Newfoundland Labrador

Labour Relations Board

INFORMATION BULLETIN
DUTY OF FAIR REPRESENTATION

PURPOSE

This bulletin provides general information to employees, unions and employers in order that they may better understand Board procedures. It is for information purposes only; it is not Labour Relations Board policy and it is not legislative interpretation. Further, it does not provide legal advice.

INTRODUCTION

The Labour Relations Board certifies trade unions as bargaining agents for defined bargaining units of employees. When a trade union becomes certified, it is given the exclusive authority to bargain collectively with the affected employer on behalf of the employees it represents. The legislation places a statutory duty of fair representation on the trade union when it acts on behalf of the employees it represents.

Trade unions negotiate collective agreements with the Employer. They do this on behalf of their members. Unions enforce the terms of the collective agreement by filing grievances on behalf of employees if they are of the opinion that the employer has violated a term of the collective agreement. Collective agreements prescribe the steps in a grievance procedure and if a grievance cannot be resolved at one of those steps, a union may choose to take a grievance to arbitration.

I. OVERVIEW

Section 130 of the *Labour Relations Act* (which covers employees of private companies) and Section 43 of the *Public Service Collective Bargaining Act* (which covers public employees) provide that an employee in a bargaining unit may make a written complaint to the Labour Relations Board claiming to be aggrieved because his or her bargaining agent has acted in a manner that is arbitrary, discriminatory or in bad faith in the handling of a grievance that the employee has filed or attempted to file with that bargaining agent. The legislation requires unions to fairly represent all employees in a bargaining unit. This is referred to as the ***duty of fair representation***. The principles that govern the union's duty, which have been adopted by the Labour Relations Board, have been set out by the Supreme Court of Canada, as follows:

- 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 employees comprised in the unit.
- 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.
- 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 for the union on the other.
- The union's decision must not be arbitrary, capricious, discriminatory or wrongful.
- 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. (See *Canadian Merchant Service Guild v. Gagnon* [1984] 1 S.C.R. 509).

A union must not act in an arbitrary manner. **Arbitrary** conduct by the union, depending on the circumstances, could include implausible, reckless, unreasonable, capricious or negligent conduct, or a non-caring attitude. The type of conduct which could fall within the definition of arbitrary could include a failure to adequately investigate an employee's grievance or to give only superficial attention to the facts of a grievance. A union should thoroughly investigate all the facts and evaluate the probable outcome of arbitration before deciding to abandon or settle a grievance. Failure to make a reasonable and objective assessment of the case may amount to arbitrary conduct by the union.

A union must not act in a **discriminatory** manner. This means that a union must not discriminate against an employee on illegal or prohibited grounds, such as age, race, etc. It also means that a union should not distinguish between or treat individuals differently without a cogent reason for doing so or based on unreasonable grounds. It should be noted that not every instance of differential treatment is considered discriminatory.

A union must not act in **bad faith** in the handling of a grievance. Actions or decisions motivated by hostility, ill-will or other improper purpose could be considered bad faith. Actions designed to mislead or deceive others, or the conscious doing of a wrong because of dishonest purpose have also been considered to be bad faith.

A union is entitled to consider factors such as the employee's legitimate interests, the legitimate interests of the other members of the bargaining unit and the chance of success at arbitration, using its knowledge of how similar issues have been decided by arbitrators.

The Board must determine whether or not a union has acted in a manner that is arbitrary, discriminatory or in bad faith. This assessment is made based upon the **actions** taken by the union in handling the employee's grievance. The Board considers whether the union objectively considered the merits of an employee's grievance and made an objective and rational judgment about how to handle the grievance. The Board does **not** assess the merits of the grievance; that is the role of the union and an arbitrator, if the grievance proceeds to arbitration. This does not mean that unions

cannot be wrong or make mistakes; they do not always have to be correct in their assessments and decisions they make in relation to the handling of a grievance as long as they do not act in an arbitrary, discriminatory or bad faith manner in so doing.
As stated in *Gagnon*, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion to decide whether to proceed to arbitration.

II. FILING A COMPLAINT

Disclosure of personal information

When filing any application with the Newfoundland and Labrador Labour Relations Board (the "Board"), all information included in the application is provided to the other party or parties as respondents or interested parties. Further, such information may be referred to in any order or reasons issued by the Board at the conclusion of the matter, on the Board's website and in print and online reporting services that may publish the Board's decision.

When a complaint may be filed

The legislation requires that a complaint must be made within 90 days from the date on which the complainant knew or, in the opinion of the board, ought to have known, of the action or circumstances, giving rise to the complaint. After that 90 day period has passed, the Board has no jurisdiction to deal with a complaint. This may mean that a person may have to file a complaint with the Board before there is a final disposition of the grievance. Failure to file a complaint within the time stipulated may result in the complaint not being processed.

An aggrieved employee can file a complaint with the Board against the union (bargaining agent) alleging that the bargaining agent has acted in a manner that is arbitrary or discriminatory or in bad faith in the handling of a grievance that he or she has filed or attempted to file with that bargaining agent.

A complaint with the Board must, in accordance with Section 37 of the *Labour Relations Board Rules of Procedure*, include the following information:

- the name and address of the complainant;
- the name and address of the local trade union; and,
- the grounds on which the complaint is based.

There is a specific Duty of Fair Representation Complaint Form available for your use (please refer to the **Forms and Applications** section of the Labour Relations Board's website). An employee or former employee should file a complaint by either filling out this form or writing a letter to the Board which includes the above-noted information. In addition to the information stated above, the complaint should also include the following:

- the name and address of the employer;
- the piece of legislation under which the complaint is filed, i.e., either Section 130 of the *Labour Relations Act* or Section 43 of the *Public Service Collective Bargaining Act*;
- the nature of the grievance which the employee filed or attempted to file;
- the circumstances of the complaint including a chronology of the events, times, dates and people involved;
- details of the actions or conduct of the union officials that it is alleged were arbitrary, discriminatory or in bad faith;
- a statement of the remedy the complainant is seeking from the Board; and
- copies of any relevant documents that the complainant has referred to in the complaint and intends to rely upon.

The complaint must be verified by affidavit or statutory declaration that the facts set out therein are true to the best knowledge of the complainant. This means that it must be signed by the complainant in the presence of a commissioner for oaths or a solicitor/lawyer who witnesses the signing. One of the Board's staff is a commissioner for oaths and can assist a complainant in having the document sworn. If a complaint is filed that has **not** been verified by statutory declaration, it cannot be processed until it has been sworn.

A complaint may be filed at the Board's offices by delivery in person or by courier, or by mail. It is considered to be filed at the time it is received by the Board.

It is strongly recommended that employees who wish to file such complaints should review some previous decisions of the Labour Relations Board by contacting one of the Board officers who can provide copies of previous decisions. These decisions explain the reasoning of the Board and the principles which the Board applies to decide duty of fair representation complaints. All Board decisions are also available on the Board's searchable Decision System which can be found on our website at www.hrle.gov.nl.ca/lrb/ Questions may be addressed to one of the Labour Relations Board Officers at telephone number (709)729-2707.

III. PROCESSING THE COMPLAINT

When a complaint is filed, it is reviewed by the Chief Executive Officer (CEO) or Deputy Chief Executive Officer (Deputy CEO) of the Board. The Board also employs Labour Relations Board Officers. All employees of the Board are impartial and assist the Board in the processing of complaints and applications. They do not advocate for employees, unions or employers.

The reasons for the complaint being reviewed by the CEO are to ensure that the complaint is complete and that it contains an allegation of a violation of the legislation properly setting out the grounds upon which the complaint is based. If the complaint is found to be in order, a copy of the complaint is sent to the union and the employer for reply. At that time, the CEO appoints a Board Officer to investigate and attempt to settle the complaint.

The Board's *Rules of Procedure* provides a time limit of **10 calendar days** (section 7(2)) for the union and the employer to file a written reply to the complaint. When such replies are filed, they are sent to the complainant and the other party with a time limit of **5 calendar days** (section 9.1) in which they may file a response to a reply. Responses are sent to the parties for information only. Please refer to the Policy Circular titled Applications, Replies and Interventions which is accessible on the Board's website.

The Board Officer meets with all of the parties to the complaint and, if a resolution cannot be reached, the Officer files a report with the Board setting out the facts surrounding the complaint and the positions taken by the parties in relation to the complaint. This written report of the Officer is sent to the complainant, the union and the employer (or their representatives). The parties may comment on some or all of the contents of the Officer's report. Any comments which the parties wish to make in relation to the report must be filed with the Board within two **(2) working days** of their receipt of the report (section 11(3) of the *Rules*).

All replies and responses filed with the Board must be verified by affidavit or statutory declaration.

IV. DISPOSING OF THE COMPLAINT

Board meetings are held regularly to review applications and complaints. Hearings may or may not be held to assist the Board in its consideration of complaints.

Board Meetings

The Board meets to review the file which includes the complaint, replies and responses filed by the parties, the officer's report, the replies to the officer's report and any other relevant documents. The Board will assess whether or not a hearing is required before making a decision.

In its decisions over the years the Board has examined the conduct of the union in the handling of the employee's grievance and answered such questions as: Did the conduct of the union in handling the employee's grievance amount to acting in an arbitrary, discriminatory or bad faith manner. It has focused on how the union officials behaved. The Board does **not** have the jurisdiction or power to assess or decide the **merits** of the grievance; that is the role of the union and an arbitrator, if the grievance proceeds to arbitration. As stated in *Gagnon*, 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. For example, unions may settle grievances even if the affected employee does not agree with the settlement. This does not mean that unions cannot be wrong or make mistakes; they do not always have to be correct in their assessments and decisions they make in relation to the handling of a grievance as long as they do not act in an arbitrary, discriminatory or bad faith manner in so doing.

If the Board determines that the conduct of the union in handling the employee's grievance was not arbitrary, discriminatory or in bad faith and, therefore, was not a violation of the *Act*, it will dismiss the complaint. If the Board finds that the union has breached this section of the *Act*, it can direct the

bargaining agent to take those steps the Board deems appropriate in the circumstances. The types of orders that the Board has made in the past include an order that the bargaining agent file a grievance (in a case where the employee has attempted to file a grievance); that the union refer the grievance to arbitration; or comply with a requirement contained in the collective agreement or the union's constitution in relation to the handling of a grievance, and others.

The Hearing

If the Board determines that a hearing is necessary, hearing date(s) will be set. Hearings normally take place in the Board's hearings room located in the Beothuck Building, St. John's, NL. The hearing panel consists of three Board members, the Chairperson (or a Vice-Chairperson), an employee representative and an employer representative. At the hearing, each party presents evidence and introduces documents to support its case. The parties may be represented by legal counsel. Please refer to the Policy Circular titled Scheduling of Hearings which is accessible on the Board's website.

Following the completion of the hearing, the Board will consider the evidence and argument adduced at the hearing and will issue a decision.

Issuance of Board Decisions

All decisions of the Board are issued in the form of Board Orders. Where there is no hearing held, Orders are issued following Board meetings. If a party wishes to have written reasons for the Board's decision, a written request for reasons can be filed with the Board within 30 calendar days of the party's receipt of the Board Order. Where a formal hearing has been held, written reasons for decision are generally issued together with the Board Order. (See Section 12 of the *Labour Relations Act* and Section 16 of the *Labour Relations Board Rules of Procedure*).