April 20, 2018

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**Attention: Mr. Jeffrey W. Deagle**

Gerrand Rath Johnson
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**Attention: Ms. Crystal L. Norbeck**

Dear Sir and Madam:

**RE: LRB File No. 168-17 - Kelsey Melnechenko v. International Brotherhood of Boilermakers, Local 555 and Icon Construction Ltd.**

**Background:**

[1] Mr. Kelsey Melnechenko ("Melnechenko") applied to the Board alleging that the International Brotherhood of Boilermakers, Local 555, (the "Union") improperly refused to re-instate Melenchenko to the Union's call list established for the purposes of dispatching members of the Union to various job opportunities with employers requiring the services of Boilermakers. Melenchenko alleged that this failure represented a breach of the Union's Duty of Fair Representation as set out in section 6-59 of *The Saskatchewan Employment Act* (the "*SEA*).

[2] At the commencement of the hearing, the Board raised an issue concerning its jurisdiction to hear and determine the matter. In so doing, the Board pointed out to the parties the Court of Appeal decision in McNairn v. United Association of Journeymen

and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada , Local 179.[1]

[3] The Board then adjourned to allow the parties to consider this question. Upon resumption of the hearing, the Board heard arguments from the parties regarding its jurisdiction.

[4] Following argument by the parties, the Board provided an oral decision dismissing the application with reasons to follow. These are those reasons.

**Factual Background:**

[5] The facts related to this matter have been gleaned from the application and reply filed in this matter by the parties. No additional evidence was heard..

[6] Melnechenko is a member of the Union. The Union operates a hiring hall to dispatch members to job sites upon requisition from unionize employers. The hiring hall is conducted through a call list (the "call list"). Eligible members are placed upon this call list when available for work. Only members of the Union on the call list are offered employment opportunities when work becomes available.

[7] Melnechenko was dispatched, on September 9, 2015, from the call list to an employment opportunity with Icon Construction Ltd. ("Icon"). One of the requirements for working at the Icon jobsite was a pre-access drug and alcohol test (the "D & A test"). Melenchenko had submitted to a previous D & A test for another work assignment on June 27, 2015. He asserts that he was advised by the Union that

[1] 2004 SKCA 57 (CanLII)

he would not be required to submit to another D & A test. The Union denied this assertion.

[8] Melnechenko was initially granted access to the worksite, but was later asked by Icon to verify his pre-access D & A test. At that time he produced a card dated from 2013, which he provided to the Union's shop steward. However, he was advised on September 20, 2015 that he would be required to attend for a new D & A test or be denied access to the worksite. He was informed on September 21, 2015 that the 2013 pre-access screening card was insufficient. At that time only one scheduled day remained on the job site. Melnechenko did not perfom the new D & A test.

[9] The Union, in its reply, deposes that the Applicant purported to submit a new D & A test results card to Icon, which card identified the testing date as September 11, 2015. The Union deposes that they were advised by Icon that they found it strange that the card was dated September 11, 2015 when the test date was to have been September 21, 2015. The Union deposed that Icon advised Melnechenko that they believed the test card was a forgery. That was confirmed by the testing company.

[10] On November 5, 2015, the Union advised Melneschenko that he would no longer be eligible for dispatch through the call list until he completed a pre-access substance abuse assessment as he was not compliant with the CODC Alcohol and Drug Policy and Procedures.

[11] On January 12, 2016, the Union received correspondence from IWS-Integrated Workplace Solutions, Dianne Fernandez confirming that Melnechenko had been referred to their offices for an assessment for failing to test for the Icon dispatch. On January 13, 2016, Melnechenko was advised by IWS-Integrated Workplace Solutions of the return to work process and payment. However, the Union deposed in their reply that IWS-Integrated Workplace Solutions has heard nothing further from Melnechenko

and that he has not received a clearance certificate to put him in compliance with the CODC Alcohol and Drug Policy and Procedures.

[12] Melnechenko deposes that the letter of January 12, 2016 amounted to an active status letter. The Union denies this characterization of the letter The letter itself states in the second paragraph:

> *Based upon the results of the assessment, Kelsey Melnechenko does not, at this time, require assistance in dealing with a substance abuse issue. Kelsey Melneschenko has been assigned to complete one educational session with this writer [Dianne Fernandez]. I will inform you when the program has been successfully completed.*

[13] It is the one educational session which has not been completed by Melnechenko.

**Discussion and Analysis**

[14] The Application and Reply filed with respect to this matter establish that Melnechenko's claim is based upon the denial of his eligible status to be dispatched from the call list. That was the issue faced by Mr. McNairn in his claim against the Pipefitters union in the Court of Appeal decision in McNairn v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada , Local 179.

[15] As was the case here, Mr. McNairn claimed considerable damages for the Pipefitters as a result of his name being moved from the top of the, in that case, unemployment board to the bottom, thereby denying him work for which he was qualified and, as determined by the Court of Appeal, damages as a result.

[16] In McNairn, the issue was whether the courts had jurisdiction over this factual situation or if the matter was one for the Board pursuant to then section 25.1 of *The Trade Union Act*[2], which was the Duty of Fair Representation provision of that Act. The action was originally brought by Mr. McNairn in the Court of Queen's Bench. That court concluded that the essential character of the dispute was grounded in then section 25.1 and the dispute therefore fell within the jurisdiction of this Board. Based upon that determination, the Court of Queen's Bench struck out Mr. McNairn's claim.

[17] McNairn appealed that decision to the Court of Appeal. The Court of Appeal differed from Mr. Justice Hrabinsky with respect to what was the essential character of the dispute. In their decision, the Court of Appeal overturned the Court of Queen's Bench decision and reinstated McNairn's claim.

[18] Mr. Justice Cameron wrote the reasons for the Court's decision. He characterized the question raised by the appeal as being "a choice between the jurisdiction of the Court of Queen's Bench and that of the Labour Relations Board". He noted that "it invites comment on the relationship between the two".[3]

[19] At paragraph 24 he says:

> *[24] The Queen's Bench Act, 1998 endows the Court of Queen's Bench, as the superior court of record in Saskatchewan, with all-embracing original jurisdiction in civil matters. Section 9 states: "The court has original jurisdiction throughout Saskatchewan, with full power and authority to consider, hear, try and determine actions and matters", including by definition all civil proceedings commenced by statement of claim. In addition to this express jurisdiction, the Court is possessed of inherent jurisdiction to entertain a civil cause of action. This emanates from the principle that if a right*

[2] Since repealed and replaced by *The Saskatchewan Employment Act*
[3] See paragraph 23

> *exists, the presumption is that there is a Court which can enforce it, and if no other mode of enforcing it is prescribed, that alone is sufficient to afford jurisdiction to the Court of Queen's Bench: Board v. Board, 1919 CanLII 546 (UK JCPC), [1919] 2 W.W.R. 940; [1919] A.C. 956 (P.C.), affirming 1918 CanLII 343 (AB CA), [1918] 2 W.W.R. 633 (Alta. C.A.).*

[20] As noted above, this application, while framed as an employee union dispute is, in essence, a dispute over the operation of the Union's call list. That was the same dispute that was adjudicated in the McNairn decision.

[21] At paragraph 34 *et seq*, Mr. Justice Cameron provides the following analysis;

> [34] Were the dispute between the parties grounded in section 25.1, there could be no doubting the Board's exclusive jurisdiction to entertain it. However, the facts as pleaded in the statement of claim do not reveal a dispute of that character. They reveal a dispute over whether the Union removed Mr. McNairn's name from the top of the unemployment board in breach of its obligations pertaining to the maintenance of the board. The Union's obligation to place the names of its unemployed members on the unemployment board in appropriate sequence did not arise out of its statutory duty of fair representation. Rather, it arose out of the Working Rules and Bylaws. Nor is the dispute otherwise concerned with whether the Union breached its statutory duty of fair representation. Indeed, on the facts as we know them the Union was found not to have done so by the Labour Relations Board. Assuming the allegations in the statement of claim are true, the fact is the Union violated Article 11(d) of the Bylaws and Working Rules of the Union, not section 25.1 of the *Act*.
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> [35] The long and short of it, in our respectful opinion, is that the dispute between the parties, in its essential character, does not arise out of section 25.1, is not governed by this section, and does not fall within the jurisdiction of the Labour Relations Board by reason of this section.
>
> [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 preceeding 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.

[39] Seen in this light, and in light of the allegations of fact made in the statement of claim, subsection 36.1(1) has no effective bearing on the essential character of the dispute between the parties. The Union is not alleged to have breached the duty imposed upon it by this subsection, and nothing material to the action and its determination turns on this duty. The Union's duty to place the names of its unemployed members on the unemployment board in prescribed sequence, which lies at the heart of the dispute posited by the statement of claim, is not to be found in subsection 36.1(1) of *The Trade Union Act* but in Article 11(d) of the Union's Working Rules and Bylaws. And on the facts of the matter, the complaint is not about Mr. McNairn having been deprived of natural justice by the Union, contrary to section 36.1(1) of the *Act*. It is about his having been deprived of work, for which he was qualified, because the Union, contrary to Article 11(d) of Working Rules and Bylaws, moved his name to the bottom of the unemployed board following his job-related experience at Burstall.

[40] Nor, having regard for the facts alleged in the statement of claim, is the dispute about whether the Union failed to give Mr. McNairn reasonable notice of a meeting, as required by subsection 36.1(2), or unreasonably denied him membership in the Union, contrary to subsection 36.1(3).

[41] In sum, we are of the view the dispute disclosed by the cause of action pleaded in the statement of claim does not, in itsessential character, engage section 36.1 of *The Trade Union Act*. Nor in our view does it engage section 25.1 of the *Act*. With the greatest of respect, then, we do not share the opinion of Justice Hrabinsky. We are of the opinion the dispute is not governed by these provisions, cannot be said to have arisen out of them, and does not therefore fall within the jurisdiction of the Labour Relations Board. That being so, the Court of Queen's Bench has jurisdiction to entertain the statement of claim. Hence, we are left to allow the appeal, set aside the order, and dismiss the Union's application to strike out the statement of claim.

[22] In this case, Meleschenko did not plead section 6-58[4] of the *SEA*, instead relying upon section 6-59 of the *SEA*. Nevertheless, even if that section had been relied upon, it is clear from the above noted passage that it would not assist Melneschenko in respect of his application to this Board.

[23] There has been some modification to the wording of both section 6-58 and 6-59 of the *SEA* since the decision in McNairn. However, those changes do not, in my view, afford the Board additional jurisdiction in respect of this dispute. The Board is bound by the Court of Appeal decision in McNairn. The essential character of the dispute here is the same type of dispute that was dealt with by the Court in McNairn. Accordingly, the Board lacks jurisdiction to hear and adjudicate the dispute.

**Decision and Order:**

[28] As noted above, we have determined that the essential character of the dispute revolves around the denial by the Union of dispatch under the call list. For these reasons, the application was dismissed.

[29] This decision has been made by me, sitting alone pursuant to section 6-95(3) of the *SEA* and has been completed by me pursuant to section 6-94 of the *SEA*. The Board's formal Order in respect of this matter will be included with this letter decision.

Yours truly,

Kenneth G. Love, Q.C.
Chairperson[5]

[4] This section is the replacement for section 36.1 referenced by Mr. Justice Cameron.
[5] See section 6-94 of the *SEA*