Saskatchewan
Labour Relations Board

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, LODGE NO. 532, Applicant v MASOOD AHMED, Respondent and RUSSEL METALS INC., Respondent

LRB File No. 003-21; May 11, 2021
Vice-Chairperson, Barbara Mysko; Board Members: Hugh Wagner and Laura Sommervill

Counsel for the Applicant, International Brotherhood of Boilermakers, Lodge No. 532:	Greg D. Fingas
The Respondent, Masood Ahmed:	Self-Represented
Counsel for the Respondent, Russel Metals Inc.:	William S. Gardner, Q.C.

Application for Summary Dismissal – Section 6-111 of *The Saskatchewan Employment Act* – Underlying Duty of Fair Representation Application – Section 6-59 – Arbitration hearing held – Complaint about responsiveness of Union representative in early stages, suspicions about misinformation, and merits of grievance – No reasonable chance of success – Underlying application dismissed.

REASONS FOR DECISION

[1] **Barbara Mysko, Vice-Chairperson:** The Board has decided to summarily dismiss a duty of fair representation application, filed on October 16, 2019 pursuant to section 6-59 of *The Saskatchewan Employment Act* [Act].[1]

[2] The duty of fair representation application arises from a layoff effected by the Employer, Russel Metals Inc., in or around April 18, 2019. The Union, International Brotherhood of Boilermakers, Lodge No. 532 [*Lodge 532*] filed a related grievance on behalf of the Applicant, Masood Ahmed, on April 22, 2019. The grievance proceeded to arbitration and was heard by an arbitrator in January, 2021.

[3] In his application, the Applicant states:

> *Applicant requested updates on three different occasions, with no reply except the last time when going to court was given as an ultimatum. When applicant requested hard evidence, the Union Rep insisted there was no documentation of anything and would not provide proof of retaining Greg Fingas as a lawyer either. Finally he agreed to send updates; which was basically a written version of the phone call conversation. No proof has been provided that there is any progress with the case. When applicant spoke to shop steward afterwards,*

[1] LRB File No. 224-19.

> *he assured the applicant there would be a paper trail, and also informed applicant that the lawyer was retained from a different location than the location told by Union Rep. It has been 6 months since the beginning of this case and the matter still hasn't been resolved.*

[4] The statements contained in the application are declared by the Applicant pursuant to the *Canada Evidence Act*. At paragraph 6 of that application, he acknowledges that arbitration dates had been set. He later acknowledges, in written submissions, that a grievance was submitted along with grievances for other employees.

[5] The Union filed its application for summary dismissal of the underlying duty of fair representation application on January 12, 2021. In that application, the Union states that the underlying complaint is limited to the quantity and form of updates and notifications provided early in the processing of the grievance. If the allegations are accepted as true, they fall short of the standard necessary to establish a breach of the duty of fair representation. The Applicant's grievance was advanced and pursued in good faith, it proceeded to an arbitration hearing on the dates acknowledged by and known to the Applicant, and an award has been issued. In the arbitration hearing, the Applicant's position was represented fully and fairly. The underlying application is destined to fail and ought to be summarily dismissed.

[6] The Union asked that the application for summary dismissal be determined by a panel of the Board *in camera*. The Board later set deadlines for the submission of written materials and received submissions from all parties, including the Employer.

[7] The Applicant's written submissions raised factual issues that had not been outlined in his application. The Board will outline each of these issues, in turn.

[8] First, the Applicant complains about the representative's initial response to the layoff, suggesting that the representative should have been better informed about the seniority of the employees involved. He does not elaborate about this concern.

[9] Second, he provides additional detail about his complaints with respect to the service he was receiving, as follows:

> *(d) I had a phone conversation with [the representative] on October 9, 2019, where I made several requests:*
>
> *I. Any document which showed that the case was being pursued, whether it was the grievance application or written communication, to which he responded twice that there was no paper document; finally stating that he could forward the grievance application.*

> *II. Proof of retaining Greg Fingas as a lawyer in September as he stated, where he responded with "I am not going to give you that because I see no point" which obviously made me feel like I was being lied to.*
> *III. Concluded with providing an email outlining the dates of said conversations.*
> *IV. Stated in the beginning that he did not realize "I was totally out of touch" with the entire procedure as I hadn't received a single notice.*

[10] Third, he states that he was not informed of the arbitration hearing that was held.

[11] The Union makes the following arguments in support of its application to summarily dismiss.

[12] The Union suggests that the Applicant's complaint is about the level of service provided by the Union, rather than about any substantive matter that can be found to fall into any one of the three categories of unfair representation. The essence of the complaint is that the Applicant was dissatisfied with the representative's responsiveness to requests for updates; with the representative's particular response to the demand for "hard evidence" of steps that the Union had taken and for proof that the Union had retained a particular lawyer; with the suggestion that said lawyer had been retained from a different location than the location noted by the Shop Steward; and with the fact that six months had passed without a resolution.

[13] Nor does the application give rise to any allegation of discriminatory treatment on any ground, whether based on a prohibited ground as contained in human rights legislation or otherwise. The grievance was advanced to arbitration. At arbitration, the Union was represented by experienced legal counsel. Although unsuccessful, the Union presented evidence and made argument with respect to the Applicant's circumstances, seeking to enforce an interpretation of the collective agreement that would give bumping rights to the grievor.

[14] Nor is there any allegation of bad faith on the part of the Union. Bad faith requires a finding that the Union's actions were motivated by ill-will, malice, hostility or dishonesty. The Applicant has not suggested that the Union acted upon an inappropriate motivation or upon any motivation at all.

[15] The provisions of the Act which govern an application for summary dismissal are clauses 6-111(1)(o) and (p):

> ***6-111****(1) With respect to any matter before it, the board has the power:*
> *…*
> *(o) to summarily refuse to hear a matter that is not within the jurisdiction of the board;*

> *(p) to summarily dismiss a matter if, in the opinion of the board, there is a lack of evidence or no arguable case;…*

[16] At the time of filing, section 32 of *The Saskatchewan Employment (Labour Relations Board) Regulations* [Regulations] was the applicable provision in the Regulations:

> ***32****(1) In this section:*
>
> *(a) "application to summarily dismiss" means an application pursuant to subsection (2);*
> *(b) "original application" means, with respect to an application to summarily dismiss, the application filed with the board pursuant to the Act that is the subject of the application to summarily dismiss;*
> *(c) "party" means an employer, union or other person directly affected by an original application.*
> *(2) A party may apply to the board to summarily dismiss an original application.*
> *(3) An application to summarily dismiss must:*
> *(a) be in writing; and*
> *(b) be filed and served in accordance with subsection (5).*
> *(4) In an application to summarily dismiss, a party shall specify whether the party requests the board to consider the application for summary dismissal by an in camera panel of the board or as a preliminary matter at the outset of the hearing of the matter that is the subject of the original application.*
> *(5) If a party requests that the application to summarily dismiss be heard:*
> *(a) by an in camera panel of the board, the application to summarily dismiss must be filed with the registrar, and a copy of it must served on the party making the original application and on all other parties named in the original application, at least 30 days before the date set for hearing the original application;*
> *(b) as a preliminary matter at the outset of the hearing of the matter that is the subject of the original application, the application to summarily dismiss must be filed with the registrar, and a copy of it served on the party making the original application and on all other parties named in the original application, at least three days before the first date set for hearing of original application.*
> *(6) An application to summarily dismiss must contain the following information:*
> *(a) the full name and address for service of the party making the application;*
> *(b) the full name and address for service of the party making the original application;*
> *(c) the file number assigned by the registrar for the original application;*
> *(d) the reasons the party making the application to summarily dismiss believes the original application ought to be summary dismissed by the board;*
> *(e) a summary of the law that the applicant believes is relevant to the board's determination.*

[17] The Union relies on *Siekawitch v Canadian Union of Public Employees, Local 21*, 2008 CanLII 47029 (SK LRB) [*Siekawitch*] and *Roy v Workers United Canada Council*, 2015 CanLII 885 (SK LRB) [*Roy*] for the proposition that the Board has authority to summarily dismiss an application without an oral hearing. This authority is well established. The Board has decided to exercise that authority in this case. The justification for a summary dismissal is plain and obvious on the materials before the Board. No further submissions are necessary.

[18] The Board in *Roy* outlines the applicable test to apply on an application for summary dismissal:

> *[9] Generally speaking, summary dismissal is a vehicle for the disposition of applications that are patently defective. The defect(s) must be apparent without the need for weighing of evidence, assessment of credibility, or the evaluation of novel statutory interpretations. Simply put, in considering whether or not an impugned application ought to be summarily dismissed, the Board assumes that the facts alleged in the main application are true or, at least, provable. Having made this assumption, if the Board is not satisfied that the main application at least discloses an arguable case, and/or if there is a lack of evidence upon which an adverse finding could be made, then the main application is summarily dismissed in the interests of efficiency and the avoidance of wasted resource.*

[19] In determining whether an application should be summarily dismissed for a failure to disclose an arguable case or for lack of evidence, the test is whether, assuming the applicant is able to prove everything alleged, there is no reasonable chance of success. The Board should exercise its authority to summarily dismiss only in plain and obvious cases. In considering whether to dismiss, the Board considers the underlying application, any particulars furnished in response to a demand, and any document referred to within the application upon which the applicant relies to establish the claim: *Roy* at para 8.

[20] Finally, the Union relies on *United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 179 v Dylan Lucas*, 2020 CanLII 76682 (SK LRB), in which the Board emphasized the requirement that an applicant provide some factual basis for the claim:

> *[22] ... As the Board stated in Siekawitch, it was incumbent on [the member] to provide some factual basis for his claim that the Union acted in an arbitrary or discriminatory manner, or had in some fashion acted in bad faith toward him.*

[21] The Board has had many opportunities to describe the test to be applied in duty of fair representation applications. The description in *Roy* remains relevant and helpful:

> *[15] … Numerous decisions of this Board have demonstrated that this Board's supervisory responsibility pursuant to [s.6-59] is not to ensure that a particular member achieves a desired result or avoids an undesirable outcome; rather the purpose of the provision is to ensure that, in exercising its representative duty, a trade union does not act in a manner that is arbitrary, discriminatory or in bad faith. As a consequence, to sustain a violation of 6-59 of the Act, an applicant must allege and then satisfy this Board through evidence that his/her trade union has acted in a manner that is "arbitrary", "discriminatory" or in "bad faith". … these terms are not mere chalices into which applicants may pour their criticisms of their trade union for presentation to the Board. These terms have specific meanings that define the threshold for this Board to exercise its supervisory authority. Simply put, this Board does not sit on appeal of each and every decision made by a trade union; rather, very specific behavior/conduct on the part of a trade union is*

> *required to sustain a violation of the Act; that conduct being arbitrariness, discrimination or bad faith. …*
>
> [citations omitted]

[22] The description in *Berry v SGEU*, 1993 CarswellSask 518 continues to provide guidance on the meaning of the terms “arbitrary”, “discriminatory” and “bad faith”, as they are used in duty of fair representation applications:

> *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:*
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> > *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.*
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> *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 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.*

[23] In *Owl v Saskatchewan Government and General Employees’ Union*, 2014 CanLII 42401 (SK LRB) [*Owl*], the Board adopted the descriptions used in *Toronto Transit Commission*, [1997] OLRD No 3148:

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

> *. . . a complainant must demonstrate that the union's actions were:*
>
> *(1) "Arbitrary" – that is, flagrant, capricious, totally unreasonable, or grossly negligent;*
>
> *(2) "Discriminatory – that is, based on invidious distinctions without reasonable justification or labour relations rationale; or*
>
> *(3) "in Bad Faith" – that is, motivated by ill-will, malice hostility or dishonesty.*

[24] Many of the allegations raised in the current case are most appropriately addressed under the category of "arbitrariness". *Hargrave et al v CUPE, Local 3833 and Prince Albert Health District*, [2003] Sask LRBR 511 provides a helpful overview of the guiding principles for determining whether a union has acted in an arbitrary manner.[2] In particular, mistakes, honest errors, and "mere negligence" are not sufficient to ground a breach pursuant to section 6-59. As noted in *Owl*, to constitute arbitrary conduct the union's actions must be found to have been flagrant, capricious, totally unreasonable, or grossly negligent.

[25] Finally, where "critical job interests" are involved, a union dealing with a grievance may well be held to a higher standard overall. A decision in any duty of fair representation case is highly dependent on the facts.

[26] To disclose an arguable case, the allegations should specify the acts or omissions on the part of the Union (or agents) that support a conclusion that the Union has failed to satisfy its duty pursuant to section 6-59: *Roy* at para 14. In our view, the application does not disclose any facts that support an allegation that the Union treated the Applicant in a manner that could be described as arbitrary, discriminatory, or in bad faith. Our reasons for reaching this conclusion are outlined as follows, beginning with an assessment of the underlying application.

[27] First, according to the Applicant, the representative was not sufficiently responsive or helpful and failed to provide "hard evidence" about the steps that the Union had taken. These particular allegations are most closely aligned with the arbitrariness category. While it is good practice for any union to maintain regular and transparent communication with a member while handling that member's grievance, these allegations do not disclose unreasonable conduct, or conduct impacting on the Union's handling of the grievance. Perfect representation is not the standard, and imperfect representation without more, does not ground a breach of section 6-59.

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[2] Cited in *Prebushewski v Canadian Union of Public Employees, Local No. 4777*, 2010 CanLII 20515 (SK LRB).

[28] Next, the fact that the representative and the Shop Steward provided different information about the lawyer's origins seems to have raised the Applicant's suspicions about the Union's intentions and its handling of the grievance. These allegations imply that the Union acted upon improper motivations, or failed to provide him with truthful information. A representative cannot be expected to have perfect knowledge of all of the facts at all times, especially if the lack of knowledge is ultimately inconsequential. The Applicant's suspicions do not give rise to a potential breach, especially when it is considered that an arbitration hearing was held and the Applicant's position was represented at that hearing.

[29] Finally, there is nothing abnormal in the timelines that are complained of, nor is there any apparent connection between those timelines and any impact on the Applicant's right to be fairly represented.

[30] Next, the Board will consider the additional issues raised by the Applicant's written submissions.

[31] First, the Applicant was disappointed with the representative's initial response and apparent unfamiliarity with the seniority levels of his colleagues. However, these allegations are not indicative of arbitrariness, discrimination, or bad faith conduct. Again, a representative cannot be expected to have perfect knowledge of all of the facts at all times, especially if the lack of knowledge is ultimately inconsequential. Simple mistakes without more do not ground a duty of fair representation complaint. There is no link between this apparent error and any impact on the Applicant's right to be fairly represented.

[32] Second, the Applicant provides additional detail about his complaints with the service he was receiving from the Union, none of which assist in making a case against the Union.

[33] Third, the Applicant states that he was not informed of the arbitration hearing. This is contradicted by his own application, in which he declares pursuant to the *Canada Evidence Act* at paragraph 6, that "an arbitration date has been set for January 16 and 17, 2020". According to the award filed by the Union, the hearing proceeded on those dates, with a final date on January 20, 2020. The Applicant's overt contradiction of his own application, raised in the late stages of the Union's application to summarily dismiss cannot, in fairness, be permitted to provide a foothold for the underlying application to proceed.

[34] The remainder of the Applicant's submissions focus on the merits of the grievance. He states that a previous layoff had been executed in accordance with the collective agreement, that

the current layoff was not so executed, and that if the former process had been undertaken in respect of the latter layoff he would have been able to continue working after obtaining his license. Each of these points was addressed by the arbitrator in the award following the arbitration hearing with respect to the grievance. The arbitrator outlined the Union's reasoned and careful submissions made on behalf of the grievor. She then interpreted the collective agreement and found that the Applicant and two other grievors were not eligible to use their seniority to bump junior employees because they were not qualified. The grievances were dismissed on that basis.

[35] The Applicant does not agree with this conclusion. As disappointed as he might be, section 6-59 does not provide an avenue for a member to appeal or collaterally dispute the findings of an arbitrator. As explained by the Board in *Roy* at para 15,

> *Numerous decisions of this Board have demonstrated that this Board's supervisory responsibility pursuant to now s. 6-59 of The Saskatchewan Employment Act (previously s. 25.1 of The Trade Union Act) is not to ensure that a particular member achieves a desired result or avoids an undesirable outcome; rather the purpose of the provision is to ensure that, in exercising its representative duty, a trade union does not act in a manner that is arbitrary, discriminatory or in bad faith.*

[36] Furthermore, a comparison of the complaint contained in the submissions before the Board and the award made by the arbitrator reveals that counsel for the Union presented the Applicant's position at the hearing, made arguments on his behalf, and otherwise represented the member's interests in a manner that demonstrated strong comprehension of the issues and care in the presentation of the case.

[37] In conclusion, assuming the Applicant is able to prove everything that he has alleged, there is no reasonable chance that he will succeed in demonstrating that the Union has breached section 6-59 of the Act. None of the allegations disclose facts that would give rise to a finding of conduct on the part of the Union that could be described as arbitrary, discriminatory, or in bad faith. It would not be an appropriate use of the Board's resources to proceed to a hearing on this matter. The concern for finality in dispute resolution proceedings weighs in favour of dismissing the underlying application.

[38] For the foregoing reasons, the duty of fair representation application should be dismissed. An appropriate order will accompany these Reasons.

[39] The Board has reviewed all of the materials filed by the parties and has found them helpful.

[40] This is a unanimous decision of the Board.

DATED at Regina, Saskatchewan, this **11th** day of **May, 2021.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson