by certiorari or prevent the error being made by prohibition. Such an error is jurisdictional in nature and renders the decision void.*

[31] [2017] CanLII 20062 (SK LRB)
[32] [2016] CanLII 79629 (SK LRB)

> ***[17]*** *However, the Board also noted that "[T]he intuitiveness of the principles of natural justice are easy to understand, yet an all-encompassing definition of natural justice is difficult to achieve. Large legal tomes have been written to describe the aspects of what constitutes natural justice".*
>
> (footnotes omitted)

[90] In the *Westfield* case, the Board found that the union had not complied with the rules of natural justice in its dealing with the grievance and, in particular by failing to provide notice to the affected employee of its intention to reconsider the motion referring the grievance to arbitration.

Is the Board precluded from dealing with this issue because it is a "dispatch" situation?

[91] The Union argued that the Board was constrained in respect of this matter because the jurisdiction over issues of dispatch were determined in *McNairn*[33] to fall within the exclusive jurisdiction of the Courts. The fact situation in *McNairn* was fairly straight forward. It was set out by the Court of Appeal in paragraph [2] of their decision as follows:

> *[2] The action was brought by Rodney McNairn against United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry in the United States and Canada, Local 179. In essence, the statement of claim pleads the following cause of action:*
>
> > *Mr. McNairn is a welder and a member of the Union.*
> >
> > *The relationship between the Union and its members is contractual and is governed by a written set of "Working Rules and Bylaws" constituting terms of the contract between the two.*
> >
> > *Pursuant to the Rules the Union maintains an unemployment board containing the names of out of work Union members, listing them in the order in which the Union is to dispatch them as jobs become available.*
> >
> > *In violation of the Rules the Union moved Mr. McNairn's name from the top to the bottom of the board, depriving him of*

[33] Supra note 23

> *work for which he was qualified, causing him loss, and entitling him to damages.*

[92] The Court of Queen's Bench struck out the claim by McNairn, who appealed to the Court of Appeal. The Court of Appeal framed the question as a choice between the jurisdiction of the Labour Relations Board and the Court of Queen's Bench as to who should have jurisdiction to deal with the issue raised in the action. The Court of Appeal outlined the problem at paragraphs [25] and [26] of the decision as follows:

> *[25] Although all-embracing, this jurisdiction of the Court is nevertheless subject to limit by other legislation within the constitutional competence of the Legislature and by common law principle restraining the exercise by the Court of its jurisdiction in some instances and in relation to some matters. These forms of limit extend to most labour relations disputes, the resolution of which the Legislature, in enacting The Trade Union Act, committed to the Labour Relations Board to the implied exclusion of the Court of Queen's Bench: Noranda Mines Ltd. v. The Queen and The Saskatchewan Labour Relations Board, 1969 CanLII 104 (SCC), [1969] S.C.R. 898; St. Anne Nackawic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219, 1986 CanLII 71 (SCC), [1986] 1 S.C.R. 704; Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057, 1990 CanLII 110 (SCC), [1990] 1 S.C.R. 1298; and Weber v. Ontario Hydro, 1995 CanLII 108 (SCC), [1995] 2 S.C.R. 929. In general, then, the Court lacks jurisdiction, or is restrained from exercising it, in relation to disputes arising out of collective bargaining agreements or the provisions of The Trade Union Act.*
>
> *[26] Even on this account of the relationship between the jurisdiction of the Court and the Board, it is sometimes difficult to tell where jurisdiction lies. A claim may be framed in tort so as to appear to lie within the jurisdiction of the Court, for example, yet be grounded in a provision of The Trade Union Act so as to lie within the jurisdiction of the Board, leaving behind uncertainty about where the claim is to be heard and determined. This was the case in Moldowan v. Saskatchewan Government Employee's Union et al. (1995), 1995 CanLII 3995 (SK CA), 126 D.L.R. (4th) 289 (Sask. C.A.) and Floyd v. University Faculty Association et al. (1996), 1996 CanLII 5074 (SK CA), 148 Sask R. 315 (Sask. C.A.).*

[93] To resolve the conflict, the Court set out to determine the "essential character of the dispute" as described by then Chief Justice Bayda in *Floyd v. University Faculty Association*[34] as follows:

---

[34] 1996 CanLII 5074 (SKCA) @ para. 2

> *[2] Our task then is to determine the "essential character" of the dispute between [the parties]. In going about our task we are not to concern ourselves with labels or with the manner in which the legal issues have been framed—in short with the packaging of the dispute. We must proceed on the basis of the facts surrounding the dispute. Given that this is an application to strike out the statement of claim, we must take our facts from the statement of claim and for the purposes of this application must accept as true the facts there pleaded.*

[94] As is the case here, *McNairn* involved a dispute between the predecessor provision to section 6-58, section 36.1 of *The Trade Union Act*. The purpose of that section was described by the Court of Appeal at paragraphs [36] to [38] as follows:

> *[36] That brings us to section 36.1 of the Act:*
>
> > *36.1(1) Every employee has a right to the application of the principles of natural justice in respect of all disputes between the employee and the trade union certified to represent his bargaining unit relating to matters in the constitution of the trade union and the employee's membership therein or discipline thereunder.*
> >
> > *(2) Every employee shall be given reasonable notice of union meetings at which he is entitled to attend.*
> >
> > *(3) No employee shall unreasonably be denied membership in a trade union.*
>
> *[37] In significant part, the purpose of this section lies in protecting a member of a union from abuse in the exercise of the power conferred on unions by the preceding section—section 36—and in particular subsections (4) and (5) thereof. These subsections empower a union to fine any of its members who has worked for a struck employer during a strike, provided the constitution of the union made allowance for this before the strike occurred. The purpose also lies in protecting an employee, employed in a unionized shop and required to maintain union membership as a condition of employment, not to be deprived of membership by the union except, according to subsection (3), for failure to pay the dues, assessments, and initiation fees uniformly required of all members.*
>
> *[38] Thus subsection 36.1(1) imposes a duty upon a union (again correlative to the right thereby conferred upon an employee), to abide by the principles of natural justice in disputes between the union and the employee involving the constitution of the trade union and the employee's membership therein or discipline thereunder. As such, the subsection embraces what may be characterized as "internal disputes" between a*

> *union and an employee belonging to the union, but it does not embrace all manner of internal dispute. For the subsection to apply, the dispute must encompass the constitution of the union and employee's membership therein or discipline thereunder. And when it does apply, it requires that the principles of natural justice be brought to bear in the resolution of the dispute.*

The Essential Character of the Dispute:

[95] As directed by former Chief Justice Bayda in *Floyd*, we are not to concern ourselves with labels or with the manner in which the legal issues have been framed, that is, the packaging of the dispute. We are to proceed on the basis of the facts surrounding the dispute.

[96] In this case, the facts do not, in our opinion, revolve around a dispute over the failure to dispatch a worker as was the case in *McNairn*. Rather, it revolves around the requirement imposed on Brady to show that he was "fit" to work, which requirement was imposed upon him at the executive meeting on August 29, 2014. There are numerous issues revolving around this requirement. Brady says that the imposition of the fitness requirement was discriminatory and that it was not something which was a requirement for other workers to be dispatched. Additionally, there is an issue regarding the process whereby this requirement was imposed and whether or not that process required the Union to observe the rules of natural justice, and if so, whether those rules were followed.

[97] Neither *McNairn or Stinson* engaged these other aspects of an internal union dispute. On their facts, they were both about whether or not the person should have been dispatched under the union rules.

[98] In *Robin v. Prince Albert Police Association*[35], the Board reviewed the genesis for what is now section 6-58 of the *SEA*. At paragraph [25], the Board says:

> **[25]** Similarly, the genesis of s. 36.1 of the *Act* arose out of the Board's supervision of the relationship between a union and its members. The earliest Board decision in this regard was in *Alexander Spalding v. United Steelworkers of America, CIO, AFL, CLC and Federal Pioneer Limited.**[11]*** In that decision at p. 53, the Board says:

[35] 2010 CanLII 81336 (SK LRB)

> *It would, in the opinion of the Board, be wrong for the Board to permit a union to punish a member for exercising a right given to him under The Trade Union Act. The Board will not permit the enforcement of any provision in the union constitution which might defeat, abrogate or vary any rights given by statute. Any attempt to enforce such rights by a union amount, in the opinion of the Board, to a violation of Section 11(2)(a) of The Trade Union Act and the Board finds the union guilty of an unfair labour practice accordingly.*

[99] The decision in *Spalding*[36] was made by the Board prior to the insertion of section 36.1 into *The Trade Union Act* and was determined by the Board as a part of its jurisdiction to supervise member/union differences under the unfair labour practice provisions of the Act.

[100] As was the case in *Robin*, this case involves the Board engaging its supervisory jurisdiction to review the process and procedures utilized by the Union in imposing the "fitness" condition on Brady.

[101] Accordingly, we are of the opinion that the essential character of the dispute is the dispute between Brady and the Union regarding the imposition of the condition that he be "fit" for dispatch. As such, the Board will take jurisdiction with respect to that dispute.

Applicability of Section 6-58:

[102] For ease of reference, it is, we think, helpful to repeat the provisions of Section 6-58. That section reads as follows:

> ***6-58****(1) Every employee who is a member of a union has a right to the application of the principles of natural justice with respect to all disputes between the employee and the union that is his or her bargaining agent relating to:*
>
> *(a) matters in the constitution of the union;*
>
> *(b) the employee's membership in the union; or*
>
> *(c) the employee's discipline by the union.*
>
> *(2) A union shall not expel, suspend or impose a penalty on a member or refuse membership in the union to a person, or impose any penalty or make any special levy on a person as a condition of admission to membership in the union if:*
>
> *(a) in doing so the union acts in a discriminatory manner; or*

[36] [1981] Sask. Labour Rep. 50, LRB File No. 001-81

> *(b) the grounds the union proposes to act on are that the member or person has refused or failed to participate in activity prohibited by this Act.*

[103] The Union has argued that the Board does not have jurisdiction to review the decisions of the executive committee under this provision.

[104] In our December 15, 2017 decision in this matter, we reviewed the principles of statutory interpretation at paragraphs [34] – [36]. At paragraph [36], the Board provided an overview of the scheme of the *SEA* and *The Trade Union Act* taken from its decision in *Saskatoon Public Library Board v. CUPE, Local 2669*[37]. That summary was as follows:

> ***[14]*** *In order to place these provisions into their proper context, it is necessary to provide an overview of the scheme of the SEA. Part VI of the SEA replaced what was formerly a stand-alone statute, The Trade Union Act. The SEA, like the former Trade Union Act, enacted a Wagner Act like model of labour relations. It provides for employees to have the right to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their own choosing. The SEA provides this Board with the authority to make numerous determinations regarding the acquisition of bargaining rights, including the exclusive right to determine whether a proposed bargaining unit constitutes an appropriate unit of employees for whom a trade union may be authorized to bargain collectively. This includes the power to require the employer to engage in good faith bargaining with those employees through a trade union chosen by those employees.*
>
> ***[15]*** *In addition to the acquisition of bargaining rights, the SEA also provides for the termination of bargaining rights on the application of Employees within the bargaining unit or through abandonment. It also provides for the transfer of bargaining rights upon a raid by another union or a successorship or if those rights are transferred from one union to another, or if the employer moves from being governed by the Federal statute to being governed under the SEA.*
>
> ***[16]*** *As in this case, the SEA also provides for the Board to amend a collective bargaining certificate ("certification") to reflect changes that may have occurred in the composition of the bargaining unit.*
>
> ***[17]*** *Other aspects of the SEA deal with the Board's authority to grant relief with respect to Unfair Labour Practices, to become involved in disputes between a trade union and its members, control of strikes and procedures leading up to strikes and with respect to resolution of disputes through arbitration.*
>
> ***[18]*** *The Wagner Act model represented in the SEA is an adversarial model that reflects the prevalent ying vs. yang between management of an*

[37] 2017 CanLII 6026 (SKLRB) at para. [14] – [18]

> *enterprise and the labour utilized by that enterprise. It provides for managerial and confidential exclusions from the bargaining unit so that there will be some balance between the two (2) conflicting entities. Inserted between those parties is a trade union who represents the employees within the appropriate unit and who is the exclusive bargaining agent for that group of employees. In addition, the SEA requires that both parties negotiate for a collective agreement in good faith.*
>
> (footnotes omitted)

[105] As was the case in *Spalding*, the Board is granted the jurisdiction to supervise member/union disputes, and, as discussed in *Robin*, this extends to insuring that the processes and procedures utilized by a union in dealing with its members are in accord with the rules of natural justice.

[106] This is also apparent when these provisions are read in conjunction with the scheme and purpose of the *SEA* as directed by *Rizzo*. Furthermore, *The Interpretation Act* [38]requires that the provisions of any Act be given "fair, large, and liberal interpretation", that the Board has the responsibility to supervise disputes between a union and its members.

[107] In this case, we have a dispute over the imposition of a fitness requirement imposed upon Brady and not on other members of the Union or, alternatively, a penalty imposed upon Brady as discipline for his actions subsequent to leaving the Colonsay jobsite, or the imposition of a penalty, that is, the ultimate penalty, the loss of the right to work in the field of his choice.

Was Brady afforded Natural Justice by the Union?

[108] In *Furnell v. Whangarei High Schools Board*[39], Lord Morris of Borth-y-Gest made the following comments, which have been adopted by our Supreme Court, concerning natural justice.

> *Natural justice is but fairness writ large and juridically. It has been described as "fair play in action". Nor is it a leaven to be associated only with judicial or quasi-judicial occasions. But as was pointed out by Tucker L.J. in Russel v. Duke of Norfolk [1949] 1 All E.R. 109, 118, the requirements of natural justice must depend on the circumstances of each particular case and the subject matter under consideration.*

[38] S.S. 1995 c. I-11.2 , section10
[39] [1973] A.C. 660

[109] Two aspects[40] of natural justice are the right to notice of a hearing and the right to know the case to be met. In the present case, while it may be that Brady was given notice of the meeting on August 29, 2014, in that he appeared at the date and time scheduled for the Executive Meeting, it is clear that he was not given any indication of the case that he was expected to meet

[110] Worrall, at Daniel's request had combed through his file to compile a dossier of issues that Brady had been involved in. He was not provided a copy of this dossier until he was present at the meeting. Daniels testified that that Brady was given the dossier at the meeting and was allowed an opportunity to respond at the meeting. Brady testified to the contrary that he was not given a proper opportunity to respond.

[111] Brady was not advised that he would be facing discipline or a penalty by being denied the right to be dispatched, or that there would be conditions for him to be dispatched. He was not advised prior to the meeting of the potential jeopardy that he faced and also was not afforded the right to counsel or representation in respect of the hearing. Nor was he advised of his right to be heard, or given any right to be heard, at the executive meeting.

[112] The Union's witnesses relied upon the requirement in their dispatch Policy Rules[41] that a member must be "qualified" in order to be dispatched. This, they argued, included being fit to perform the job and relied upon another document[42] which, in the final result, they were unable to produce.

[113] The Union contended that the work performed by iron workers was inherently dangerous and that it was necessary that everyone dispatched to a job be fit both physically and mentally. This was, they contended, a qualification. In this regard, the Union relied upon a quality assurance program established by the Union in conjunction with employers for whom the Union provided workers. Union witnesses testified that the union strove to do quality work for the employers whose employees they represented.

[114] It is unfortunate that the Union was unable to provide or locate a copy of this quality assurance program or the documentation associated with it. There is no doubt that

---

[40] For a more detailed analysis of the requirements see *Lalonde v. United Brotherhood of Carpenters and Joiners of America, Local 1985* 2004 CanLII 65627
[41] See Union exhibit U-1 @ tab 2
[42] See paragraph [42] supra

both the Union and employers had a role in insuring that workers do not, for example, report for work in an unfit condition such as impairment through drugs or alcohol. That presents a significant safety issue.

[115] Again, using an example of impairment, safety regulation would require that any impaired employee would not be permitted to work and may, depending on the jobsite rules in effect, be discharged or sent home. Such was the case with respect to Brady in regards to the Balzer's incident referred to above.

[116] Such incidents would result in a complaint from the employer to the Union regarding the performance of such an employee. In that case, the union would, we expect, take steps to insure that the employee involved sought and received appropriate counselling or treatment. This, however, was not the case with Brady.

[117] The evidence from Jacobs was that Brady's performance was accepable and that he would have been welcome to stay at Colonsay or to return to work for them. Jacobs found no issues with his fitness to work. The Union, on the other hand, took it upon themselves to suspend him from dispatch on July 29, 2014 and to compile a dossier of his past misdeeds as justification for their formal suspension of his dispatch rights on August 29, 2014.

[118] As of July 29, 2014, the Union had reached a conclusion that Brady was suffering from Post Traumatic Stress Disorder without any evidence of such or a complaint having been made by an employer. The Union then compiled the dossier as backup for their conclusion that Brady needed help.

[119] Brady was treated differently than his fellow iron workers, based upon a conclusion reached by the executive board, who were not qualified to make such determination, that he was suffering from either Post Traumatic Stress Disorder, or some other mental affliction. The executive board had no complaint or other basis for imposing the discipline upon Brady by not being dispatched with the resultant loss of livelihood.

[120] In short, it is our opinion, that Brady was not accorded natural justice in respect of the Union's decision, reached at the executive meeting on August 29, 2014 to suspend him from the dispatch list until he was deemed fit for work, contrary to section 6-58(1)(c) of the *SEA*. The condition of "fitness" imposed upon him disciplinary in nature as it was a response by the Union to the dossiers list of prior indiscretions and not a concern expressed

by an employer as to his fitness for work as they have argued. That decision and its lingering affects resulted in a significant penalty in the loss of Brady's livelihood.

[121] Additionally, however, in the alternative, we find that the Union also breached section 6-58(2)(a) by imposing a condition that Brady attend counselling with Home Solutions absent any complaint from Jacobs or any evidence to support the conclusion reached by the Union that he was suffering Post Traumatic Stress Disorder.

[122] In our opinion, the condition imposed upon Brady was not one which was universally imposed upon members of the Union. That is, we have no evidence that the Union routinely took it upon themselves to inquire into a members past performance, determine, on their own that something was amiss, and require that member to undergo counselling as a condition of dispatch. The situation here was unique to Brady and his having involved the Mines Inspector, and in his attempts to have Jacobs removed from the jobsite and replaced by another contractor.

[123] Brady was recalled from his ICON employment by Daniels and Worrall on July 29th and advised he would no longer be dispatched. He was then summoned before the executive board and the counselling condition imposed upon him for further dispatch. This was, in our opinion, in direct response to Jacob's concern as outlined in the Posniak telephone calls to Daniels. The penalty imposed upon Brady was, in our opinion, a direct result of the complaint about Brady in those telephone calls.

[124] Finally, even if we are incorrect with respect to the breaches outlined above, Brady satisfied the condition imposed upon him no later than on June 23, 2015. Even if the condition was properly imposed by the Union, which conclusion we disagree, Brady should have been eligible for dispatch by that date and should have been dispatched by the Union.

Remedy for the Breach:

[125] Section 6-104(2)(e) provides the Board remedial authority as follows:

> *(e) fixing and determining the monetary loss suffered by an employee, an employer or a union as a result of a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board by one or more persons, and requiring those persons to pay to that*

> *employee, employer or union the amount of the monetary loss or any portion of the monetary loss that the board considers to be appropriate*;

[126] The Board also had the general power granted by section 6-103(1)(c) to:

> *(c) make any orders that are ancillary to the relief requested if the board considers that the orders are necessary or appropriate to attain the purposes of this Act;*

[127] The Board's usual remedy is to attempt to put the parties in the same position that they would have been in had the breach not occurred. There is some problem in this case as there are a number of possible times to which the status quo could be restored. The first is as of July 29, 2014, the date Brady was first suspended from dispatch by Daniels. The second would be as of August 29, 2014, the date of the Executive Meeting. The third would be as of June 23, 2015, the date the Union knew or should have known that Brady had completed counselling at Homewood Health Solutions as directed by the Executive Board. Finally, there is the date on which the Union knew or should have known of the letter from Dr. Olabisi during the OH & S hearing with Adjudicator Wallace.

[128] In addition to the above noted dates, there are other additional considerations. On the evening before oral argument was to be given and after the close of the time given for oral submissions, counsel for Brady asked that the Board consider making an award against the Government of Saskatchewan as a result of Carr's failure to provide a copy of Dr. Olabisi's opinion letter to the Union. Had he done so, Brady argued that based upon that letter, Brady could have been eligible for dispatch much earlier and the costs of these proceedings and additional losses to Brady could have been avoided.

[129] Another factor to be considered is the offer by the Union to provide "Safety Officer" training to Brady, an offer which he did not respond to and which, to our understanding has not been repeated. Nevertheless, at the oral argument of this matter, Brady suggested that revisiting such training may provide a partially acceptable remedy.

[130] Also complicating the issue is the fact that due to his lack of dispatch, and income as a result, Brady was unable to or failed to pay his dues to the Union and has been suspended from membership in the Union.

Should the Board make an Award against the Government of Saskatchewan?

[131] For the reasons which follow, we must decline to make an award against the Government of Saskatchewan related to the actions of Carr. While we may have the authority under section 6-103(1)(c) to make such an award, the making of such an Order is discretionary.

[132] We decline to make the Order requested because the Government or Mr. Carr was not made a party[43] to this dispute. He was subpoenaed, but did not testify. While represented by counsel with respect to his potential testimony, at no time was there any notice given to Carr or his counsel that Brady would be requesting an award against them. They had no ability to provide evidence or argument to the Board in respect of whatever position they may have wished to advance. Absent testimony from Carr, we have no direct knowledge of whether or not he delivered the letter from Dr. Olabisi to the Union. They say they did not receive it, but testimony regarding non receipt of documents by the Union was not unusual.

[133] Nor do we have evidence as to the nature of Carr's involvement. Was he acting in an official capacity on behalf of the Government of Saskatchewan, or was he engaged in actions outside his official role? The analysis of any suggestion of liability on behalf of either the Government of Saskatchewan or Carr would require better factual background and is far outside the scope of the briefs and argument provided to us by the parties.

[134] Finally, in light of our decision here, the involvement of Carr, even though it might have been helpful if he had followed through[44], is not critical to our remedy. The letter from Dr. Olabisi, was not, in our opinion, necessary as Brady had already fulfilled the condition imposed upon him in the executive meeting by attending counselling with Homewood Home Solutions as set out in the minutes of the Executive Board Meeting.

Remedy:

[135] From the evidence and our determinations, it is clear that even if the "fitness' requirement imposed on Brady was not discriminatory, he should have been eligible for dispatch as early as June 23, 2015, being the date on which he delivered notice to the Union that he had successfully completed his counselling requirement.

---

[43] And, in respect of the Board's authority, it is arguable if Carr could have been made a party.
[44] Assuming he did not forward Dr. Olabisi's letter on to the Union.

[136] In the Union's June 16, 2015 response to the letter written by Brady, but authored by Carr, they again repeated the requirement for fitness to be dispatched. Not surprisingly, Brady provided the documents from Homewood Home Solutions one week from that repeated request.

[137] As a minimum, we find that Brady should have been eligible for dispatch from June 23, 2015. However, before consideration of the remedy which flows from this determination, we must turn our minds to the effect of our finding of a breach of Section 6-58 of the *SEA*.

What is the Effect on the Executive Board Decision of a Breach of Section 6-58.

[138] A breach of natural justice renders the decision void, not voidable[45]. That has been the usual result[46] when a breach of section 6-58 or the former provision 36.1 has been found by the Board. If the actions of the Union in imposing the fitness requirement and loss of ability to work penalty on Brady are void, then that would mean that Brady should be re-instated as of August 29, 2014.

[139] However, that ignores that Brady had been previously suspended from dispatch by Daniels following his recall from ICON to answer concerns about his activities as reported by Jacobs to the Union.

[140] The Union did not provide any explanation or authority for the suspension of his dispatch rights by Daniels prior to the executive meeting. That decision appears to have been made by Daniels based upon his stated belief that Brady was suffering from Post-traumatic Stress Disorder. No medical or any basis was provided for that belief. It appears to represent an opinion held by Daniels without any factual background or support.

[141] Since we have been provided neither basis for, nor authority for Daniels to instruct that Brady was not to be dispatched, it suffers from the same defect as the Union's impugned actions at the executive board meeting. It was done in a summary fashion by Daniels, without apparent authority, and without notice to Brady.

---

[45] See Jones & de Villars, *Principles of Administrative Law*, 2nd edition Carswell at p. 231
[46] See for example *Lalonde v. United Brotherhood of Carpenters and Joiners, Local 1985* 2004, CanLII 65627

[142] There was no evidence to support that Daniels had any authority for or rationale for his disciplinary suspension of Brady. In our opinion, the lack of authority to discipline Brady or to suspend him without due process was either contrary to the rules of natural justice or discriminatory. Nor, was there any evidence that such a unilateral suspension was something that was universally applied to other members of the Union. As such, that decision by Daniels would also be a breach of section 6-58.

Remedy:

[143] From the above, we conclude that Brady must be considered as always have being eligible for dispatch by the Union. Quantification of his monetary loss Is not, at this stage possible as we have no evidence to support any determination of what losses he may have suffered. Accordingly, we will first permit the parties to engage in discussions regarding the quantification of any losses in an attempt to come to a resolution. If no resolution is possible, the Board will hear evidence and argument as to the amount of monetary loss Brady should be awarded. This panel of the Board will not remain seized of that matter. The parties shall be given until September 30, 2018 to reach a settlement, failing which it may be returned to the Board by either party.

[144] In our opinion, those discussions should also include a renewed offer to Brady of training to become a safety officer, something his counsel mentioned he would be prepared to undertake.

[145] Finally, we will Order that Brady be restored to membership in the Union which was lost as a result of his inability or neglect in failing to pay his required dues. Any outstanding dues amount shall be remitted by the Union forthwith in order to restore Brady to his membership, which amounts shall be deducted from any monetary loss suffered by Brady as determined or agreed by the parties. He shall also forthwith be eligible for dispatch.

[146] An appropriate Order will accompany these reasons.

[147] This is a unanimous decision of the Board. Member McCormick dissents with respect to the making of an award against the Government of Saskatchewan based upon the involvement of Carr in this matter. His dissent follows these reasons.

Dissent of John McCormick, Member

[148] I agree with the majority with respect to their conclusions regarding the breach by the Union of section 6-58 of the *SEA*, but am of the opinion that the conduct by Carr in respect of his involvement in this matter requires that the Government of Saskatchewan be responsible for some of the loss incurred by Brady. I come to this conclusion based upon the undisputed facts in this case that Carr did not provided the Olabisi letter to the Union as he promised Brady he would do.

[149] I find it disturbing that Carr would be involved in this situation as the Deputy Minister of Labour Relations and Workplace Safety. Carr was the highest placed official in the Ministry. The Mines Inspectors and the employees of the OH & S division all reported to him. His involvement in this matter was clearly, in my opinion, a conflict of interest and he should never have become involved in the events which took place.

[150] Brady testified that he placed reliance upon Carr not only with respect to delivery of the medical opinion, but also with respect to the OH & S complaint which he had made to Carr's ministry. Carr took it upon himself to write to Dr. Olabisi on his department letterhead, signifying that this was an "official" request by the Ministry. Why such an "official" request was made is somewhat mystifying as we did not hear testimony from Carr.

[151] Contrary to the "official" request to Dr. Olabisi, Carr did not deal directly with the Union. Rather, he ghost wrote a letter for Brady to send to the Union regarding his dispatch rights. Again, why he would meddle in this issue is a mystery as well as someone in his position should not be involved in a dispute between a union and one of its members. His actions, in my opinion, were highly inappropriate.

[152] Carr wrote the letter to the Union on May 25, 2015. The response from Dr. Olabisi was dated May 22, 2015 and would have been received shortly after the letter to the Union was sent. It should have been a simple matter to insure that Brady got that letter to the Union, if Carr truly intended that the letter be offered as proof of Brady's fitness for work and dispatch by the Union.

[153] For whatever reason, Carr failed to provide that letter or to instruct Brady to get the letter to the Union. Brady did provide the Union with the documents from Human Solutions upon receipt of the response to the May 25th letter.

[154] In my opinion, the Government of Saskatchewan should have been required to join the discussions regarding compensation to Brady for the period from the recieipt of the Olabisi letter to the current date. Carr's failure to insure that Dr. Olabisi's letter was provided to the Union extended the time for which compensation should be due to Brady, that is, if the letter had been delivered, the Union's conditions regarding dispatch would, presumably, have been satisfied and Brady could have been dispatched that much sooner. Additionally, these lengthy proceedings may not have been necessary and significant expense for all of the parties involved could have been avoided.

DATED at Regina, Saskatchewan, this 13th day of July, 2018.

LABOUR RELATIONS BOARD

Kenneth G. Love Q.C.
Chairperson