

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 2067, Applicant v  
SCOTT MACDONALD and SASKPOWER, Respondents**

LRB File No. 136-20; February 26, 2021

Chairperson, Susan C. Amrud, Q.C.; Board Members: Lisa Poissant and Bettyann Cox

For International Brotherhood of Electrical  
Workers, Local 2067:

Andrea C. Johnson

For Scott MacDonald:

Self-Represented

**Application for summary dismissal dismissed – Assuming applicant can prove everything alleged in his DFR application, he has an arguable case.**

**Application for summary dismissal dismissed – No delay established in filing of application – Calculation of when DFR claim crystallized is based on union’s actions or lack of action, not employer’s actions.**

**REASONS FOR DECISION**

[1] **Susan C. Amrud, Q.C., Chairperson:** Scott MacDonald filed an application<sup>1</sup> [“DFR application”] with the Board on May 7, 2020 for an order that his union, International Brotherhood of Electrical Workers, Local 2067 [“IBEW”] is contravening section 6-59 of *The Saskatchewan Employment Act* [“Act”]. On September 4, 2020, IBEW made an Application for Summary Dismissal<sup>2</sup> of the DFR application. IBEW requested that its application be considered by an *in camera* panel of the Board pursuant to subsection 32(4) of *The Saskatchewan Employment (Labour Relations Board) Regulations* [“Regulations”].

[2] IBEW makes this application on three grounds:

- It does not owe a duty of fair representation to MacDonald with respect to the complaint outlined in the DFR application;
- If it owes him a duty of fair representation, it has met that duty; and
- MacDonald has unduly delayed in filing the DFR application.

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<sup>1</sup> LRB File No. 074-20.

<sup>2</sup> LRB File No. 136-20.

As a result, it argues, the DFR application puts forward no arguable case, is doomed to fail, and ought to be summarily dismissed.

[3] SaskPower, MacDonald's employer, takes no position on this application.

**Relevant Legislative Provisions:**

[4] Section 6-59 of the Act provides as follows:

*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.*

[5] The Board's powers with respect to summary dismissal applications are found in section 6-111 of the Act and section 32 of the Regulations:

*Powers re hearings and proceedings*

6-111(1) *With respect to any matter before it, the board has the power:*

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

...

*Applications for summary dismissal*

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 be 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.

### **Background:**

[6] While the facts set out by the parties are not entirely clear, at this point the Board understands the chronology of events that led to the filing of the DFR application to be as follows.

[7] Prior to April 15, 2013, Meter Readers were in the bargaining unit represented by Communications, Energy and Paperworkers Union of Canada Local 649 ["CEP"].<sup>3</sup> On that date, SaskPower and CEP entered into a Letter of Understanding ["2013 LOU"] that included the following introductory statement:

*In an effort to minimize disruption and bumping due to the implementation of the AMI project in accordance with article 9.02 the parties agree that all permanent employees in the meter reader classification will be given priority in all staffing competitions for all CEP bids until AMI is fully implemented.*

[8] The 2013 LOU then set out a series of procedures to be followed in providing that priority, which included the following statement:

*Upon being appointed to a permanent position through this initiative an employee's eligibility for redeployment under this initiative will be exhausted.*

[9] More than two and a half years later, on December 15, 2015, an Agreement ["2015 Agreement"] was entered into by SaskPower, Unifor and IBEW. The 2015 Agreement reads as follows:

*This letter of agreement will transfer the remaining active UNIFOR Meter Reader (Class Codes 41402 & 41303) members to the IBEW Meter Reader (Class Codes 1704 & 1223) effective January 16, 2016.*

*Effective January 16, 2016 the employees will be transferred to IBEW with their current accumulated seniority and all terms and conditions will be as per the SaskPower/IBEW Local 2067 agreement.*

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<sup>3</sup> At some point during these events, Unifor Local 649 became the successor to CEP. Henceforth that union will be referred to in these Reasons as Unifor.

*These Employees will also retain UNIFOR bidding seniority that reflects their current and future IBEW seniority date. They also will be eligible for the Vacancy Management letter signed April 15, 2013.*

*Article 11 of the SaskPower/IBEW collective agreement does not apply for employees, who are being transferred as per the above, while they remain in their current positions.*

**[10]** MacDonald was employed with SaskPower as a Meter Reader in the Unifor bargaining unit. He was granted an education leave by SaskPower to take training as a CADD Technologist. He returned to his employment from his leave in 2016. His Meter Reader position in Saskatoon was no longer available, resulting in him applying for and being given a new permanent position as a Storekeeper in the IBEW bargaining unit. When he left on his education leave, he had CEP/Unifor seniority that would assist him in obtaining a new position on his return that would reflect his increased education. He believed that seniority would be available to him, through the 2015 Agreement. Since receiving his CADD Technologist diploma in 2018, he has applied for several CADD Technologist positions within the Unifor bargaining unit. SaskPower refuses to recognize his Unifor seniority and he has therefore been unsuccessful in obtaining any of those positions. At the time the 2015 Agreement was signed, MacDonald held one of the Meter Reader positions that was transferred by that Agreement to the IBEW bargaining unit. Neither IBEW nor MacDonald has indicated whether he was appointed to the Storekeeper permanent position through the initiative referred to in the 2013 LOU.

#### **Argument on behalf of IBEW:**

**[11]** IBEW refers to several decisions of the Board that spell out what an applicant must establish to satisfy the test for summary dismissal. In this case, it says, the test has been met. In *United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 179 v Dylan Lucas*<sup>4</sup>, relying on *Roy v Workers United Canada Council*<sup>5</sup>, the Board described the test as follows:

*The Board recently adopted the following as the test to be applied by the Board in respect of its authority to summarily dismiss an application (with or without an oral hearing) as being:*

*1. In determining whether a claim should be struck as disclosing no arguable case, the test is whether, assuming the applicant is able to prove everything alleged in his/her claim, there is no reasonable chance of success. The Board should exercise its jurisdiction to strike on this ground only in plain and obvious cases and where the Board is satisfied that the case is beyond doubt.*

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<sup>4</sup> 2020 CanLII 76682 (SK LRB) at para 14.

<sup>5</sup> 2015 CanLII 885 (SK LRB), at para 8.

*2. In making its determination, the Board may consider only the subject application, any particulars furnished pursuant to demand and any document referred to in the application upon which the applicant relies to establish his/her claim.*

[12] IBEW argues that the proper interpretation of the 2013 LOU and the 2015 Agreement is that once MacDonald accepted the permanent Storekeeper position in IBEW, his right to have his previous Unifor seniority recognized by SaskPower ended. Therefore, he has no claim against SaskPower on which it should be representing him.

[13] As well, MacDonald's complaints apply to a position in the Unifor bargaining unit. IBEW owes no duty to him with respect to that position as it does not have jurisdiction with respect to that position. IBEW argues that Unifor is the exclusive bargaining agent for the CADD Technologist positions for which MacDonald unsuccessfully applied. As a result, Unifor holds the exclusive authority to represent members relating to the CADD Technologist positions. If any right to representation exists with respect to these positions, the obligation to fulfill that representation falls on Unifor, not IBEW. It bases this argument primarily on the dissent in *Ontario (Attorney General) v Fraser*<sup>6</sup>.

[14] As a result of these two factors, it argues, IBEW does not owe MacDonald a duty of fair representation. Accordingly, he has not made out an arguable case against it.

[15] In the alternative, IBEW argues that if it owes a duty of fair representation to him, it has met that duty. It states that it has attempted to advocate for him, including discussing the matter with him and meeting with representatives of Unifor and SaskPower to try to reach a resolution of this issue.

[16] IBEW also argues that the DFR application should be dismissed because of the undue delay in bringing it. The allegations date back to 2015 and he has had knowledge of the complaints since 2018 at the latest. It referred the Board to *Strohan v Saskatchewan Government and General Employees' Union*<sup>7</sup> which spelled out the factors the Board applies in considering delay:

*[8] The Union relies on Nistor v USWA, 2003 CanLII 62878 (SK LRB). They submit that it is very similar to the facts in this case. In that case, the employee filed his duty of fair representation application with the Board eight months after an arbitrator dismissed the grievance of his termination. With respect to the issue of delay the Board made the following comments:*

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<sup>6</sup> 2011 SCC 20.

<sup>7</sup> 2019 CanLII 43222 (SK LRB).

[17] . . . . The Board noted that the fundamental question is whether justice can still be done despite the delay and noted the various factors that will be considered in arriving at the decision. In particular, the Board will consider if the respondent union is prejudiced in its prosecution of the grievance as a result of the delay.

[18] In the present case, given the timing of the application under s. 25.1, the Union would not be able to prosecute the grievance even if it were found to have been in breach of the duty of fair representation in relation to the suspension grievance. The intervening event, that is, the termination of the Applicant's employment and the resulting arbitration award upholding the termination, render it impossible for the Union to prosecute the Applicant's suspension grievance. The Applicant has no employment status with IMS at this time as s. 25(1.2) of the Act renders the arbitration award "final and conclusive." The only remedy available for a breach of s. 25.1 in these circumstances is an order for damages against the Union.

[9] The Union also relied on *Hartmier v RWDSU, Local 955*, 2017 CanLII 20060 (SK LRB) ["Hartmier"], where the Board made the following findings, at paragraph 120:

*This survey of relevant Board Decisions reveals that while each decision turned on the particular facts of the case, nevertheless a number of factors figure prominently in the Board's analysis of undue delay applications in duty of fair representation claims. The more prominent factors include:*

- *Length of Delay: The length of delay is critical. An applicant will bear the burden to explain the reasons for any delay and the longer the delay, the more compelling must be the reasons for the delay in filing the application. Now that the Legislature has mandated a statutorily prescribed time limit for the filing of unfair labour practice applications, the Board's tolerance for exceptionally long delays has decreased significantly.*
- *Prejudice: Labour relations prejudice is presumed in cases of delay; however, if the delay is extensive or inordinate this factor will weigh more heavily in the analysis. The longer the delay, the greater the prejudice to a respondent. Evidence of actual prejudice to a respondent likely will result in the main application being dismissed.*
- *Sophistication of Applicant: An applicant's knowledge of labour law and labour relations matters, generally is an important consideration when assessing the veracity of the reasons for the delay.*
- *The Nature of the Claim: The issues at stake for an applicant will be weighed in the balance. If the consequences of dismissing an application for reasons of delay are significant to an applicant, this will weigh in favour of permitting the application to proceed despite a lengthy delay in its initiation.*
- *The Applicable Standard: When adjudicating delay applications, the standard which has been applied consistently is: can justice be achieved in the matter despite a lengthy delay in commencing it?*

[17] It then analyzed how these factors would, in its opinion, lead to a decision that the DFR application should be dismissed for delay.

**[18]** With respect to the length of the delay, IBEW describes the length of the delay as 2 to 4.5 years. MacDonald should have taken action when he returned from education leave and learned that he had been placed into the IBEW bargaining unit. At the latest, he should have taken action when he first unsuccessfully applied for a CADD Technologist position in 2018 and neither Unifor nor IBEW brought a grievance on his behalf. It points to *Dishaw v COPE Local 397*,<sup>8</sup> where the Board dismissed an application pursuant to section 6-59 of the Act on the basis that a delay of over 23 months was excessive.

**[19]** With respect to prejudice, IBEW submits that the business manager and assistant business managers that were in its business office when the events in question occurred have been replaced. This will prejudice IBEW by creating greater difficulty in gathering the information and evidence necessary to put forward a full defence:

*Through the election of a new business manager and the subsequent correspondence of appointment of new assistant business managers of IBEW, the entire business office which was in place at the time that all of the allegations raised by the Respondent occurred are no longer members of the business office. In addition to the fading of memories, the replacement of these business officers will further prejudice IBEW by creating greater difficulty in gathering information and evidence necessary to put forward a full defence.<sup>9</sup> (emphasis added)*

There is no suggestion, however, that the previous business manager is unavailable.

**[20]** While IBEW acknowledges that there is no evidence that MacDonald is sophisticated with respect to labour relations issues, it argues that he could have taken steps sooner to gain information about the Board's processes.

**[21]** IBEW does not consider the nature of the claim to be serious enough for the Board to consider. MacDonald continues to be employed at SaskPower, just not in his preferred position.

**[22]** Finally, IBEW argues that justice cannot be achieved in this matter. It argues that the delay has caused prejudice to its ability to bring a full defence to the claim. It is of the view that Unifor should also be a party to the DFR application, as the party that ultimately bears the responsibility to represent MacDonald. It further states that unless a CADD Technologist position is currently available, it is not possible to grant MacDonald the remedy he asks for in this matter, and there is no evidence of whether such a position exists. It states that MacDonald has provided no reasons for the delay in bringing the DFR application, and the Board should take that factor into account.

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<sup>8</sup> 2009 CanLII 507 (SK LRB).

<sup>9</sup> Written Submissions on Behalf of the Applicant, IBEW, Local 2067 dated December 21, 2020, at para 54.

**Argument on behalf of MacDonald:**

[23] MacDonald states that IBEW has not assisted him in his efforts to convince SaskPower to recognize his seniority, as required by the 2015 Agreement. His interpretation of the 2015 Agreement is that SaskPower continues to have an obligation to recognize his Unifor seniority. He indicates that he will bring evidence of other employees' situations in which the 2015 Agreement has been interpreted and applied in that manner. He also submits that the previous Business Manager of IBEW confirmed that his interpretation has been applied to "several individuals of similar situations within other classifications to grant their seniority"<sup>10</sup>. He argues that, as his bargaining agent, IBEW has an obligation to assist him in this dispute with SaskPower, and that they have failed or refused to do so.

[24] With respect to delay, he indicates that it was not until March 18, 2020 that he realized that IBEW was no longer willing to assist him in protecting his rights under the 2015 Agreement. When he first applied for a CADD Technologist position, he was informed by SaskPower that he was not the senior applicant and should bid on the next posting. He states that he filed the DFR application after a position he applied for went unfilled and to an external hiring process. He said that at this time the IBEW Business Manager "screamed at me in an unprofessional manner"<sup>11</sup>.

**Analysis and Decision:**

[25] As IBEW submits, the test the Board applies on an application for summary dismissal is well-established. IBEW must satisfy the Board that MacDonald has no arguable case, that assuming he is able to prove everything alleged in his claim, there is no reasonable chance of success.

[26] IBEW relies on the wording of subsection 6-59(1) of the Act to establish its argument that it owes no duty to MacDonald with respect to the issue of whether SaskPower is required to continue to recognize his Unifor seniority. However, parsing the words of that subsection, the Board is of the view that MacDonald has an arguable case: as a member of IBEW, he has a right to be fairly represented by the union that is his bargaining agent with respect to his rights pursuant to a collective agreement. It is to be noted that the definition of collective agreement in Part VI of the Act reads as follows:

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<sup>10</sup> DFR application, 4<sup>th</sup> paragraph of #5.

<sup>11</sup> Written Submissions of the Respondent, Scott MacDonald, dated December 30, 2020, at para 19.



6-1(1)(d) “collective agreement” means a written agreement between an employer and a union that:

- (i) sets out the terms and conditions of employment; or
- (ii) contains provisions respecting rates of pay, hours of work or other working conditions of employees.

It is arguable that this definition would include the 2015 Agreement, to which IBEW is a party.

**[27]** IBEW’s argument that Unifor has exclusive authority with respect to the CADD Technologist positions entirely misses the mark. MacDonald is a member of IBEW. He is asking IBEW to represent him in protecting his rights in the collective agreement that IBEW entered into with SaskPower. Whether he could have also brought a claim against Unifor, as a former member of that union, is not before this Board. The right that MacDonald is alleging is a right with respect to the recognition of his seniority. This is not a dispute he is having with Unifor, but with SaskPower.

**[28]** Two interpretations of the 2015 Agreement have been submitted to the Board. MacDonald states that he can bring evidence that his interpretation, which would protect his rights, has been applied to other IBEW members.

**[29]** With respect to whether IBEW has fulfilled its duty of fair representation, MacDonald states that while the previous business manager was fulfilling the duty of fair representation, the new business manager refuses to assist him. On a summary dismissal application, the Board is to assume that MacDonald can prove these allegations.

**[30]** On an application for summary dismissal, in determining whether MacDonald has an arguable case, the Board is to assume that he can prove everything alleged in his claim. Assuming MacDonald can bring the evidence outlined above to the hearing leads to a finding that he has proven he has an arguable case. The Board would dismiss the application for summary dismissal on that basis.

**[31]** The next issue is whether a delay in bringing the DFR application should lead to its summary dismissal. As IBEW noted, the Board considers four factors in determining a delay allegation.

**[32]** The first issue is the length of the delay. Here the parties differ widely in their interpretation of the length of the delay. According to MacDonald, the date that the circumstances giving rise to the DFR application came to his attention was March 18, 2020. He filed the DFR application seven

weeks later. This appears to be the date that the new IBEW business manager indicated to him that it was not going to assist him with the seniority issue.

**[33]** According to IBEW, the relevant date was either January 16, 2016, the date the 2015 Agreement took effect or sometime in 2018, when MacDonald first unsuccessfully applied for a CADD Technologist position. The Board does not accept IBEW's calculation of the length of the delay. On neither of the dates it suggests is MacDonald alleging that IBEW had taken any action that could arguably be characterized as arbitrary, discriminatory or in bad faith. There is no evidence before the Board at this point that MacDonald had approached IBEW for assistance by either of those dates. While the chronology of events over a number of years will be relevant to a determination of the DFR application, it cannot reasonably be said that MacDonald delayed in filing the application. What crystallized MacDonald's claim against IBEW is not SaskPower's actions, but its own actions or lack of action.

**[34]** On the basis that the events MacDonald relies on occurred in March 2020, there is no delay. It is therefore unnecessary to consider the delay factors.

**[35]** The Application for Summary Dismissal is dismissed.

**[36]** This is a unanimous decision of the Board.

**DATED** at Regina, Saskatchewan, this **26th** day of **February, 2021**.

**LABOUR RELATIONS BOARD**

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Susan C. Amrud, Q.C.  
Chairperson