Saskatchewan
Labour Relations Board

JASON G. RATTRAY, Applicant v UNIFOR NATIONAL, UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS), LOCAL 9841 (SUCCESSOR TO UNIFOR LOCAL 481) and SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Respondents

LRB Files No. 012-17 and 022-17; January 24, 2020
Chairperson, Susan C. Amrud, Q.C., (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

For Jason G. Rattray:	Larry Dawson
For Unifor National:	Daniel Sikakane
For United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers), Local 9841 (successor to Unifor Local 481)	Heather M. Jensen
For Saskatchewan Government and General Employees' Union:	Bettyann Cox

Duty of fair representation – Local 9841 breached duty of fair representation in its consideration of Applicant's termination grievance – Carried out no investigation – Delegated decision whether to proceed to arbitration to lawyer – Grievance Committee did not hear from Applicant or his advocate before making a decision – Conducted membership appeal of decision in a manner destined to be unfair to Applicant.

Duty of fair representation – Unifor National owes no duty to Applicant under section 6-59 of the Act as it is not the Applicant's bargaining agent.

Section 6-58 of the Act – Applicant did not prove his claim against either Unifor National or Local 9841.

Remedy – Declaratory Order – Public apology – Reasons for Decision, Order and apology to be posted in workplace for 60 days – Parties to negotiate damages, failing which the Board remains seized to determine amount.

REASONS FOR DECISION

Background:

[1] Susan C. Amrud, Q.C., Chairperson: Jason Rattray ["Rattray"] was employed as a labour relations officer with Saskatchewan Government and General Employees' Union

["Employer"] from May 20, 2008 until he was terminated on April 13, 2016. At the time of the events relevant to this matter, he was a member of Unifor Local 481[1] ["Local 481"]. By letter dated November 22, 2016, Unifor National advised Local 481 that its Charter as a local union of Unifor National had been revoked[2]. As a result, the Employer's employees sought out and became members of United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers), Local 9841 ["Local 9841"]. Local 9841 applied for an Order seeking the transfer of bargaining rights to it from Local 481; a Certification Order naming Local 9841 as the bargaining agent for the Employer's employees was issued on October 26, 2017, in LRB File No. 011-17[3]. In these Reasons, reference is made to Local 481 or Local 9841 on the basis of which Local was the bargaining agent at the relevant time. Given the Order granted October 26, 2017, they should be considered as one and the same in the interpretation of these Reasons. In the hearing of Rattray's Applications, Local 9841 appeared, as successor to Local 481.

[2] Rattray filed two Applications under sections 6-58 and 6-59 of *The Saskatchewan Employment Act* ["Act"]. The first Application (LRB File No. 012-17) was filed January 26, 2017 against Unifor National, Local 481 and the Employer. That Application alleges that: Local 481 arbitrarily withdrew grievances relating to his termination; Unifor National arbitrarily revoked Local 481's Charter; and several charges he filed against elected members of Local 481 were abandoned by Unifor National, even though the process to hear the charges was underway when Local 481's Charter was revoked.

[3] The second Application (LRB File No. 022-17) was filed February 9, 2017 against Unifor National, Local 481 and the Employer, citing 19 grounds, which it described as follows: "The above examples amount to a campaign of bad faith, arbitrariness and discrimination that have been committed by both Unifor National, and Unifor Local 481".

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[1] In LRB File No. 035-03, Communications, Energy and Paperworkers Union, Local 481 was certified as the bargaining agent for the Employer's employees, on March 14, 2003. In 2013, Communications, Energy and Paperworkers Union merged and amalgamated into Unifor. The Certification Order was not amended to reflect this change.

[2] Exhibit A-38.

[3] Rattray applied for, but was denied, status to intervene in that Application*: Rattray v United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 9841*, 2017 CanLII 30194 (SK LRB). An agreement was entered into between Local 481 and Local 9841 that the effective date of the transfer was January 20, 2017.

[4] In a decision issued August 24, 2017[4], the Board dismissed an Application for Summary Dismissal of LRB File No. 012-17 and deferred an Application for Summary Dismissal of LRB File No. 022-17 awaiting a determination by Unifor National's Public Review Board ["PRB"].

[5] A complicated fact situation was disclosed during ten days of hearings. Rattray filed 76 Exhibits and the other parties filed 12 more, most of which were emails or letters exchanged among various representatives of the parties. Eight witnesses provided evidence. The most pertinent information is outlined below.

Grievances:

[6] While none of the parties could identify exactly how many grievances had been filed on behalf of Rattray, the evidence indicated that at least seven grievances were filed on his behalf between February 18, 2015 and February 19, 2016[5]. A further grievance was filed following his termination. Although the grievance of his termination was the one that attracted the most attention during the hearing, in its termination letter, the Employer relied on its progressive discipline (through the actions objected to in the earlier grievances) as justification for its termination of Rattray for just cause.

[7] Hannah Gasper is a member of the Grievance Committee and was Rattray's advocate in the grievance process. Marie Amor, the Chair of the Grievance Committee, sent three email requests for information from Rattray and Gasper with respect to the grievances filed during 2015[6]. Gasper testified that she spoke to Amor, following receipt of the first email, who indicated that there was no rush to provide the information. Following the second email she spoke to Amor again. Given her workload, and the significant amount of information required to be compiled for Rattray's grievances, Gasper was having difficulty putting the information together. Following the third email Gasper talked to Amor on more than one occasion and advised her she was working on compiling the requested information. Amor admitted that Gasper told her she was busy but the information was coming. Following Rattray's termination on April 13, 2016 a further grievance was filed on his behalf, on April 14, 2016. No request for information was made by Amor to Gasper with respect to the termination grievance.

[8] Local 481's Grievance and Arbitration Policy includes the following statement:

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[4] *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 9841 v. Jason Rattray*, 2017 CanLII 68782 (SK LRB).
[5] Exhibit A-34.
[6] Exhibit U-3, Tab 2 (January 20, 2016), Tab 5 (March 2, 2016), Tab 8 (March 23, 2016).

> *6. The Grievance Committee is responsible for determining, in consultation with the UNIFOR national representative, if legal advice should be sought on any grievance file. The committee will then seek authorization for the expenditure from the Local Executive.*[7]

Despite this, at a meeting of the Local 481 membership on May 4, 2016, a motion was passed approving expenditures for a legal opinion on Rattray's termination grievance. Amor testified that the Grievance Committee did not make the motion or recommend to members that a legal opinion be obtained; at that point they had not yet considered the termination grievance. Kevin Yates, Local 481 President, testified that it was his recommendation to the membership meeting that a legal opinion be obtained. The minutes of the meeting respecting that motion noted that the legal opinion would be given to the Grievance Committee for final determination[8]. Gasper's view was that a legal opinion was not required; no one talked to her before it was requested.

[9] The motion passed at the May 4, 2016 membership meeting also directed the Chair of the Grievance Committee to accumulate information about the termination and request submissions from Rattray's advocate. That was not done. On June 24, 2016, following receipt of the legal opinion, the Grievance Committee met, in the absence of Rattray and Gasper, and passed a motion to not proceed to arbitration with his grievances.

[10] Gasper indicated that the proper process the Grievance Committee should have followed would have been to review a summary prepared by her and presented by her to the Grievance Committee. She would have been present to provide them with information and answer their questions, but not vote. In her view it was completely inappropriate that she was denied an opportunity to represent Rattray at the Grievance Committee meeting. Greg Eyre, another member of the Grievance Committee, agreed with that opinion and testified that the normal process would have been for Gasper to attend the Grievance Committee meeting to provide them with information but not vote. Kathy Mahussier, another labour relations officer with the Employer, agreed that Gasper should have been at the Grievance Committee meeting because she was the one who knew the file. Amor stated that a previous termination grievance (MH) was not treated very differently, but then admitted that his advocate was allowed to attend their meeting and provide information to the Grievance Committee.

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[7] Exhibit A-11.
[8] Exhibit A-12.

[11] Contrary to their usual practice, the Grievance Committee did not allow Gasper to attend their meeting to ensure they were making their decision on the basis of complete information. She was only advised of the meeting that morning. She was not allowed to attend or present any evidence or argument to the Grievance Committee. The information requested of Gasper in the three emails referred to above was not received by the Grievance Committee before they made a decision. Amor was of the view that the Grievance Committee had provided Rattray and Gasper with a sufficient opportunity to provide them with information.

[12] The Grievance Committee based their decision entirely on the legal opinion they obtained which, according to Rattray, was based on incomplete information. Rattray and Gasper were interviewed by the lawyer, Marcus Davies, by telephone. Gasper and Rattray testified that, on the telephone call with Davies, he supported moving forward to arbitration. They offered to provide him with medical information, to which his response was that he had enough information to recommend going forward to arbitration. However, the legal opinion[9] indicated "we would identify our chances of success at overturning the termination at 25%, and the chance of success in reinstatement of the grievor at <5%". Gasper was surprised when she read the opinion, and thought that the percentages of success made no sense.

[13] Rattray was not given an opportunity to correct what he viewed as Davies' misapprehension of the facts. This was contrary to what occurred in MH's termination case, where Davies initially recommended against arbitration but, following receipt of further information, changed his opinion. This allowed MH's grievance to move forward to arbitration resulting in a "significant and favourable outcome" for MH.[10] Rattray set out his specific concerns about the legal opinion in a detailed email to Ken Stuart, Manitoba/Saskatchewan Area Director for Unifor National, on June 28, 2016; Stuart's response was to tell him that his remedy was an appeal to the membership[11].

[14] Rattray provided evidence of the process followed in MH's termination, which he described as the usual process. None of Local 9841's witnesses disputed that characterization. In that case, MH's advocate (Rattray) was allowed to attend the Grievance Committee meeting to represent MH's interests, answer the Committee's questions, and provide them with a written brief setting

[9] The opinion was entered as Exhibit A-60.
[10] LRB File No. 022-17, Application, paragraph 4(13).
[11] Exhibit A-61.

out the argument for proceeding to arbitration[12]. No explanation was provided by Local 9841 of why Rattray and his advocate were not provided with the same process.

[15] Rattray's testimony, which was not disputed, was that Local 481's usual practice was to consider the legal opinion as only one factor to consider in making a determination whether to proceed to arbitration. Amor's view was that Davies had all the information that Rattray considered relevant, so that was sufficient. Davies looked at the information; the Grievance Committee did not need to review it too. It was because Rattray and Gasper had a chance to present his case to Davies that Amor thought Gasper did not need to be invited to the Grievance Committee meeting. Amor admitted that no one told Gasper or Rattray that his fate would be decided at the June 24, 2016 meeting. Gasper is an experienced labour relations officer. In her opinion, Rattray's grievances were not properly handled by the Grievance Committee.

[16] Later on the same day that the Grievance Committee met and rejected proceeding to arbitration (June 24, 2016), the Local 481 Executive passed a motion to support and uphold the recommendation of the Grievance Committee. Following the Grievance Committee meeting, Rattray appealed their decision to the membership. Before Rattray's appeal was heard by the membership, Stuart, at Local 481's request, negotiated a settlement of Rattray's termination grievance with the Employer. Even though she was Rattray's advocate, Gasper was not involved in the negotiations or consulted about the Settlement Agreement.

[17] On June 30, 2016 the Local 481 Executive passed a motion to accept the Employer's offer.[13] This motion was passed despite the fact that Rattray's appeal process was still underway. A Settlement Agreement was signed by the Employer on June 30, 2016 and by Local 481 on July 5, 2016. Rattray was not consulted about the settlement offer until after the Executive had voted to accept it and signed the Settlement Agreement. On July 5, 2016, Rattray sent an email to Stuart rejecting the offer[14]. Rattray was unaware the Settlement Agreement had been executed in June/July 2016 until the Employer sent it to him in September 2016.

[18] Exhibit A-62 contains a series of emails sent by Rattray on July 4, 2016. He set out his specific concerns with the process that had been followed to that date. Most important to this matter are the following:

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[12] Exhibit A-68.
[13] Exhibit A-12.
[14] Exhibit A-12.

- The Grievance Committee requested information from Gasper and never received it: Rattray and Gasper were told by Yates to hold off until the termination grievance was heard at Step 2, because a termination automatically goes to arbitration.

- The Grievance Committee did not inform Gasper that a meeting was being held until the day of the meeting. They prevented Gasper and Rattray from providing more information. They did not follow their usual practice that would have allowed Gasper to attend the meeting, make a presentation, answer their questions, then recuse herself while they made a decision: they denied her access to the meeting entirely.

[19] None of Local 9841's witnesses denied these statements. As a result of his concerns, Rattray asked the Grievance Committee to reconvene to make a decision on the basis of a full record. The next day, July 5, 2016, Amor replied on behalf of the Grievance Committee and indicated that the Committee would consider his request[15]. On July 14, 2016, Gasper also asked the Grievance Committee to reconvene[16], given the lack of discussion with her and absence of crucial arguments from the legal opinion. On July 25, 2016, Amor advised Rattray that the Committee met on July 11, 2016 and decided not to reconvene[17].

[20] On August 17, 2016, a Local 481 membership meeting was held at the Employer's head office in Regina to consider Rattray's appeal of the decision not to proceed to arbitration with his termination grievance. He noted that previously such meetings had been held off-site, with the appellant appearing in person. In this case, Rattray was told not to attend in person, but to phone in[18]; Gasper attended the meeting in person at the Regina office. Other members attended in person at the Regina, Saskatoon and Prince Albert offices or phoned in. Gasper had asked that the membership meeting be moved to a different location so Rattray could attend in person, but Yates refused the request. His rationale was that since other members would be participating by telephone, Rattray could also participate in the appeal process by telephone[19]. This made it impossible for Rattray and Gasper to confer privately during the appeal process.

[21] Gasper and Rattray each were given an opportunity to present his arguments, in detail. The notes of the meeting taken by Kathy Mahussier[20], another labour relations officer employed

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[15] Exhibit A-63.
[16] Exhibit U-3, Tab 20.
[17] Exhibit U-3, Tab 20.
[18] The Employer would not allow Rattray to enter their building.
[19] Exhibit A-8.
[20] Exhibit A-15.

by the Employer, indicate that the meeting was uncontrolled and frequently off topic. Despite his admitted conflict of interest, Yates chose to chair the meeting**.** It was not helpful to bringing forward facts to the members to have Rattray in his car. Gasper could not control Rattray, and he could not read the room. Rattray, alone in his car in the Employer's parking lot, without his advocate able to intervene, did not help his case with his outbursts during the meeting.

[22] In preparation for the membership meeting, members received information not just about Rattray's grievances but also about the complaints and charges he had filed against fellow members. According to Mahussier, this information upset many members. The discussion became personal and was not a debate on the merits of the appeal. Mahussier described the discussion as emotional, heated, out of control, with raised voices and people talking at the same time. None of Local 9841's witnesses disputed this description. There was also no contradiction of her assertion that the impact on the bargaining unit of proceeding or not proceeding to arbitration was not discussed.

[23] Local 9841 referred to Article 6 of its By-laws[21] as justification for the process it followed: Rattray's request for a review of the Grievance Committee's decision was scheduled for review at the next regular meeting[22]; Rattray was given a full opportunity to present his arguments; paragraph 2 allows members to participate via conference call "as facilities and technology permits".

[24] Rattray's view was that requiring him to phone in from the parking lot, and not having his advocate at his side, did not comply with the requirement that he be given a full opportunity to present his arguments. While he was allowed to read out his list of procedural issues[23] at the beginning of the appeal, they were not addressed. His request for a roll call at the end of the appeal submissions was also refused; a roll call was taken at the beginning of the meeting and again partway through the meeting. Since the third roll call was not taken, Rattray was unable to provide any evidence that anyone voted who had not heard the appeal. His interpretation of Article 6, paragraph 2, is that allowing members to call in from their cell phones was a contravention of the By-laws. Rattray's interpretation is that membership meetings can be held by conference call, but not appeals, which are always held in person. His appeal was the first to occur under the new By-laws that allow participation at membership meetings by conference call.

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[21] Exhibit A-70.
[22] It was rescheduled to the next following meeting at Rattray's request.
[23] Exhibit A-10.

[25] Another issue of controversy during the meeting was whether a motion passed at a previous meeting, that allowed for voting to occur electronically, applied to this vote. Rattray argues that a motion to change voting rules cannot change the By-laws; the By-laws can only be changed at an annual meeting and amendments are subject to approval of Unifor National. A vote was held using Survey Monkey, following the meeting. According to Rattray, the By-laws do not allow a vote to be held the next day by Survey Monkey and the By-laws do not allow for electronic voting. In fact, while the Elections Policy at Appendix B authorizes an Election Committee to adopt a form of electronic voting, the By-laws are silent with respect to voting procedures in this situation.

[26] Michael Sherar, Chair of Local 481's Membership Bylaws Elections Committee ["MBE Committee"], testified that although Local 481 had initially encountered security issues using the free version of Survey Monkey, it had switched to the more secure, subscription-based version before the August 17, 2016 meeting. Although there were rumours to the contrary, he was confident that no member would have been able to vote more than once on Rattray's appeal. The members voted to uphold the decision not to proceed to arbitration.

[27] Mahussier indicated that she could only recall one appeal being held at a membership meeting. It was held in person and the appellant attended. The documentation considered with respect to that appeal was distributed at the meeting, for the purpose of the appeal, then returned immediately after the vote, to protect the appellant's personal information. In this case, Rattray's personal information was distributed by email to all Local 481 members, with no admonition to keep it confidential.

[28] Exhibit A-16 contains minutes of a Local 481 membership meeting held on May 25, 2013 at a hotel. It was tendered as evidence of a proper way to run an appeal process. At that meeting an appeal hearing was held respecting a recommendation by the Grievance Committee to not proceed to arbitration with a grievance. A Grievance Committee member outlined their reasons; the grievor presented her reasons; the Grievance Committee representative provided a brief response; members were given an opportunity to ask questions for clarification; the two speakers left the room while the membership made their decision; the members of the Grievance Committee abstained from the vote. The meeting was held at a hotel so that the appellant could attend in person.

[29] Yates testified about the procedure at the membership meeting that considered Rattray's appeal. He said he chaired the meeting because that is what the Constitution requires. He said it was held at the Employer's office because it was to be dealt with at the next regularly scheduled

membership meeting and that is where Local 481 holds its membership meetings. Half of the people at the meeting participated by telephone. Being on the telephone did not change Rattray's ability to put forward his case. The members decided how often to do a roll call. He saw no need for another roll call at the end of the appeal. Knowing who was still in attendance would provide no guarantee they would have listened. Even if everybody had been in the same room, there is no way to determine if they are paying attention.

[30] As noted above, information about Rattray's complaints and charges against other members of Local 481 (to be discussed below) was sent to the membership with the information about the grievance appeal. Rattray argued that it should not have been sent. Yates said that the decision to share this highly controversial, personal, prejudicial information with the membership was due to lack of familiarity with the process to be followed, and not ill will.

[31] On or about September 29, 2016, Rattray received a deposit into his bank account from the Employer paying him the amount that Local 481 and the Employer had agreed to for settlement of his grievances. Unifor National advised Rattray that it was their understanding that no payment was to be made until Rattray had used his remaining two levels of appeal. Rattray indicated that he sent a cheque to the Employer, returning the funds, but the cheque was never cashed[24]. Under the Constitution, Rattray had a right of appeal to Unifor National from the decision of the membership. After the successorship agreement was signed, Unifor National has argued that the appeal can no longer proceed. The PRB process is still unresolved on this issue (see more on this, below).

Complaints/Charges against fellow members:

[32] Also in the mix during this time period were complaints and charges that Rattray had made against Larry Buchinski, Kevin Yates, the Local 481 Executive and the Local 481 Grievance Committee under the Unifor Constitution.[25]

[33] Rattray filed a charge against Buchinski on October 29, 2014. It was investigated by the MBE Committee and determined to be unfounded[26]. During the investigation, no one from the MBE Committee interviewed Rattray.

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[24] The Employer led no evidence to contradict this assertion.
[25] Throughout this time period, and during the hearing, there was confusion respecting whether Rattray had filed "complaints" or "charges". The By-laws set out different procedures for each.
[26] Exhibit A-1.

[34] On January 26, 2015 Rattray filed a second charge against Buchinski. Around the same time as this charge was to be considered by the MBE Committee, Buchinski filed harassment complaints against Rattray with the Employer that were eventually determined to be well-founded, following investigations and reports by three external investigators. Rattray's charge was then determined by the MBE Committee to be unfounded[27]. Again, Rattray was not interviewed by the MBE Committee before it made this decision.

[35] Rattray objected to this procedure as, in his opinion, Local 481 had no authority to deal with charges; the Constitution required that they be sent to the Unifor National office. The first charge was not sent to the Unifor National office for almost two years. Mahussier also testified that the charges were improperly handled because the MBE Committee misinterpreted the process described in the By-laws. The investigation is to be undertaken by Unifor National, not the MBE Committee. The role for Local 481 under the Constitution with respect to charges is to ensure they are "proper"[28], then send them to Unifor National; it was not Local 481's job to consider the merits. Despite this, Local 481 delayed forwarding the first charge to the Unifor National office for almost two years.

[36] Rattray filed the charge against the Grievance Committee with the MBE Committee on July 27, 2016.[29] It is not clear from the evidence when the charge against the Executive was filed, but by August 17, 2016, all the charges had been received by the Unifor National office for their consideration.[30]

[37] In November 2016, Rick Garant from Unifor National advised Rattray and others that he intended to hold a hearing on Rattray's charges as soon as he was able to arrange a date[31]. Unfortunately for Rattray, Unifor National's expulsion of Local 481 intervened and the promised hearing was never held.

[38] On December 23, 2016, Rattray received a letter from Unifor National indicating that, given Unifor National was no longer in a position to impose any finding against the persons Rattray complained against, since they were no longer Unifor members, the scheduled hearing would be

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[27] Exhibit A-2.
[28] Exhibit A-70, Local 481 By-laws, Appendix C, paragraph 31: "A charge shall be considered proper if there are facts or information which indicates that an apparent case of violation of the constitution may have taken place. An accusation which is considered frivolous or vexatious shall not be considered proper. A charge which is irregular as regards its timeliness or specificity shall not be considered proper".
[29] Exhibit U-3.
[30] Exhibit A-26.
[31] Exhibit A-27.

cancelled[32]. In response, the same day, Rattray sent a request under the Constitution for a "further and final review" by the PRB[33]. Unifor National's President responded on January 30, 2017, indicating that Rattray's request for a review by the PRB would not be processed since the PRB did not have jurisdiction to review Unifor National's policies or provide an effective remedy[34]. Not content with this response, Rattray contacted the PRB directly, who agreed with Rattray that the request for review needed to be sent to them, and eventually his request for review was sent to the PRB[35].

[39] On November 24, 2017, the PRB issued a Decision, which they summarized as follows:

> *THE REQUEST FOR A REVIEW IS DENIED IN PART. THE PRB DOES NOT HAVE JURISDICTION TO REVIEW THE REVOCATION OF LOCAL 481'S CHARTER, BUT REVIEWS BY THE PRB OF THE HANDLING OF GRIEVANCES AND CHARGES IS SUSPENDED PENDING FINAL DISPOSITION AT THE SASKATCHEWAN LABOUR RELATIONS BOARD.*[36]

[40] The PRB noted that only if this Board was to decide "that Local 481's Charter had not been revoked lawfully and/or that Unifor continues to be the exclusive bargaining agent for SGEU's employees" would it be appropriate for them to "proceed with a review of the manner in which Mr. Rattray's grievances were handled and/or proceed with an appeal with respect to Mr. Rattray's charge-related concerns". In the absence of such a decision by this Board, the PRB would be unable to impose a meaningful remedy, even if it found in Rattray's favour.

[41] Rattray also filed a complaint against Yates, on February 19, 2016, alleging bad faith and conflict of interest. The MBE Committee found it had no authority to take action respecting the alleged conflict of interest, and found insufficient evidence of bad faith[37].

[42] The By-laws set out a procedure for investigating membership complaints. They require the MBE Committee to consult with the grievant, permit him or her a full opportunity to be heard, and provide the grievant their written decision within seven days. None of these procedures was followed with respect to Rattray's complaint. Even though this case was called a complaint, it was sent to Unifor National with the charges, and suffered the same end.

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[32] Exhibit A-41.
[33] Exhibit A-42.
[34] Exhibit A-43.
[35] Exhibits A-46 to A-49.
[36] Final paragraph of Exhibit A-51.
[37] Exhibit A-3.

Argument on behalf of Rattray:

[43] Rattray argues that there are many examples of actions taken by Local 481 that were arbitrary, discriminatory and in bad faith. He relies on the list of procedural issues that he read out at the beginning of his appeal at the membership meeting on August 17, 2016:

> *1. The grievance committee did not provide advance notice to the griever or his advocate of the meeting.*
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> *2. Hannah Gasper, the advocate for the griever was precluded from the grievance committee review of the grievance files. Hannah is a member of the committee.*
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> *3. The grievance committee only considered the legal opinion to decide whether or not to arbitrate.*
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> *4. The grievance committee ignored evidence from the griever and advocate of significant issues not considered in the legal opinion.*
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> *5. The grievance committee denied a request to have a conference call with Marcus Davies and us to discuss his opinion.*
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> *6. The Executive of Local 481 ignored a special meeting request with over 25% of member signatures.*
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> *7. Four members of the Executive were party to the employer's disciplinary campaign against the griever.*
>
> *8. Membership charges/complaints against the President and Treasurer were mishandled and did not follow process. They have only recently been forwarded to the National for investigation. These charges are significantly intertwined with the grievances and without a proper review omits cogent evidence. 21 months have passed since the first complaint was made without recourse.*
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> *9. The Executive refused to allow the griever to attend the appeal on August 17, 2016 in a location where he could attend. Further the Executive used the employer's determination of harassment where the griever was refused his right to appeal and is currently under grievance.*
>
> *10. Conference call number can be overheard by anyone with the code. There are issues with noise and confidentiality.*[38]

[44] Most egregious of these, says Rattray, was the exclusion of Gasper from the meeting of the Grievance Committee at which they decided not to proceed to arbitration with his grievances. This had never occurred before. The grievor's advocate was always allowed to attend and present the grievor's case. Eyre confirmed this. This is an example of arbitrary treatment.

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[38] Exhibit A-10.

[45] Gasper asked that the location for the August 17, 2016 appeal meeting be changed so that Gasper and Rattray could attend together. This request was refused.[39] Mahussier gave evidence respecting another appeal to the membership, where that member was also not allowed on the Employer's property, resulting in the meeting being held at a different location. That case indicated that Local 481 considered it important for the grievor to be present at the appeal meeting. No reasonable explanation was given by Local 9841's witnesses respecting why the same practice was not followed in this case.

[46] At the membership meeting Gasper argued that the use of Survey Monkey for a vote the next day is a contravention of the Grievance and Arbitration Policy. This was ignored.

[47] At the membership meeting, Yates indicated that all decisions were based on the legal opinion. This was not the usual practice and, in any event, the legal opinion was flawed because it was based on incomplete or misunderstood information.

[48] Providing information respecting Rattray's complaints and charges to the membership prejudiced them against him. Yates admitted that the information respecting the complaints and charges should not have been sent to the membership.

[49] Local 481 settled his grievances, without Rattray's involvement or even his knowledge. This was a further indication of bad faith and arbitrary treatment. Rattray and Gasper were not advised that Local 481 had entered into a Settlement Agreement until several months after it was complete. Local 481 negotiated a settlement with the Employer, then kept it a secret while they set up an appeal meeting in a manner destined to fail.

[50] The Settlement Agreement was signed by Local 481 on July 5, 2016.[40] Rattray was not aware of this until the money was deposited into his account on September 29, 2016. The Grievance Policy required that a settlement at Step 1 or 2 not be confirmed until it had been reviewed with Rattray and Gasper. That requirement was ignored.

[51] Exhibit A-12 is a record of various meetings respecting Rattray's grievances. At none of these was Gasper present to advocate on Rattray's behalf. This is a denial of natural justice and a contravention of the Grievance and Arbitration Policy. This had never been done before in Local 481.

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[39] Exhibit A-8.
[40] Exhibit A-31.

[52] Rattray filed two charges against Buchinski and a complaint against Yates. They were not handled in a timely manner. When an investigation was done, he was not questioned by the investigators. This was admitted by Local 9841's witnesses. This is a contravention of the principles of natural justice, and another indication that he was not being treated fairly.

[53] Local 481 undertook a premeditated course of seeking to undermine Rattray. A defence of no malicious intent is not open to them. They held discussions in secret, and negotiated in secret, without telling Rattray or Gasper. They actively worked to disadvantage Rattray.

[54] Rattray relied on three cases, the first of which was *Prebushewski v. Canadian Union of Public Employees, Local No. 4777*[41] ["*Prebushewski*"], in which the Board reviewed the interpretation of arbitrariness in a duty of fair representation application. In that case, there was no evidence of personal hostility or animosity toward the applicant by the union. In paragraph 63, the Board quoted at length from *Hargrave, et al v Canadian Union of Public Employees, Local 3833, and Prince Albert Health District*[42], in which the Board relied on a number of cases that considered the definition of arbitrariness, including the following:

> *Through various decisions, labour boards, including this one, have defined the term "arbitrary." Arbitrary conduct has been described as a failure to direct one's mind to the merits of the matter; or to inquire into or to act on available evidence; or to conduct any meaningful investigation to obtain the data to justify a decision. It has also been described as acting on the basis of irrelevant factors or principles; or displaying an indifferent and summary attitude. Superficial, cursory, implausible, flagrant, capricious, non-caring or perfunctory are all terms that have also been used to define arbitrary conduct. It is important to note that intention is not a necessary ingredient for an arbitrary characterization.*[43]

[55] Rattray argued that, based on that description, Local 481's actions toward him were arbitrary. In *Prebushewski*, the actions that the Board found amounted to a contravention of the duty of fair representation were: acting on the basis of erroneous information; failing to communicate its decision to the applicant in a timely fashion; and failing to advise the applicant of her right to ask the executive committee to reconsider its decision. The Board appeared to place considerable emphasis on the fact that the grievance at issue was, as here, a dismissal grievance: "The seriousness of the consequences for the Applicant is part of the circumstances within which the actions of the Union must be measured"[44].

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[41] 2010 CanLII 20515 (SK LRB).
[42] [2003] Sask LRBR 511, LRB File No. 223-02.
[43] *Rousseau v International Brotherhood of Locomotive Engineers et al.*, 95 CLLC 220-064 at 143, 558-9 (CLRB).
[44] At para 70.

[56] Rattray also referred to *Berry v Saskatchewan Government Employees Union*[45] and *Saskatchewan Government Employees Union v Saskatchewan (Labour Relations Board) and Berry* [46]. The Board made the following comments in coming to the conclusion that the union had contravened its duty of fair representation:

> *20 The terms "arbitrary," "discriminatory," and "in bad faith," which are used in the legislative description of the kind of conduct on the part of a trade union which is to be prevented, have been held to address slightly different aspects of the duty. The Supreme Court in Gagnon used the following comments from the decision of the British Columbia Labour Relations Board in Rayonier Canada (B.C.) Ltd. (1975), 2 CLRBR 196, at 201, to convey the distinct attributes of the duty of fair representation:*
>
> > *... The union must not be actuated by bad faith, in the sense of personal hostility, political revenge, or dishonesty. There can be no discrimination, treatment of particular employees unequally whether on account of such factors as race and sex (which are illegal under the Human Rights Code) or simple, personal favouritism. Finally, a union cannot act arbitrarily, disregarding the interests of one of the employees in a perfunctory manner. Instead, it must take a reasonable view of the problem before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations*.
>
> *21 This Board has also commented on the distinctive meanings of these three concepts. In Glynna Ward v. Saskatchewan Union of Nurses, LRB File No. 031-88, they were described in these terms:*
>
> > *Section 25.1 of The Trade Union Act obligated the union to act "in a manner that is not arbitrary, discriminatory, or in bad faith". The union's obligation to refrain from acting in bad faith means that it must act honestly and free from personal animosity towards the employee it represents. The requirement that it refrain from acting in a manner that is discriminatory means that it must not discriminate for or against particular employees based on factors such as race, sex or personal favouritism. The requirement that it avoid acting arbitrarily means that it must not act in a capricious or cursory manner or without reasonable care. In other words, the union must take a reasonable view of the problem and make a thoughtful decision about what to do*.
>
> *22 In the case of Gilbert Radke v. Canadian Paperworkers Union, LRB File No. 262-92, this Board observed that, unlike the question of whether there has been bad faith or discrimination, the concept of arbitrariness connotes an inquiry into the quality of union representation. The Board also alluded to a number of decisions from other jurisdictions which suggest that the expectations with respect to the quality of the representation which will be provided may vary with the seriousness of the interest of the employee which is at stake. They went on to make this comment:*
>
> > *What is expected of trade union officials in their representation of employees is that they will act honestly, conscientiously and without prejudgment or favouritism. Within the scope of these criteria, they may be guilty of honest*

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[45] 1993 CarswellSask 518; [1993] SLRBD No 62; 4th Quarter Sask Lab Rep 65.

[46] [1994] SJ No 618; 127 Sask R 163; 1994 CarswellSask 437 (Sask QB). Appeal to Saskatchewan Court of Appeal dismissed: *SGEU v Saskatchewan (Labour Relations Board)*, 1995 CarswellSask 309, 131 Sask R 246. The appeals addressed only the appropriate remedy and not the finding of a breach of the duty of fair representation.

> *errors or even some laxity in the pursuit of the interests of those they represent. In making decisions about how or whether to pursue certain issues on behalf of employees, they should certainly be alert to the significance for those employees of the interests which may be at stake. Given the importance of the employee interests the union has the responsibility to pursue, they should also carry out their duties seriously and carefully. The ultimate decision made or strategy adopted, however, may take into account other factors than the personal preferences or views of an individual employee*.

[57] Rattray argues that, taken as a whole, Local 481's actions did not comply with its duty of fair representation of him. Local 481 acted in a manner that was arbitrary, discriminatory and in bad faith.

[58] Rattray argues that both Local 9841 and Unifor National bear responsibility for this contravention of the duty of fair representation. During this time period, Rattray was also raising his concerns with representatives of Unifor National. They provided him with no assistance in having his process concerns addressed.

Argument on behalf of Local 9841:

[59] Local 9841 acknowledges that it is the successor to Local 481, and has assumed all the rights and obligations of Local 481.

[60] It argues that the onus of proof is on Rattray. While he may have suspicions about what led to Local 481 proceeding as it did, he was unable to provide evidence that it acted in an arbitrary or discriminatory manner or in bad faith. The Board cannot make a decision on the basis of speculation and innuendo.

[61] Unifor National does not have any obligations under sections 6-58 and 6-59, as it is not Rattray's bargaining agent. The Board has issued a certification order naming Local 9841 the exclusive bargaining agent. This followed a transfer of obligations from Local 481 to Local 9841. It is only Local 481, and now Local 9841 as its successor, Rattray's bargaining agent, who owe a duty of fair representation to Rattray under sections 6-58 and 6-59.[47]

[62] In the alternative, if the Board finds that Unifor National owes a duty to Rattray under section 6-58 or 6-59, and these duties were not met, Local 9841 has not assumed responsibility

[47] *Martel v Christian Labour Association of Canada, Local 151*, 2003 CanLII 62880 (SK LRB).

for those actions. The Local and the National are separate entities.[48] Local 9841 only assumed the rights and liabilities of Local 481. If there is any liability on Unifor National, Local 9841 is not answerable for those actions.

[63] With respect to the handling of his grievances, Local 9841 argues that it fairly represented Rattray: it gathered information, obtained a legal opinion, and took a considered decision to accept a reasonable settlement offer rather than proceed to arbitration. It argues that Rattray had four opportunities to participate in its decision to settle rather than arbitrate his grievances: in the grievance process between Local 481 and the Employer; in the Grievance Committee's processes (which Rattray largely ignored or neglected to engage in); in providing information and input to the lawyer providing a legal opinion to the Grievance Committee; and in the appeal to the membership.

[64] Local 9841 relies on the interpretations of the concepts of "arbitrary, discriminatory or in bad faith" that were established by the Ontario Labour Relations Board in *Toronto Transit Commission*[49]:

> *. . . a complainant must demonstrate that the union's actions are:*
>
> *(1) "ARBITRARY" – that is, flagrant, capricious, totally unreasonable, or grossly negligent* [citation omitted]*; or*
>
> *(2) "DISCRIMINATORY" – that is, based on invidious distinctions without reasonable justification or labour relations rationale; or*
>
> *(3) "in BAD FAITH" – that is motivated by ill-will, malice, hostility or dishonesty.*

[65] It also refers to paragraph 10 of that decision:

> *The Board in paragraph 7 of MILAN ALAICA v. CAW-CANADA, LOCAL 1524, SUPRA, goes on to say:*
>
> > *7. The behaviour under review must fit into one of these three categories. It must be "arbitrary", "discriminatory", or undertaken "in bad faith". Mistakes or misjudgements are not illegal; moreover, the fact that an employee fails to understand his rights under a collective agreement or disagrees with the union's interpretation of those rights does not, in itself, establish that the union was wrong - let alone "arbitrary", "discriminatory" or acting "in bad faith".*

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[48] *Fullowka v Pinkerton's of Canada Ltd.*, 2010 SCC 5 (CanLII), [2010] 1 SCR 132; *Brooker v Unifor*, 2017 CanLII 35714 (BC LRB); *Cherubini Metal Works Ltd. v United Steelworkers of America*, 2011 NSSC 94 (CanLII); *Canadian Union of Public Employees v Hachey et al.*, 2011 NBCA 41 (CanLII).
[49] [1997] OLRD 3148, at para 9.

[66] Local 9841 argues that the disclosure of the information about the complaints and charges Rattray made against other members, to the entire membership, in preparation for the appeal, cannot be considered to support his Applications. The information was true. Rattray also spoke about it during the appeal proceeding. Local 9841 argues that ensuring the members had knowledge of the full circumstances supports its position that it properly exercised its duties.

[67] Local 9841 denies that holding the appeal on the Employer's property is evidence of arbitrary behaviour. It says it had, almost a year before, made a decision to hold membership meetings by telephone, instead of in person, to allow meetings to occur more frequently, reduce costs, and increase participation. The By-laws required the appeal to be heard at a membership meeting. Many of the participants in the meeting attended by telephone, so having Rattray participate by telephone is not evidence of arbitrary, discriminatory or bad faith behaviour. It also argues that electronic voting is less intimidating for members than a show of hands and more confidential.

[68] Local 9841 argues that it was not required to have Rattray and/or Gasper present on all occasions when his grievances were being discussed, either within Local 481 or with representatives of the Employer.[50]

[69] Local 9841 referred the Board to several cases in support of its argument that a decision not to refer a grievance to arbitration, and a decision to settle a grievance over the objection of the grievor is not, without proof of actions that are seriously negligent, arbitrary, capricious, discriminatory or wrongful, a breach of its duty of fair representation.[51] It argues that it complied with the principles, that the Board adopted for assessing the merits of a duty of fair representation claim, in *Zalopski* v *Canadian Union of Public Employees, Local 21*.

[70] Local 9841 argues that the Board should not second-guess the legal opinion it obtained respecting Rattray's grievances, or its decision to rely on it in assessing the merits of the grievances.[52]

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[50] *KH v CEP, Local 1-S and SaskTel*, [1997] Sask LRBR 476 (SK LRB); *Vandervort v University of Saskatchewan Faculty Association*, [2003] Sask LRBR 147 (SK LRB).
[51] For example, *Gibson v Communications, Energy and Paperworkers Union of Canada, Local 650 and Fantastic Cleaning Inc.*, [2002] Sask LRBR 574; *Zalopski v Canadian Union of Public Employees, Local 21*, 2017 CanLII 68784 (SK LRB).
[52] *MacNeill v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, 2005 CanLII 63107 (SK LRB); *Presseault*, 2001 CIRB 138 (CanLII).

[71] Local 9841 asks the Board to ignore the issues of conflict of interest raised by Rattray. In its view, it took steps to respond to his allegations, that Rattray accepted at the time. In its view, only when individuals disagreed with Rattray did he claim they were in conflict with him and should not have a role in decision-making about him. Even if there were conflicts of interest, Rattray has not proven that they affected Local 481's representation of him, and therefore they should be disregarded.[53]

[72] The Act provides the Board with supervisory powers over the procedures, but not the substantive decisions, of Local 481. Rattray has not provided the Board with evidence that the procedures followed by Local 481 were arbitrary, discriminatory or in bad faith.

[73] Rattray was dissatisfied with the manner in which his complaints and charges against members of Local 481 were handled by Unifor National and Local 481. Local 9841 argues that, as complainant, Rattray is owed minimal procedural rights.[54] In its view, the question about which they disagree is the proper interpretation and application of the Constitution, not a question about the fairness of the process employed in addressing the complaints and charges. That means the subject matter of Rattray's allegation is not within the Board's jurisdiction.[55] Further, because Unifor National is not Rattray's bargaining agent, his allegations against it are beyond the jurisdiction of the Board.

[74] With respect to remedy, Local 9841 argues that there is no basis for an award of damages. The purpose of an award of damages by the Board would be to make Rattray whole, not punish Local 9841. Rattray has already received a payment under the Settlement Agreement of $35,242.23. Even if the Board considers damages an appropriate remedy, a further hearing would be required to determine the amount. No labour relations purpose would be served by making a Declaratory Order.

Argument on behalf of Unifor National:

[75] Unifor National adopted all of Local 9841's arguments. In addition, Unifor National argues that this Board should follow the decision made in *Brooker v Unifor*[56]. That case addressed an

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[53] *Banks v Canadian Union of Public Employees, Local 4828*, 2013 CanLII 55451 (SK LRB).
[54] *Walker v Health Professions Appeal and Review Board*, 2008 CanLII 7755 (ON SCDC); *Aylward v Law Society of Newfoundland and Labrador*, 2013 NLCA 68 (CanLII).
[55] *McNairn v United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 179*, 2004 SKCA 57 (CanLII); *Westfield v Canadian Union of Public Employees, Local 8443*, 2017 CanLII 20062 (SK LRB).
[56] 2017 CanLII 35714 (BC LRB).

application brought by a local whose Charter was also revoked by Unifor National, on November 11, 2016. The British Columbia Labour Relations Board held that the dispute did not fall within its jurisdiction.

[76] Unifor National also argues that no negative inference should be drawn against it for not providing the Board with any evidence. It was satisfied that all necessary evidence was already before the Board.

Argument on behalf of Employer:

[77] The Employer argues that it did nothing wrong in this case. It followed the grievance procedure in the collective bargaining agreement. It did not effect the settlement until after the membership had voted on Rattray's appeal. There is no basis on which to award damages against the Employer.

Relevant Statutory Provisions:

[78] Rattray's Applications rely on two provisions of the Act:

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

Analysis and Decision:

Section 6-59:

[79] Rattray's Applications rely on both sections 6-58 and 6-59 of the Act. Most of the hearing focused on section 6-59 and whether Local 481 and Unifor National had breached their duty of fair representation. Turning first to Unifor National, the Board finds that Unifor National has no duty under section 6-59. It applies only to an employee's bargaining agent. In this case the bargaining agent was Local 481. Pursuant to the Certification Order issued by the Board and the agreement entered into by Local 481 and Local 9841, Local 481's duties and obligations have been assumed by Local 9841.

[80] According to Local 9841, Unifor National and its locals are separate entities. The cases relied on by Local 9841 do not, as it suggests, stand for the rule that they are always separate entities. As *Fullowka v Pinkerton's of Canada Ltd.* stated:

> *There is no doubt that union locals may have an independent legal status and obligations separate from those of their parent national unions. Whether they do depends on the relevant statutory framework, the union's constitutional documents and the provisions of collective agreements.*[57]

[81] Local 9841 provided no evidence to support its assertion that Unifor's Constitution gives its locals an independent legal status. However, the onus of proof is on Rattray, and he submitted no evidence or argument to support his assertion that Unifor National owed him a duty pursuant to section 6-59. In his Reply to the Application for Summary Dismissal of his first Application (LRB File No 012-17), he admitted that Unifor National and Local 481 were separate entities.

[82] As a result, the duty of fair representation under section 6-59 falls solely on Local 9841, as the successor union to Local 481. The Board was provided with many precedents to consider in this matter, reaching back to the oft-cited 1975 decision of the British Columbia Labour Relations Board in *Rayonier Canada (B.C.) Ltd.*[58], which held that the cumulative effect of several relevant features are to be considered in duty of fair representation applications:

- How critical is the subject matter of the grievance to the interest of the employee concerned?

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[57] *Supra*, at para 119.
[58] (1975), 2 CLRBR 196; (1975) CarswellBC 1238 at para 25 (BCLRB).

- How much validity does his claim appear to have, either under the language of the agreement or the available evidence of what occurred, and how carefully has the union investigated these?

- What has been the previous practice respecting this type of case and what expectations does the employee reasonably have from the treatment of earlier grievances?

- What contrary interests of other employees or of the bargaining unit as a whole have led the union to take a position against the grievor and how much weight should be attached to them?

[83] A consideration of these questions leads to a finding that Local 481 breached the duty of fair representation it owed to Rattray. The subject matter of the grievance, his employment, was critical. Local 481 did not carefully investigate. It did not follow its previous practice. It did not argue that any contrary interests were considered in making its decision.

[84] Nine years later, in *Canadian Merchant Service Guild v. Gagnon et al.*[59] the Supreme Court of Canada noted:

> *The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*
>
> *1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
>
> *2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
>
> *3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*
>
> *4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*
>
> *5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.*

[59] 1984 CanLII 18 (SCC), [1984] 1 SCR 509 at page 527.

[85] Local 481's actions in this matter do not lead the Board to a conclusion that it properly exercised its discretion when it chose not to proceed to arbitration. The evidence does not satisfy the Board that its discretion was exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for Rattray on the one hand and Local 481 on the other. Neither did it comply with principle 4 or 5 in making its decision.

[86] Local 9841 argues that this Board has decided on numerous occasions that a union can enter into a settlement agreement with an employer without the grievor's consent. The right to decide whether to take a grievance to arbitration is reserved to the union.[60] While this is accurate, that is not the end of the matter. The Board has also emphasized in those cases that unions must exercise great care and restraint in the exercise of that discretion when the job interests involved in the grievance are critical to the individual employee. No job interest could be more critical to an employee than a grievance respecting his termination. The Board must analyze Local 481's actions to determine whether it acted in an unreasonable or arbitrary manner, disregarding Rattray's interests or treating them in a manner that could be considered perfunctory. In deciding not to proceed to arbitration and to instead enter into a Settlement Agreement with the Employer, the Board must assess whether Local 481 conducted a thorough analysis of the many factors that were before it and made a thoughtful decision not to advance the grievance to arbitration. The evidence satisfied the Board that Local 481 did not meet these requirements.

[87] In *Coppins v. United Steelworkers, Local 7689*[61] ["*Coppins*"], the Board addressed a case in which the fate of the grievor was left to a vote of the membership:

> *[39] In its decision in Stewart Kelly Read v. Amalgamated Transit Union, Local 615 and the City of Saskatoon, the Board noted its earlier decision in Gordon W. Johnson v. Amalgamated Transit Union, Local 588, wherein the Board had noted that the taking of a grievance to a membership meeting to determine if it should be submitted to arbitration was inherently arbitrary. In Gordon W. Johnson, the Board says:*
>
> > ***Mr. McCormick and the other members of the executive took what steps they could to ensure that the members of the bargaining unit were properly briefed prior to the vote, and that they understood that the executive was in favour of proceeding to arbitration.*** *The mechanism of the vote among the entire group of employees, many of whom had not participated in the discussion at the membership meeting, and some of whom may not have been in possession of any information beyond what*

[60] *Gibson v. Communications, Energy and Paperworkers Union of Canada, Local 650*, 2002 CanLII 52904 (SK LRB); *Vandervort v. University of Saskatchewan Faculty Association*, [2003] Sask LRBR 147 (SK LRB); *MacNeill v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, 2005 CanLII 63107 (SK LRB); *Koop v. Saskatchewan*, 2009 CanLII 53732 (SK LRB).
[61] 2016 CanLII 79633 (SK LRB).

> *was on the notice was, in our opinion, inherently arbitrary as a means of making a decision about the fate of an individual employee, however useful it might be as a means of obtaining direction about issues of more general significance.* [emphasis in original]
>
> *[40] This concern is further highlighted by the arguments of both the Applicant and the Union. The Applicant argues he was denied the opportunity (due to the scheduling of the meeting) to have his supporters come out to the meeting to vote on his behalf. Similarly, the Union suggested that such a vote should not become a "popularity contest".*
>
> *[41] There was no evidence to determine what the parameters were that the membership was voting on. Was it based on personal popularity, monetary concerns, or the strength of the legal opinion? No evidence was provided as to the exact nature of the question posed to the group present at the meeting.*

[88] In *Coppins*, the Board remitted the matter back to the grievance committee: "The decision as to whether or not the grievance should proceed to arbitration was properly in the hands of the grievance committee and should have been resolved at that stage"[62]. The vote by the membership in this matter was even more egregious. Local 481 did not take steps to ensure the process was fair to Rattray; it did the opposite. All of the witnesses agreed that much of the discussion at the appeal meeting was not focused on the merits of Rattray's grievances. It was a popularity contest that Rattray lost.

[89] *Hartmier v Saskatchewan Joint Board Retail Wholesale and Department Store Union and Retail, Wholesale and Department Store Union, Local 955*[63] ["*Hartmier*"] emphasized this point:

> *These authorities clearly demonstrate that a process in which the Union effectively delegates the question of whether a member's grievance should be sent to arbitration to a vote by its membership, is fraught with danger. Such a process makes it extremely difficult, if not impossible, to identify with any degree of precision what are the true reasons motivating the membership's final decision. Furthermore, a decision reflected in a majority vote is not amenable to explanation or to third party scrutiny, nor, more importantly, is it accountable to the member or members directly affected by it. Instead, it leaves those members and, ultimately, this Board with only "the most impressionistic understanding of what may have motivated people to vote in the way they did." See: Gilles Charlebois v Amalgamated Transit Union, Local 279 (1993), 91 di 14 (CLRB no. 989), aff'd Charlebois v Amalgamated Transit Union, Local 279 et al. (1994), 169 NR 144 (FCA), at 22.*

Those comments apply equally to the membership vote here.

[90] *Hartmier* set out four criteria that a union must fulfill to meet its duty of fair representation:

- conduct a proper investigation into the full details of the grievance;

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[62] At para 43.
[63] 2017 CanLII 20060 (SK LRB) at para 204.

- clearly turn its mind to the merits of the grievance;
- make a reasoned judgment about its success or failure; and
- if it decides not to proceed with the member's grievance, provide clear reasons for its decision.[64]

[91] As in *Hartmier*, none of these criteria was satisfied in this case. There was no serious investigation into the circumstances of, and the context underlying, Rattray's grievances, particularly the termination grievance. If the Grievance Committee was running out of patience in waiting for Rattray and Gasper to provide them with information respecting his perspective, that was never communicated to Rattray or Gasper. No explanation was provided for this decision. No request for information was made of them by the Grievance Committee following the filing of the termination grievance.

[92] The evidence did not show that the members of the Grievance Committee gave any, let alone thoughtful, consideration, to the merits of these grievances. The By-laws state that "It shall be the duty of this Committee to review, investigate and determine the merits of all grievances"[65]. They did not carry out their duty in this matter. The evidence of Gasper and Rattray respecting the regular practice of the Grievance Committee is compelling, since they were both members of the Grievance Committee. Rattray's account of how he handled MH's termination grievance reflected an appropriate course of action that complied with Local 481's duty of fair representation. As MH's advocate, Rattray appeared at the Grievance Committee, provided the facts from MH's perspective and answered their questions; the Grievance Committee ensured itself that it had all relevant facts before it made a decision; when a legal opinion was received that appeared to be based on a misunderstanding of the facts, Rattray, as MH's advocate, was allowed to speak to the lawyer again, clarify the misunderstandings, and obtain a revised legal opinion that recommended proceeding to arbitration.

[93] The evidence indicates that the Grievance Committee made several requests for information to which Gasper responded that she was very busy but would get it to them. In the end, the Committee met before receiving the promised information, but without advising Gasper or Rattray of the date of the meeting until it was too late for them to provide written material in advance, and without allowing Gasper to attend and provide oral information. They had an

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[64] At para 213.
[65] At para 11(3)(d)(I).

opportunity to correct this egregious error when Gasper and Rattray asked them to reconvene, but they declined. While it is understandable that they may have been frustrated by the delay in receiving the requested information, to meet without any submissions on behalf of Rattray was inexcusable.

[94] Even if Local 9841's suggestion (they led no evidence on this issue) that Gasper and Rattray misunderstood the lawyer's intention when he indicated he needed nothing more from them, that does not explain why the Grievance Committee would not allow Gasper and Rattray to have another discussion with him to clarify his misunderstandings and provide him with the personal health information that Rattray had offered to provide to him.[66]

[95] These factors, together with the fact that the decision respecting Rattray's grievances was left to a vote of the membership, lead to the conclusion that Local 481 acted in arbitrary manner. Local 481 did not act honestly, conscientiously and without prejudgment or favouritism. It did not make a reasoned judgment about the grievances' likely outcome.

[96] Local 481 did not provide Rattray with clear reasons for its decision to accept the Employer's settlement offer. In fact, it never told him they had done so. He received this information from the Employer three months later.

[97] Local 9841 invited the Board to review its actions in light of the principles set out in *Zalopski v Canadian Union of Public Employees, Local 21*:

> - *The Union need not take every grievance to arbitration. It need not take a grievance to arbitration just because the grievor asks the Union to do so. The Union is entitled to assess the merits of the grievance, the chances of success at arbitration, the costs of the arbitration process and other factors when deciding whether or not to advance a grievance to arbitration.*
>
> - *The Board focuses its examination on the Union's conduct and considerations while the Union represented the employee and in making its decision, rather than on the merits of the grievance, which is the question an arbitrator would answer.*
>
> - *The Union is entitled to make a wrong decision, as long as it fairly and reasonably investigates the grievance and comes to an informed decision.*
>
> - *The Union must give the employee a fair opportunity to present the employee's own case to the Union and to provide input on the result of the Union's investigation.*

[66] Local 9841 suggested that the Board should draw a negative inference against Rattray from the fact that he did not provide the Board with evidence of this personal health information. However, that information would only be relevant if the Board's role was to consider the merits of the grievance in making this decision. The Board's role is to consider the procedure, not the content of the grievance.

- *The Union should communicate fairly with the employee about all aspects of its representation. Communication with the employee can play a significant role in representation, but the union need not take direction from the employee or answer all questions to the employee's satisfaction nor must it act within the employee's time limits.*

- *A Union does not breach its duty of fair representation just because it reaches a conclusion with which the employee does not agree.*[67]

[98] A review of those principles also leads the Board to the conclusion that Local 481 failed to comply with its duty to fairly represent Rattray. It did not give thorough consideration to the merits of his grievance or its chance of success at arbitration. It did not fairly and reasonably investigate the grievance and come to an informed decision. The Grievance Committee did not give Rattray a fair opportunity to present his case; he had no chance to provide input on the result of their investigation, as they did no investigation. Local 481 did not communicate fairly with him; the Grievance Committee did not give his advocate advance notice of and an opportunity to attend the meeting at which his fate would be decided. Local 481 did not communicate with him during its negotiations of the Settlement Agreement with the Employer, or even after it decided to accept the Employer's offer and signed the Settlement Agreement.

[99] The problem is not that Rattray disagreed with Local 481's conclusions. The evidence indicated a troubled, politicized workplace that was divided into camps. In this situation, there was even more of an onus on Local 481, especially the Grievance Committee, to ensure that they were complying with the duty of fair representation they owed to Rattray.

[100] While we will never know what the outcome of a potential arbitration hearing might have been if Rattray had been afforded a fair opportunity to present his case, what is clear is that Local 481's Executive and Grievance Committee went out of their way to ensure that Rattray's interests would not be protected. There is no question that Local 481 did not uphold its duty of fair representation of Rattray, and instead acted toward him in a manner that was arbitrary, discriminatory and in bad faith.

[101] In Yates' testimony he suggested that some mistakes were made because they were a small local that did not have a lot of experience with handling complaints. While this may have been true with respect to the complaints and charges, it does not apply to his grievances. As labour relations officers, their job included representing the Employer's members in grievances. Amor testified that in Local 481 there were 18 labour relations officers, including Amor and Eyre

[67] At para 40.

(two of the three members of the Grievance Committee who made the decision not to proceed with Rattray's grievances) and Yates. It is disingenuous for him to suggest that they did not know how to proceed.

[102] The Board finds that Local 481/9841 contravened the duty of fair representation that it owed to Rattray pursuant to section 6-59 of the Act, in its following actions:

(a) The Executive interfered in the grievance procedure, which is to be conducted by the elected members of the Grievance Committee.

(b) The Grievance Committee met to decide whether to submit his termination grievance to arbitration without any information from him and without carrying out any investigation into the merits of the grievance.

(c) The Grievance Committee did not follow its usual practice when it met without Gasper in attendance to provide a submission and answer any questions they might have. As a member of the Grievance Committee she should have received notice of the meeting; instead it was convened without her and she was barred from attending.

(d) The Grievance Committee did not make a thoughtful decision, considering all the facts; instead it basically delegated the decision to Davies. Amor admitted they did not direct their minds to the merits of the grievance.

(e) The Grievance Committee refused to allow Rattray and/or Gasper to go back to Davies after the legal opinion was received, to ensure he understood all the facts, and provide him with additional information.

(f) The Grievance Committee refused to reconvene to reconsider its decision once Gasper and Rattray brought to their attention the serious breaches of their duty at the first meeting.

(g) Local 481 negotiated and signed a Settlement Agreement with the Employer without input from Gasper or Rattray and then never told him they had signed it.

(h) Local 481 refused to move the membership appeal meeting to a location where Rattray could attend in person with Gasper.

(i) Local 481 distributed irrelevant, prejudicial information to the members before the meeting, and did not direct them to keep it confidential. Information about internal disputes among Local 481 members has no bearing on the issue of the merits of his grievances.

(j) Despite his admitted conflict of interest, Yates chaired the appeal meeting, and ran it in a manner that was destined to be unfair to Rattray.

(k) Local 481 left the final decision, of whether the termination grievance should proceed to arbitration, to the members, when it knew that the atmosphere in the workplace would likely lead some members to vote on the basis of personal animosity and not on the merits of the grievance.

Any one of these alone may not have contravened the duty of fair representation. However, the Board is to consider the cumulative effect of Local 481's actions. When the cumulative effect is considered, there is no doubt that Local 481/9841 failed miserably in the duty of fair representation that it owed to Rattray. Their actions were arbitrary, discriminatory and carried out in bad faith.

Section 6-58:

[103] Rattray complains that he was denied natural justice by Unifor National, contrary to section 6-58 of the Act, in the handling of his complaints and charges. Section 6-58 applies only to his bargaining agent. Unifor National has no obligation to Rattray under that section. The Board has no jurisdiction to consider Rattray's claims against Unifor National under that section.

[104] The By-laws are unclear with respect to the procedure to be followed in dealing with complaints and charges. Unifor National eventually directed Local 481 to forward the complaints and charges to it to handle, and that was done. Unfortunately for Rattray, because of the delay, the revocation of Local 481's Charter intervened before the hearing of either the complaints and charges, or his appeal of the decision to withdraw his grievances, was held.

[105] Section 6-58 requires Local 481 to apply the principles of natural justice to disputes with its members relating to three issues. In this matter, the only issue that could potentially be engaged is "matters in the constitution of the union". The Board was provided with little argument respecting whether any of the matters raised by Rattray fall within that description. Based on the evidence, Local 481 appears not to have complied with the rules of natural justice in its

consideration of Rattray's charges against Buchinski. However, Rattray provided no evidence that this is a matter "within the constitution of the union" and did not identify to the Board any specific sections of the Constitution that Local 481 contravened. As a result, he has not proven that the Board has jurisdiction to consider his claim and has not proven that Local 481 contravened section 6-58.

[106] However, the Board finds that the evidence of the treatment of his charges against Buchinski is more evidence of the breach of section 6-59. During the time that Local 481 thought it was responsible for dealing with those matters, it did not put its mind to carrying out a thoughtful investigation before dismissing them. Local 9841 argues that because Rattray is the complainant, and not the person complained against, the natural justice it owed to him was very low. While this may be true, it owed him more than nothing. With respect to his two charges against Buchinski, all witnesses agreed that the MBE Committee did not even speak to Rattray before making a decision. Mr. Sherar could not remember whether he or Ms. Sherar carried out the investigations or completed the reports. The decisions/conclusions of the reports commissioned by the Employer, on which the MBE Committee relied to dismiss the second charge against Buchinski, were relayed to Mr. Sherar, to use his words "second hand". He could not or would not elaborate on what that meant. The treatment of these charges was slipshod and perfunctory, without consideration of their merits.

Remedy:

[107] Rattray invited the Board to find that Local 481's Charter was revoked by Unifor National to avoid having to deal with his issues. No evidence to support that allegation was tendered. To the contrary, the evidence shows that in January 2015 Unifor National's Executive Board adopted a policy that included the following statement:

> *Unifor representation of members employed by another union is at all times a mutually voluntary relationship based on a shared understanding of these principles to serve the interests of the labour movement. Unifor shall ensure that members employed by other unions are aware of this policy.*[68]

[108] Throughout 2015 and 2016 it revoked the Charters of many locals whose members were employed by other unions. The Board will not make the Order requested by Rattray, to revoke Local 9841's Certification Order, and reinstate Local 481 as the bargaining agent.

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[68] Exhibit A-41.

[109] When the Board is considering an appropriate remedy, its goal is to place Rattray as far as possible in the same position he would be in if Local 9841 had not contravened its duty of fair representation. Remedies are to be compensatory, not punitive. Usually, in a matter such as his, that would mean directing Local 9841 to properly process his grievance or referring the grievance directly to arbitration. This is one of those unusual cases where reference to Local 9841 or arbitration is no longer an appropriate remedy. Too much time has passed for that to be a reasonable outcome in this matter. Rattray is no longer asking for reinstatement. Rattray suggested that, at this point, a reasonable remedy would be an award of damages or a negotiated settlement. The Board agrees that would be part of a reasonable remedy in this matter. The money paid to him under the Settlement Agreement is a good start.

[110] Local 9841 argues that a declaration would serve no labour relations purpose in this matter. The Board disagrees. Local 481 and now Local 9841 as its successor, have been granted the right to be the exclusive bargaining agent for their members in this workplace. In return they have a duty to fairly represent every member. With these Reasons, the Board will issue a declaration that Local 481/9841 breached its duty of fair representation in this matter.

[111] In addition, the Board will order that Local 9841 issue a public apology to Rattray. It is to provide a written apology to Rattray for its actions in this matter, and post it, along with a copy of these Reasons and the Order issued in conjunction with these Reasons, in each of the Employer's offices where its members are employed, for 60 days.

[112] The Chairperson will remain seized with this matter to hear further submissions from the parties with respect to remedies, if that should become necessary. The Board strongly urges the parties to find a way to resolve this matter, with the assistance of a mediator if necessary. All parties have expended considerable time and resources on this dispute and it is time to put these disputes behind them and move on.

[113] The parties provided Written Submissions and Books of Authorities that the Board has reviewed and found helpful. While not all have been mentioned in these Reasons, all were considered in reaching a conclusion.

DATED at Regina, Saskatchewan, this **24th** day of **January, 2020.**

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson