# THE "ARBITRARY", "DISCRIMINATORY" AND "BAD FAITH" TESTS UNDER THE DUTY OF FAIR REPRESENTATION IN ONTARIO

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## I. *Introduction.*

In 1971 the Ontario legislature adopted what is now section 68[1] of the Ontario Labour Relations Act. This section provides:

> A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.[2]

It has readily been acknowledged by the Ontario Labour Relations Board that this "duty of fair representation" is an off-spring of a series of learned commentaries[3] and judicial decisions[4] in the United

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[1] R.S.O., 1980, c. 228.

[2] In 1975 the Labour Relations Act was amended to include the following provision, now s. 69, *ibid.* "Where, pursuant to a collective agreement, a trade union is engaged in the selection, referral, assignment, designation or scheduling of persons to employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith." R.S.O., 1970, c. 232, as am., 1975, c. 76, s. 16.

[3] Some of the more important articles prior to 1971 are the following: Blumrosen, The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship (1963), 61 Mich. L. Rev. 1435; Cox, Rights Under a Labor Agreement (1956), 69 Harv. L. Rev. 601; Cox, The Duty of Fair Representation (1957), 2 Vill. L. Rev. 151; Levy, The Collective Bargaining Agreement as a Limitation on Union Control of Employee Grievances (1970), 118 U. of Pa L. Rev. 1036; Lewis, Fair Representation in Grievance Administration: *Vaca* v. *Sipes*, [1967] The Supreme Court Rev. 81; Rosen, Fair Representation, Contract Breach and Fiduciary Obligations: Unions, Union Officials and the Worker in Collective Bargaining (1964), 15 Hastings L.J. 391; Summers, Individual Rights in Collective Agreements and Arbitration (1962), 37 N.Y. Law Rev. 362; Wellington, Union Democracy and Fair Representation: Federal Responsibility in a Federal System (1958), 67 Yale L.J. 1327. Since 1971 see: Finkin, The Limits of Majority Rule in Collective Bargaining (1980), 64 Minn. L. Rev. 183; Summers, The Individual Employee's Rights Under The Collective Agreement: What Constitutes Fair Representation (1977), 126 U. of Pa L. Rev. 251; Clark, The Duty of Fair Representation: A Theoretical Structure (1973), 51 Texas L. Rev. 1119. See also McKelvey (ed.), The Duty of Fair Representation (1977).

[4] The duty of fair representation has its judicial origin in *Steele* v. *Louisville & N.R.R.* (1944), 323 U.S. 192, a case arising under the Railway Labor Act. The union which represented firemen was the bargaining agent for all employees within the unit, both black and white, but barred black employees from union membership. In negotia-

States culminating in the decision of the United States Supreme Court in *Vaca* v. *Sipes*.[5] In fact, it appears that the critical language of section 68 was borrowed intact from the comments of Mr.Justice White in *Vaca* who, in delivering the opinion of the court, said that a "breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith".[6] This acknowledgment of indebtedness to American jurisprudence has led the Board to suggest that American decisions will be "helpful guides in interpreting and

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tions with the railroad company, certain provisions were incorporated into the contract which placed a ceiling upon the number of black employees who were to be assigned work within the unit and restricted their access to other jobs. When a number of black firemen lost their jobs, they brought an action in state courts. The suits were dismissed and ultimately appealed to the Supreme Court of the United States which reversed the decisions. That court found that there was implied in the Railway Labor Act a "duty to exercise fairly the power conferred upon it on behalf of all those for whom it acts, without hostile discrimination against them". (At p. 203). The court further suggested that this duty could be enforced by the courts through appropriate injunctive relief or an award of damages against both the union and the employer. This duty was formally extended to unions operating under the National Labor Relations Act in *Syres* v. *Oil Workers International Union* (1955), 350 U.S. 892 (*per curiam*). In *Ford Motor Co.* v. *Huffman* (1953), 345 U.S. 330, the court held that there were permissible distinctions that could be drawn between employees which would not violate this duty of fair representation. Thus, the court approved an arrangement whereby the company and the U.A.W. agreed after the end of World War II to give seniority credit to service veterans who had not worked for the company prior to their military service. The court stressed the notion of reasonableness "subject always to complete good faith and honesty of purpose in the exercise of its discretion". (At p. 338). Subsequently, the court extended the protection of fair representation beyond the negotiating stage and applied it to the administration of the collective agreement: *Humphrey* v. *Moore* (1964), 375 U.S. 335.

The United States Supreme Court decision, *Vaca* v. *Sipes* (1967), 386 U.S. 171, to which our Board has alluded on frequent occasions, involved a grievance filed by an employee who, having taken leave from work because of heart problems and then having been certified as fit for work by his own doctor, was refused re-employment because the company doctor, after an examination, declared him unfit to return. The employee secured a declaration of fitness from a third doctor but the company remained adament and permanently discharged him. The union carried the grievance to the fifth stage of its grievance process and then obtained a medical opinion from a fourth physician who confirmed the conclusions of the company doctor. The union then refused to refer the matter to arbitration and the employee sued for breach of fair representation. Though at trial there was a finding of fact favourable to the employee on the issue of fitness for work, the Supreme Court, nevertheless, held that the union's duty not to act in a manner which was arbitrary, discriminatory or in bad faith had not been breached. Of minor interest is the fact that before the court reached its decision, the grievor died of a cardiovascular accident due to hypertension.

[5] *Ibid.* For Board decisions acknowledging this indebtedness, see *I.A.W., Local 2-700*, [1972] O.L.R.B. Rep. 916; *Ford Motor Company of Canada Ltd*, [1973] O.L.R.B. Rep. 519; *Imperial Tobacco Products (Ontario) Ltd*, [1974] O.L.R.B. Rep. 418, rehearing denied, [1974] O.L.R.B. Rep. 609; *C.U.P.E., Local 1000*, [1975] O.L.R.B. Rep. 444; *Antonio Melillo*, [1976] O.L.R.B. Rep. 613; *Douglas Aircraft Company of Canada Ltd*, [1976] O.L.R.B. Rep. 779.

[6] *Vaca* v. *Sipes*, *ibid.*, at p. 190.

applying section [68]''[7] and that occasionally the Board will review these decisions to assist it in determining the meaning of this section of the Act.[8]

Ontario was not without its antecedent jurisprudence in this regard. The Supreme Court of Canada had held that it was a breach of natural justice for a union to file a policy grievance which, in effect, was directly aimed at compelling the employer to discharge an employee for refusal to authorize the payment of union dues as required under a check-off-clause of the collective agreement without notifying the employee of the hearing or affording him the opportunity to make representations on his own behalf.[9] The court concluded that where an employee's rights are being adversely affected and the union is taking a position at arbitration adverse to these interests, the employee is entitled to be represented in his own right. For the same reason the Ontario Court of Appeal in *Re Bradley et al. and Ottawa Professional Fire Fighters Association*[10] quashed an arbitration award in favour of a union which had filed a policy grievance concerning the interpretation of the collective agreement over promotion entitlement. The arbitration award resulted in the demotion of the applicants even though the latter had no opportunity to be present at the hearing where the union was promoting the interests of other employees.[11]

This article reviews the jurisprudence of the Ontario Labour Relations Board concerning the duty of fair representation covering the decade following the enactment of section 68. The principal focus is on a substantive analysis of the terms ''arbitrary'', ''discriminatory'' and ''bad faith'', the general duty or obligation owed by a union to employees in the representation of their interests and the standard by which the conduct of union officials is to be judged.[12]

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[7] *Ford Motor Company of Canada Ltd, supra*, footnote 5, at p. 526.

[8] *Douglas Aircraft Company of Canada Ltd, supra*, footnote 5.

[9] *In Re Hoogendoorn* (1968), 65 D.L.R. (2d) 641 (S.C.C.).

[10] [1967] 2 O.R. 311 (C.A.).

[11] For a discussion of these two cases and Board decisions which in effect suggest a duty of fair representation see Carr, The Development of the Duty of Fair Representation in Ontario (1968), 6 O.H.L.J. 281. The author suggests that as of that date an Ontario ''employee had greater rights . . . against his union than his counterpart in the United States''. (At p. 292). For a judicially created duty of fair representation in the province of British Columbia, see *Fisher* v. *Pemberton* (1970), 8 D.L.R. (3d) 521 (B.C.S.C.). Professor Adell discusses this case in The Duty of Fair Representation—Effective Protection for Individual Rights in Collective Agreements (1970), 25 Ind. Rel. 602. The province of British Columbia has since legislated the duty: S.B.C., 1973, c. 122, s. 7. The Ontario Board has rejected the argument that since the duty of fair representation existed at common law, the statutory duty must necessarily be a more onerous one: *Rutherford's Dairy Ltd*, [1972] O.L.R.B. Rep. 240.

[12] The period covered by this article is up to and including September 1981. The author plans to explore the procedural ramifications of the duty of fair representation in a future article.

## II. *The Meaning of Fair Representation.*

### A. *The General Nature of the Duty of Fair Representation.*

#### (1) *Administering the Grievance Process.*

In order for there to be a violation under section 68, the Board must find that the union acted in a manner that was arbitrary, discriminatory, or in bad faith in the representation of an employee. The general character of this duty is readily discernable from a review of the decision of the Board to date. An employee is not entitled as a matter of absolute right to have his or her grievance taken to arbitration[13] or to any of the various stages of the grievance procedure[14] or, for that matter, even to have his or her grievance filed in the first instance.[15] Nor is there any obligation to apply for judicial review of an arbitration award adverse to the complainant once the grievance process has been exhausted.[16]

Certainly no further action need be taken on the grievor's behalf by the union where it has already settled the grievance with the employer[17] particularly where the grievor concurred in the mechanism by which settlement was to be reached[18] or in the settlement itself.[19] However, the Board has drawn the same conclusion even in the absence of the grievor's concurrence or consultation regarding the process of grievance negotiations[20] or their result.[21]

The failure by the union to pursue a grievance may be a deliberate and conscious one[22] or it may be the result of inadvertence, error or negligence on the part of a union official. In the latter regard, the Board has repeatedly said that the duty owed under section 68 does not

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[13] *Sheet Metal Workers Local 540,* [1971] O.L.R.B. Rep. 664; *Steinberg's Ltd,* [1972] O.L.R.B. Rep. 423; *Nick Bachiu,* [1975] O.L.R.B. Rep. 919; *Douglas Aircraft of Canada Ltd,* [1979] O.L.R.B. Rep. 745.

[14] *Local 30 Sheet Metal Workers International Association,* [1972] O.L.R.B. Rep. 719; *Babcock and Wilcox Canada Ltd,* [1978] O.L.R.B. Rep. 886; *U.A.W., Local 1459,* [1979] O.L.R.B. Rep. 913.

[15] *Ryancrete Sterling Products,* [1972] O.L.R.B. Rep. 298; *Carlos Mendata Samuels,* [1975] O.L.R.B. Rep 633; *American Motors (Canada) Ltd,* [1980] O.L.R.B. Rep. 1.

[16] *Concrete Construction Supplies,* [1979] O.L.R.B. Rep. 739; *Toronto East General and Orthopaedic Hospital Inc.,* [1980] O.L.R.B. Rep. 555.

[17] *Walker Exhausts Ltd,* [1979] O.L.R.B. Rep. 144.

[18] *Jaroslav Rehak,* [1976] O.L.R.B. Rep. 522.

[19] *United Electrical Union Local 504,* [1972] O.L.R.B. Rep. 523.

[20] *Walker Exhausts Ltd, supra,* footnote 17.

[21] *Chrysler Canada Ltd,* [1979] O.L.R.B. Rep. 618.

[22] *E. B. Eddy Forest Products Ltd,* [1977] O.L.R.B. Rep. 762; *Wakefield Harper,* [1978] O.L.R.B. Rep 640.

reach such human shortcomings as negligence,[23] inadvertence,[24] carelessness,[25] honest mistakes and innocent misunderstandings,[26] or poor judgment, irresponsibility and unawareness.[27] Thus, the Board has been unwilling to find a violation of section 68 merely because the union's procrastination or error permitted the time limits for filing an arbitration to be exceeded[28] or that its inadvertence and negligence resulted in the failure to pursue a grievance to some stage of the grievance procedure.[29] Even an innocent misrepresentation, causing the complainant to forego attendance at a union meeting where a recommendation of the executive against taking the complainant's grievance to arbitration was to be discussed, was not considered to be of a sufficiently serious nature to attract liability under section 68.[30]

(2) *Factors in Determining Whether to Process a Grievance.*

Where the union does undertake to address itself to the grievor's complaint, the Board has identified a number of factors which the union may take into consideration in determining whether to proceed further or at all with respect to a particular grievance. These include such matters as the nature of the grievor's conduct, the union's perception of him or her as a witness, the grievor's acquiescence in an alternative method for resolving the dispute and the union's overall responsibility and authority to act in the interests of the bargaining unit as a whole in the administration of the collective agreement.

The grievor's misconduct may include incidents both preceding and following the event which precipitated the discipline over which a particular grievance arose. These incidents and indeed, the general employment history of the grievor,[31] including any history of disciplinary action[32] and the effect such discipline may have had on his or her behavior,[33] may be taken into consideration by the union in determining whether to proceed further. Thus, in *The International*

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[23] *Jay Sussman*, [1976] O.L.R.B. Rep. 349; *Royal Ontario Museum*, [1980] O.L.R.B. Rep. 106.

[24] *U.A.W., Local 1285*, [1975] O.L.R.B. Rep. 387; *Ivan Pletikos*, [1977] O.L.R.B. Rep. 776.

[25] *Royal Ontario Museum, supra*, footnote 23.

[26] *I.T.E. Industries Ltd.* [1980] O.L.R.B. Rep. 1001.

[27] *Diamond "Z" Association*, [1975] O.L.R.B. Rep. 791.

[28] *United Steel Workers of America, Local 7608*, [1973] O.L.R.B. Rep. 184; *The Steel Company of Canada Ltd.* [1974] O.L.R.B. Rep. 392.

[29] *Ivan Pletikos, supra*, footnote 24.

[30] *I.T.E. Industries Ltd, supra*, footnote 26.

[31] *Victory Soya Mills Ltd.* [1974] O.L.R.B. Rep, 252.

[32] *Nick Bachiu, supra*, footnote 13. In this particular case the complainant was involved in five previous incidents where discipline was invoked.

[33] *Rolland Inc.*, [1979] O.L.R.B. Rep. 1287.

*Association of Machinists and Aerospace Workers, Local 2330,*[34] there was evidence of frequent occasions of insubordination on the part of the complainant which ultimately led to his dismissal,[35] while in *Francon Division of Canfarge Ltd,*[36] the complainant, following the filing of a grievance, had engaged in conduct similar to that for which he was discharged. In *U.A.W., Local 200,*[37] the complainant, who was discharged for threatening to kill his foreman, decided to repeat his performance while the grievance was pending.

The union may also evaluate the grievor's credibility as a witness. Thus the union may not be satisfied that the grievor will make a credible witness,[38] particularly with respect to his version of events giving rise to the grievance.[39] This may be critical where the complainant has been less than candid with the union itself.[40]

A grievor who has elected an alternative method of dispute resolution, may not be in a position to complain if the union refuses to process it through the normal grievance machinery. Thus, in *Jaroslav Rehak,*[41] the complainant was one of seven employees discharged by the employer for drinking on company premises and causing considerable property damage. The complainant, together with the others, agreed to forego the normal grievance procedure and a special committee was struck by the union which investigated the incident, obtained statements, discussed the evidence with the company and then proposed that the complainant and others be given conditional reinstatement. However, the final settlement, which resulted in reinstatement of some of the employees, confirmed the discharge of the complainant. The Board dismissed the section 68 complaint in view of the fact that the complainant had given his consent to the procedure that was followed.

The Board will also "recognize the legitimate interests of the trade union in representing the totality of the employees in a bargain-

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[34] [1972] O.L.R.B. Rep, 844.

[35] Between Aug. 22nd, 1969 and Jan. 7th, 1972 the complainant had been disciplined on twenty occasions by the employer, sixteen of which were for insubordination. The disciplines invoked were verbal and written warnings, suspensions and finally a discharge. During the month of December, 1971 alone he was suspended four times and had filed grievances in connection with each suspension. Even after the final discharge, the union managed to reach a settlement with the employer but the complainant refused to accept it and only then did the union refuse to pursue the matter to arbitration.

[36] [1973] O.L.R.B. Rep. 556.

[37] [1973] O.L.R.B. Rep. 628.

[38] *Supra,* footnote 33.

[39] *Nick Bachiu, supra,* footnote 13.

[40] *The Regional Municipality of Durham,* [1979] O.L.R.B. Rep. 1277.

[41] *Supra,* footnote 18.

ing unit''[42] and the union may balance these interests against that of a complainant in determining whether or not to proceed to arbitration. Thus, in *C.U.P.E. & Its Local 922*,[43] the union refused to apply its resources toward the arbitration of a grievance which would have the effect, if successful, of reversing an interpretation of a seniority provision which the union had secured on two previously settled grievances. The Board refused to find the union in violation of section 68 saying:

> In the circumstances of the present case we fail to see that the union has been derelict in its duty under section [68] of the Act in evaluating the complainant's grievance. The interpretation placed on the seniority provisions of the collective agreement is a legitimate factor for trade union concern. That in itself might be sufficient for the union to refuse to process the complainant's grievance through to arbitration.[44]

In *The Municipality of Metropolitan Toronto*,[45] the complainant filed a grievance contesting the practice of the employer in promoting persons temporarily from the bargaining unit to management positions without requiring that person to forfeit his union membership. The complainant argued that such an arrangement created a conflict of interest, particularly where the employee was an officer in the union, because the appointee could not carry out the interests of management and serve the interests of the union at the same time. The union, however, saw this arrangement as beneficial to the employees. When the union, after having received the approval of the general membership, declined to take the complainant's grievance to arbitration, the complainant filed a section 68 complaint. At the hearing before the Board, the union justified its stance on the ground that the complainant's position ''would destroy the future of promotions for bargaining unit employees and would, therefore, bring an injustice upon the members''.[46] In concluding that the union did not act in bad faith, the Board stated that it was ''satisfied that their disagreement was rooted in an evaluation of the merits of the grievance and the welfare of the majority of the members''[47] and that the duty of fair representation ''requires that the union consider the position of all its members and that it weigh the competing interests of minorities or individuals in arriving at its decisions''.[48]

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[42] *C.U.P.E. & Local 922*, [1974] O.L.R.B. Rep. 283, at p. 285; ''A union has an obligation not only to each individual member but to the bargaining unit as a whole . . .''; *Rutherford's Dairy Ltd, supra*, footnote 11, at p. 246.

[43] *Ibid.*

[44] *Ibid.*, at p. 285.

[45] [1978] O.L.R.B. Rep. 143.

[46] *Ibid.*, at p. 146.

[47] *Ibid.*, at p. 147.

[48] *Ibid.* See also *Ford Motor Company of Canada Ltd, supra*, footnote 5; *Antonio Melillo, supra*, footnote 5. For an application of this principle to employer's associa-

The financial costs to the union may be considered in determining whether to take a grievance to arbitration,[49] or for that matter beyond arbitration to some form of judicial review.[50] The Board has recognized that the process of grievance resolution and, in particular, arbitrations in Ontario has become exceedingly complex, time consuming and expensive.[51] In this regard, however, the Board should be careful to distinguish between the right of the union to refuse to pursue an arbitration for reasons of financial exigency and the refusal to permit the complainant to take the matter forward at all. While the union generally controls the grievance and arbitration process,[52] it may not be justified in not permitting the complainant to take his own grievance forward where he is willing to reimburse the union for its costs. Thus, in *C.U.P.E. & Its Local 922*,[53] the union offered the complainant exactly that option in a case where the Board held that the union otherwise had a legitimate concern not to dissipate the funds of the bargaining unit in pursuing what the union perceived to be a frivolous grievance. Of course, if the complainant is successful at arbitration, there may be even less justification in requiring the complainant to reimburse the union for any costs.[54]

Closely associated with the notion of financial exigency, may be the practical consideration that out of a large number of grievances, possibly only a few may be pursued to arbitration. This certainly was a factor which the Board permitted the union to take into consideration in *Nick Bachiu*[55] when it noted that there were some 398 grievances pending during negotiations for a new agreement which were resolved to the satisfaction of the union membership and the employer, if not to

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tions under s. 151(2) of the Ontario Labour Relations Act, see *Dominion Maintenance Ltd*, [1979] O.L.R.B. Rep. 940.

[49] *C.U.P.E. & Local 922, supra*, footnote 42. See also *Wakefield Harper, supra*, footnote 22.

[50] *Toronto East General and Orthopaedic Hospital Inc., supra*, footnote 16. In this case the Board noted that the union had already expended considerable sums on the grievance and arbitration.

[51] *Douglas Aircraft of Canada Ltd, supra*, footnote 13. In this case the delay from the initiation of the grievance to arbitration would have been five years. See also *Nick Bachiu, supra*, footnote 13, and the Report of the Industrial Inquiry Commissioner concerning Grievance Arbitration under The Labour Relations Act and The Hospital Labour Disputes Arbitration Act (Ont. 1978).

[52] See The Labour Relations Act, R.S.O., 1970, c. 232, s. 44.

[53] *Supra*, footnote 42.

[54] It can scarcely be argued by the union at this point that the grievance was frivolous where the complainant has since been successful at arbitration. Therefore, there is no reason why the union should not bear the costs of that arbitration and reimburse the complainant for any legal expenses as well.

[55] *Supra*, footnote 13.

the complainant, through the process of negotiation. The Board stated:[56]

> The bargaining unit in which the complainant works is very large by any standard. Given grievance arbitration as we now know it, it is almost inevitable that in such a bargaining unit more grievances will arise during the life of the collective agreement than can be resolved before the contract expiration date. . . . This reality is forcing parties to fashion dispute resolving alternatives to grievance arbitration in order to prevent the administration of an agreement from becoming bogged down in a quagmire of unresolved disputes. . . . The Board cannot be oblivious to the very real pressures that have spawned this search for alternatives. . . .

The union may also consider its own credibility with the employer in pursuing any grievance. Thus, as early as 1972 the Board casually suggested that a decision to take a grievance forward which had little chance of success would adversely affect the reputation of the union.[57] Along the same lines the Board added:[58]

> The effect of an individual being able to compel arbitration of his grievance regardless of merit . . . would destroy the employer's confidence in the union's authority. . . .

These sentiments were repeated in *Diamond "Z" Association*[59] when the Board expressed concern over "a continuing and viable collective bargaining relationship with the employer that may very well be undermined by the indiscriminate processing of grievances".[60] And in *Douglas Aircraft of Canada Ltd*,[61] the Board said:[62]

> If either party obstinately adheres to an unreasonable position or continually presses trivial claims, the entire settlement process could be undermined, and their long-term relationship prejudiced. It can hardly further mutual trust and respect if union and management officials spend needless hours discussing inconsequential or ill-founded grievances. Moreover, as a practical matter, a rigid insistence on one's "strict legal rights" is likely to provoke a response in kind, and yield only short-term gains.

In *U.A.W. Local 1459*[63] the union refused to process the complainant's grievance beyond the second step of the grievance process because the complainant's position was contrary to a verbal under-

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[56] *Ibid.*, at p. 927.

[57] *Rutherford's Dairy Ltd, supra*, footnote 11.

[58] *Ford Motor Company of Canada Ltd, supra*, footnote 5, at p. 527.

[59] *Supra*, footnote 27.

[60] *Ibid.*, at p. 794. This statement was repeated almost verbatim, without attribution, in *Antonio Melillo, supra*, footnote 5, at p. 616: ". . . the Board has recognized that a trade union must concern itself with continuing a viable collective bargaining relationship with the employer which may well be undermined by the indiscriminate processing of grievances."

[61] *Supra*, footnote 13.

[62] *Ibid.*, at p. 747.

[63] *Supra*, footnote 14.

taking between the union and management of many years standing.[64] The Board held that the union in withdrawing these grievances was "acting in a responsible manner designed to maintain its credibility in its collective bargaining relationship with the Company"[65] and that this was "paramount to the complainant's interest in having the grievance carried to a further step in the grievance procedure".[66]

For the same reason the Board upheld the decision of a union not to pursue a complainant's grievance at all where the complainant was less than honest with the union in his representations concerning the grievance. Thus, in *The Regional Municipality of Durham*,[67] the complainant had been discharged for having supplied a city councillor with certain information critical of his employer, where he worked as a draftsman. The complainant repeatedly denied to the employer and to his union representatives that he had talked to the city councilman involved, but in fact this was not true. The Board noted that if the union had pursued the grievance, taking the position that the complainant had had no contact with the city official, knowing this position to be false, they would at the very least be embarrassed. More importantly, however, this posture would undermine the credibility of the union and its "continuing relationship with the employer", since the "employer can never be certain to what extent the union itself had knowledge of the true facts".[68]

And in *Rowntree Mackintosh Canada Ltd*,[69] the Board concluded that a union did not have to pursue a grievance filed by an unsuccessful applicant for a posted job after the union had already opted in favour of another applicant since this "would only serve to damage the credibility of the union in the eyes of the employer and seriously impair the union's ability to resolve differences arising out of the administration of the collective agreement. . .".[70]

There are some factors referable to the nature of the grievance itself. Thus, a union may take into consideration the merits of the

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[64] The understanding was that the company would arrange to transfer employees on the second and third shifts to the day shift so that they could attend meetings of the plant shop committee on the understanding, however, that the union would not process any grievance which might be founded on a claim for payment of overtime rates if the transfer resulted in the employee working more than 8 hours during a 24 hour period. The complainant who worked on the second shift had refused to agree to this undertaking and as a result the company refused to transfer him to the day shift so that he could participate in these meetings and it also refused to pay him when he did attend such meetings. The complainant filed two grievances in this regard.

[65] *Ibid.*, at p. 916.

[66] *Ibid.*

[67] *Supra*, footnote 40.

[68] *Ibid.*, at p. 1283.

[69] [1977] O.L.R.B. Rep. 211.

[70] *Ibid.*, at p. 214. See also *Wakefield* v. *Harper*, *supra*, footnote 22.

grievance,[71] the frivolous nature of the complaint,[72] and the probability of success if the grievance is pursued.[73] And in that regard, the Board is impressed when the union has taken the effort to solicit the advice of legal counsel before taking any action adverse to the complainant in the processing of his or her grievance[74] especially where the interests of the union and the complainant are adverse.[75]

(3) *Encouraging the Settlement Process.*

If the union pursues a grievance, the policy of the Board is to encourage the process of settlement between the union and management whenever possible and it is for this reason that the Board has been unwilling to concede to individual employees the right to insist that their grievance be pursued. Thus, it has said that "by settling frivolous and unmeritorious grievances, issues can be quickly resolved without the cost and time involved in further steps of the grievance process or at arbitration".[76] If each member was free to insist that his grievance be taken to arbitration this would "vastly encumber the settlement machinery required by the Act and hamper the interests of industrial peace. . ."[77] or "seriously impair the union's ability to resolve differences arising out of the administration of the collective agreement. . .".[78] The Board has frequently alluded to the decision in *Vaca* v. *Sipes*[79] where the United States Supreme Court held that unions could screen out meritless claims through the grievance process and the Ontario Board has added:

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[71] *U.A.W., Local 1285*, [1973] O.L.R.B. Rep. 418; *Carlos Mendata Samuels, supra*, footnote 15; *Jay Sussman, supra*, footnote 23; *Scarborough General Hospital*, [1977] O.L.R.B. Rep. 770; *Vision '74' Nursing Home*, [1979] O.L.R.B. Rep. 460; *Rolland Inc., supra*, footnote 33.

[72] *C.U.P.E. & Its Local 922, supra*, footnote 42.

[73] *Amalgamated Transit Union*, [1973] O.L.R.B. Rep. 125; *Chrysler Canada Ltd, supra*, footnote 21; *Douglas Aircraft of Canada Ltd, supra*, footnote 13; *Rolland Inc., supra*, footnote 33; *York University*, [1980] O.L.R.B. Rep. 383; *I.T.E. Industries Ltd, supra*, footnote 26.

[74] *Francon Division of Canfarge Ltd, supra*, footnote 36; *Wakefield Harper, supra*, footnote 22; *Toronto East General and Orthopaedic Hospital Inc., supra*, footnote 16.

[75] See for example, *Service Employees Union, Local 204*, [1972] O.L.R.B. Rep. 770, where the employer discharged the complainant at the request of the union when the complainant refused to join the union or pay union dues after she had been disqualified for a religious exemption under section 47. The Board was satisfied that the union acted in good faith in refusing to pursue her grievance to arbitration since among other things it acted on the strength of an opinion by legal counsel regarding the requirements of the collective agreement.

[76] *Ford Motor Company of Canada Ltd, supra*, footnote 5, at p. 527.

[77] *Ibid.*

[78] *Rowntree Mackintosh Canada Ltd, supra*, footnote 69, at p. 214.

[79] *Supra*, footnote 4. See *Ford Motor Company of Canada Ltd, supra*, footnote 5.

[80] *Service Employees Union, Local 204, supra*, footnote 75, at p. 778.

> The Board believes it should make clear that it does not consider the duty of fair representation requires a union to blindly carry every grievance through to arbitration at the demand of the grievor. The grievance procedures set out in collective agreements are obviously designed to afford opportunity for settlement and compromise at any of the different levels of consultation up to arbitration. The settlement of disputes and grievances of employees under the terms of the collective agreement has been said to be as much a part of the general process of collective bargaining as are the negotiations which bring about a collective agreement.

These sentiments reflected the views expressed by Professor Cox as quoted in *Antonio* v. *Melillo*:[81]

> Allowing an individual to carry a claim to arbitration whenever he is dissatisfied with the adjustment worked out by the company and the union treats issues that arise in the adminsitration of a contract as if there were always a "right" interpretation to be devined from the instrument. It discourages the kind of day-to-day co-operation between the company and union which is normally the mark of sound industrial relations — a dynamic human relationship in which grievances are treated as problems to be solved and contract clauses serve as guideposts.[82]

With these policy guides in mind the Board has said that not only does a union have a right to withdraw or abandon a grievance at any stage of the grievance procedure but, indeed, on occasion, it may have a duty to do so.[83]

The view that unions ought to control the processing, including the settlement, of grievances was rationalized in *Ford Motor Co. of Canada Ltd.*[84] First, the parties in the collective agreement contemplated that each would settle grievances in good faith and in Ontario this expectation was encompassed within the framework of the Labour Relations Act.[85] Secondly, the union's control over the settlement process would ensure a consistency of treatment for the benefit of all employees under the agreement. Thirdly, individual control over grievances would unduly clog the process by which grievances are administered and "destroy the employer's confidence in the union's authority".[86]

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[81] *Supra*, footnote 5, at p. 617.

[82] Cox, Law and the National Labour Policy (1960), pp. 83-84. This excerpt was in turn taken from a British Columbia Labour Relations Board decision, *Rayonier and I.W.A., Local I-217* (1975), 2 C.L.R.B.R. 196.

[83] *Service Employees Union, Local 204, supra*, footnote 75.

[84] *Supra*, footnote 5.

[85] S. 44(2), *supra*, footnote 2.

[86] *Ford Motor Co. of Canada Ltd, supra*, footnote 5, at p. 527. The Board adopts the arguments of Professor Cox in Rights Under a Collective Agreement, *op. cit.*, footnote 3. For a thoughtful critique of the Cox analysis, see Summers, Individual Rights in Collective Agreements and Arbitration (1962), 37 New York Univ. L. Rev. 362.

(4) *Resolving and Adjusting Competing Interests.*

In the processing of grievances under a collective agreement, the union is often placed in a position where it must resolve competing interests among various employees or, as previously suggested, conflicts between the interests of the grievor and the union itself. The Board in one of its earlier cases articulated its concern when it attempted to describe the essential features of the duty of fair representation.[87]

> Section [68] of the Labour Relations Act is to ensure that individual rights are not abused by the majority of the bargaining unit; it is an attempt to achieve the balance between the individual interests and the majority interest by recognizing that the exclusive bargaining agent has a duty to consider all the separate interests in the performance of its obligations. The duty has been described as the duty of fair representation. The emphasis is on fairness—it is a duty to act fairly in the interests of all members of the bargaining unit, minority factions, as well as majority factions, individual employees as well as the collective group, members as well as non-members, craft employees as well as industrial employees. It is not a duty which makes the union the guarantor or insurer for every situation in which an individual employee is aggrieved or adversely affected; rather, the Statute attempts to have the union consider the position of all groups and to weigh the competing interests of minorities, individuals and other like groups in arriving at its decision. The difficulties that arise are in applying the concept of fairness and particularly where to draw the line between majority and minority interests.

There are a variety of choices that a union may be invited to make between competing interest groups. At times these will involve deliberate steps to pursue the interest of one grievor to the detriment of another or to pursue the interests of the union as a whole to the disadvantage of an individual or groups of individuals. Occasionally, the union may have to intervene actively in favor of one political faction against that of another. These same choices may, as well, be effected by deliberate inactivity on the part of the union. Finally, the activity or inactivity of the union may be tainted further by the fact that the complainant may be unpopular within the bargaining unit or at least with the union officer or officers assigned the task of processing the grievance or reviewing its merits.

The Board has not experienced any particular difficulty in reviewing complaints relating to deliberate choices made by the union in favour of one individual against that of another in pursuing a grievance where that decision is not otherwise affected by matters extraneous to the merits of the grievance itself. Thus, in *Ontario Hydro*,[88] the company posted a vacancy notice having regard to a cable technician job for which the complainant and others applied. When another employee was selected, the complainant asked the company for an explanation and not being satisfied with the answer,

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[87] *Ford Motor Co. of Canada Ltd. ibid.*, at pp. 525-526.

[88] [1974] O.L.R.B. Rep. 366.

requested the union to investigate and file a grievance. The union looked into the matter and concluded[89] that the complainant could not prevail on his grievance. The Board held that there was no violation of section 68 when the chief steward refused to process it.

In *Rowntree Mackintosh Canada Ltd*,[90] the complainant had been employed by a company for some four months and another employee, a Mrs. Elley, had been employed for twenty years. The employer created a temporary position of "checkweigher" which the complainant was selected to fill. When the employer decided to make the position permanent, the job was posted and Mrs. Elley, the complainant and others applied. In tests for the job, only Mrs. Elley and the complainant demonstrated sufficient math ability to perform the job, though the latter scored significantly higher. The employer awarded the job to the complainant and Mrs. Elley grieved. In a compromise worked out with the union, the employer agreed to give Mrs. Elley a ninety day probationary period on the job. The complainant then filed a grievance, which the union accepted, but refused to process further until the probationary period was completed. At the end of the probationary period the employer concluded that both employees were now first class checkweighers with nothing to favour one over the other but it determined that since the complainant had departmental seniority she should be awarded the job. Mrs. Elley filed another grievance which the union supported, pointing out that company, and not departmental, seniority was the appropriate criteria under the collective agreement. After a review, the company concurred and awarded the job to Mrs. Elley. The complainant filed a second grievance but the union turned it down on the ground that Mrs. Elley had properly been assigned to the job.

The Board concluded that the union had no obligation to pursue the grievance of the complainant further. It specifically approved the right of the union to pursue the interests of one grievor to the disadvantage of another:[91]

> In situations such as this, where two or more employees are competing against each other for a single job vacancy, a union is entitled to challenge those decisions of Management which it feels violates the terms of the collective agreement.

The Board reached similar conclusions in two other cases where the interests of one individual competed with the interests of another. In *Ivan Pletikos*,[92] the union opted in favour of one employee in

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[89] On somewhat tenuous but, nevertheless, plausible grounds, the Board concluded.

[90] *Supra*, footnote 69.

[91] *Ibid.*, at p. 214.

[92] *Supra*, footnote 24.

interpreting the collective agreement regarding bumping rights[93] while in *Massey-Ferguson Industries Ltd*,[94] the union, after agreeing to reactivate the complainant's seniority following his termination of employment, reversed itself when two other employees complained that the arrangement would cost them their places on the skilled trades seniority list. The Board upheld the union decision and concluded:[95]

> In exercising its duty of fair representation, the union must keep in mind the respective concerns of all members of the bargaining unit and cannot focus on the interests of one member to the exclusion of the others. The Bargaining Committee's initial, positive response to the company's offer was a decision that the union, upon reflection, viewed as one that would have promoted the interests of a single employee to the unfair detriment of both the two employees who would have immediately dropped down on the skilled trades seniority list as well as other members who had also quit at one time or another, lost their seniority and had not, subsequently, been given preferential treatment. The Board readily accepts that the union was concerned that if they allowed their original decision to stand they might well have been violating their duty of fair representation in respect of other individuals in the bargaining unit.

With regard to conflicts between the interests of an individual grievor and those of the entire bargaining unit, the Board has approved decisions by a union refusing to file, process or pursue to arbitration, grievances which were inconsistent with the union's interpretation of the collective agreement, practice and policy or the interpretation gained through previous arbitration awards on settlements with management. Thus, the Board has sanctioned the refusal by the union to file a grievance where the union interpreted the collective agreement as calling for plant seniority rather than the shift seniority claimed by the grievor[96] or interpreted it as calling for loss of seniority when a person was transferred from one skilled trade classification to another.[97] Where there was a long-standing practice between the union and management to change shifts weekly rather than every two weeks, as complainant sought, the Board upheld the union's refusal to file a grievance.[98] So too, the Board did not find a violation when the union dropped a grievance challenging a union policy permitting a person temporarily promoted to management to retain his union membership[99] or withdrew a grievance which would

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[93] The case was complicated somewhat by the fact that the union, through inadvertence or negligence, failed to process the complainant's grievance to the third stage under the collective agreement after having indicated it would do so.

[94] [1980] O.L.R.B. Rep. 49.

[95] *Ibid.*, at pp. 55-56.

[96] *Oil, Chemical and Atomic Workers International Union*, [1972] O.L.R.B. Rep. 521.

[97] *Chrysler Canada Ltd.* [1975] O.L.R.B. Rep. 141.

[98] *U.A.W., Local 199*, [1973] O.L.R.B. Rep. 470.

[99] *The Municipality of Metropolitan Toronto, supra*, footnote 45. This case might have more appropriately been decided on the basis that the grievance was a policy one which only the union, and not the complainant, could pursue.

have had the effect of challenging a long-standing arrangement with management permitting the transfer of persons to the day shift so that they could attend Plant Committee meetings.[100]

It is not clear whether the Board would also approve a settlement between management and the union of a policy grievance calling for super seniority for committeemen during a layoff where, as part of the settlement, the union agreed not to file any individual grievances on the part of the complainants challenging the result, since in the particular case the complaint was dismissed for failure to exhaust internal union appeal procedures.[101] However, a union is free to negotiate such provisions at the bargaining table.[102]

The union may also initiate a policy grievance seeking an interpretation of a collective agreement on seniority which is antithetical to the complainant's seniority standing.[103] In this regard the Board has said:[104]

> This case raises the question as to whether a bargaining agent's act of seeking a contract clarification or interpretation can, in itself, be found to be a breach of its duty to fairly represent all employees. The mere fact that the ruling sought may have the effect of changing the status of individual employees from that which existed prior to arbitration does not seem to be relevant. By definition, the arbitration function is to clarify for the parties the true intent and meaning of the language they have previously agreed on. The arbitration process does not result in any change in language but merely makes clear what that language has meant since its inception: the arbitration process is one of adjudicative impartiality, uninfluenced by the special interests of the parties. . . . The seeking of an impartial ruling from an arbitrator by a union is the antithesis of discrimination, arbitrariness or bad faith; it is voluntarily putting the entire issue for resolution in the hands of an independent third party.

Finally, the Board has approved the actions of a union in refusing to pursue to arbitration a seniority grievance which was inconsistent with previous grievances supported by the union and which, if successful at arbitration, would reverse an interpretation which the union had secured through two previously settled grievances.[105] The Board indicated that the interpretation which the union placed on the collective agreement might "in itself . . . be sufficient for the union to

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[100] *U.A.W., Local 1459, supra,* footnote 14.

[101] *General Impact Extrusions (Mfg) Ltd,* [1972] O.L.R.B. Rep. 798. In principle, though, there is no reason for the Board to reject such an arrangement.

[102] *Douglas Aircraft Co. of Canada Ltd, supra,* footnote 5.

[103] *John Farrugia,* [1978] O.L.R.B. Rep. 152. This was the first case under the Colleges Collective Bargaining Act, R.S.O., 1980, c. 74.

[104] *Ibid.,* at pp. 160-161.

[105] *C.U.P.E. and Local 922, supra,* footnote 42. However, the union indicated that the complainant could pursue the arbitration if he was willing to absorb his own costs.

refuse to process the complainant's grievance through to arbitration''.[106]

In a small group of cases, the union may have to be more cautious. These involve the so-called problem of ''trade-offs'' where the interests of some may be exchanged for the interests of others or the entire bargaining unit. Thus, a number of grievances may be filed by several employees involving a single incident and the union may have to decide which, if any, are worth pursuing and, if pursued, what disposition is appropriate to each. Oftentimes, there are many grievances arising out of totally unrelated incidents and these may be left pending at a time when the union and management are negotiating a new contract.

Where the grievances grow out of a single incident the issues may be easier to evaluate. Thus, in *Ford Motor Company of Canada Ltd*,[107] the complainants' grievances were considered along with several others whose discharges arose out of the same series of incidents. Compromises and accommodations were reached regarding several employees but the complainants' discharges were not modified. The Board concluded that the result did not constitute a simple trade-off, thus suggesting that such a practice might be looked upon with disfavour. It noted that the final decision and settlement was reached ''only . . . after due consideration by the union as to the meritoriousness of each case''.[108] The Board also reviewed the activity and responsibility of each grievant in the incident leading to the discharges and concluded that the complainants' roles were such that they could justifiably be treated more harshly by the employer.

In *Jaroslav Rehak*,[109] the complainant was one of several employees discharged by the employer for drinking on company property and causing extensive damage. In this case there was little to fault with regard to the union since all grievors agreed to the convening of a special committee to consider the grievances and the union did recommend that the complainant be reinstated but the employer would not concur.

In *Chrysler Canada Ltd*,[110] the complainant was discharged for directing a protest against the company and fighting with another employee. Though the union obtained his reinstatement, the complainant objected to the settlement because his penalty was greater than the person who led the protest or the other person involved in the

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[106] *Ibid., at p. 285.*

[107] *Supra*, footnote 5.

[108] *Ibid.*, at p. 532.

[109] *Supra, footnote 18.*

[110] *Supra*, footnote 21.

fight. The Board's cryptic response to this argument was that there was no "obligation on the union under section [68] to ensure that either the other participant in the fight or the real leader of the work stoppage be disciplined".[111]

In *York University*,[112] the Board approved the negotiation of a settlement of three grievances which achieved only partial satisfaction for the grievors but secured a concession from management regarding payment of future overtime, the problem which led to the grievors' suspension in the first instance. The Board did not feel that the grievors' interests had been sacrificed on behalf of the unit as a whole.

The "trade-off" issue is more clearly evident in the settlement of grievance backlogs around the time of collective bargaining. In *Walker Exhausts Ltd*,[113] the complainant, who had already been suspended by the company, was accused of participating in illegal picketing during his suspension. He was fired along with forty-two others and they all filed grievances. During negotiations, the company proposed that thirty-three employees be reinstated with thirty day suspensions, four be referred to arbitration and six, including the complainant, remain discharged. The union rejected this proposal. After negotiations for renewal of a collective agreement began, a settlement was reached and ratified by the membership which converted the complainant's dismissal into a disciplinary suspension without pay and subject to certain conditions. In return the union withdrew all grievances. The union admitted that it had not considered the individual merits of the complainant's case in reaching this settlement. It felt that the complainant's position could be more adequately protected by dealing with the grievances as a group. The Board did not feel that such a practice violated section 68:[114]

> In such circumstances a union is not required to consider in detail the merits of every grievance before it. What is required is that the union put its mind to the situation as a whole and engage in a process of decision-making which cannot be considered unreasonable or capricious.

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[111] *Ibid.*, at p. 625. Obviously the complainant was seeking to reduce the harshness of his penalty, not increase the penalty for the others. An issue that was not pursued was the efficacy of the condition attached to the complainant's reinstatement. Thus, it was agreed that for "a period of one year following the date of reinstatement, any violation or infraction of Company rules will result in his discharge without Union representation". *Ibid.*, at p. 619. The same condition was appended to a reinstatement reported in *Chrysler Canada Ltd*, [1980] O.L.R.B. Rep. 650. It is difficult to believe that the Board will approve such an abdication of statutory responsibility when the matter is presented to it for consideration.

[112] *Supra*, footnote 73.

[113] *Supra*, footnote 17.

[114] *Ibid.*, at p. 150.

The Board did add a cautionary note, however:[115]

> That is not to say a union can disregard completely the merits of individual grievances. Where the available evidence indicates that a particular grievance is worthy of special consideration, the union may be found in breach of its duty if it fails to give such consideration. The qualification is inserted because there may be situations in which a union would be justified in not dealing separately with a grievance which appears particularly meritorious.

The problem posed by trade-offs is highlighted by the decision in *Nick Bachiu*.[116] The complainant was accused of having taken part in a wildcat strike and was given a five day suspension. His grievance was among some 114 arising out of this incident in a bargaining unit consisting of 11,500 employees. When the contract came up for renegotiation these grievances were among 398 submitted for a review by a subcommittee composed of management and union personnel. During negotiations the union objected to the employer's suggestion of package deals which involved swapping of grievances without regard to merits. After eleven meetings all 398 grievances were resolved and the results ratified by the membership. The union withdrew 204 grievances or 51.3% of the total grievances, including the complainant's, and the company allowed or satisfactorily modified 193 grievances or 48.7% of the total grievances. With regard to the complainant's grievance, the union indicated that it disbelieved his story that he was not involved in the wildcat strike and it was also unfavorably impressed by the fact that his work record included five previous disciplinary incidents.

Given the statistical breakdown on the disposition of grievances and the sheer difficulty in resolving fairly that number of grievances at one time, it is hard to believe that the union did not succumb to the employer's alleged suggestion that the grievances be swapped. However, the Board was satisfied that the union had a rational justification for the withdrawal of the complainant's grievance and that there was no conclusive evidence that "swapping" took place.[117]

Occasionally, the union must opt in favour of the interests of one faction within the union and against the interests of another. This conflict occurs oftentimes after a merger of two companies where the union must decide on an equitable method of merging seniority lists.

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[115] *Ibid.*

[116] *Supra*, footnote 13.

[117] The Board appears to have no objection to such trade-offs at the bargaining table. Thus, the Board in *Reginald Stanley Harcourt*, [1976] O.L.R.B. Rep. 508, at p. 511, said that "such trade-offs are the everyday stuff of collective bargaining". See also the dicta in *Dominion Maintenance Ltd, supra*, footnote 48, where the Board said that the union is not prohibited from making trade-offs at the bargaining table in the interest of the majority. Incidentally, this latter decision marks the first one defining the duty of fair representation by an employers' association toward its members under s. 151(2) of the Ontario Labour Relations Act, *supra*, footnote 2.

Quite often the collective agreement clearly governs the application of seniority and the complaint is directed solely to the accuracy of the placement.[118] In other instances, the resolution of the conflict may be simply one in which the union supports a decision favorable to a majority of its members over that of the interests of a minority. This occurred in *Clifford Renaud*[119] when one of the two plants covered by a single collective agreement was closed and the union, with a majority of the membership in support, negotiated an addendum to the contract end-tailing the complainants on the seniority list for layoffs, recall and job posting. The Board held that the solution was a reasonable one but found a violation of section 68 in the fact that the union had not notified the complainants in advance of the meeting where this agreement was to be ratified by the membership.

In other cases, the Board has been unwilling to find a section 68 violation where a union calculated the seniority date of apprentices to the latters' disadvantage,[120] favoured one unit of employees over another unit in a jurisdictional dispute[121] or followed the mandate of a majority of the unit on the interpretation to be given to seniority provisions which disadvantaged a minority, including the complainant.[122]

The cases which are most likely to involve a breach of section 68 are those where the union is dealing with an "unpopular" member of the bargaining unit. He may be disliked because he does not socialize, will not participate in strike action or agree to a Rand formula check-off,[123] or he is delinquent in the payment of union fees,[124] or has been suspended for violating the constitution of the union,[125] or had circulated inflamatory material sharply critical of the union,[126] or crossed a picket line,[127] or sought to displace the existing union with another union,[128] or leaked information about the incompetence of fellow

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[118] *Ryancrete Sterling Products, supra,* footnote 15.

[119] [1975] O.L.R.B. Rep. 967.

[120] *Imperial Tabacco Products (Ontario) Ltd, supra,* footnote 5.

[121] *Canadian Rogers Eastern Ltd,* [1975] O.L.R.B. Rep. 406.

[122] *Robin Albert Amor,* [1978] O.L.R.B. Rep. 26. This decision is clearly wrong if the Board is suggesting that a union may disregard the clear meaning of a collective agreement to accommodate the majority at the expense of a minority. For a discussion of this and related problems, see Summers, The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation? *op. cit.*, footnote 3.

[123] *United Steelworkers of America, Local 7608, supra,* footnote 28.

[124] *International Union of Operating Engineers, Local 793,* [1973] O.L.R.B. Rep. 361.

[125] *International Union of Electrical Workers, Local 523,* [1974] O.L.R.B. Rep. 275.

[126] *Jay Sussman, supra,* footnote 23.

[127] *Great Lakes Forest Products Ltd,* [1979] O.L.R.B. Rep. 651.

[128] *Vision '74' Nursing Home, supra,* footnote 71.

employees[129] or was a hard-nosed foreman thoroughly disliked by a majority of the union membership.[130]

There are occasional cases where the grievor falls into the category of an unpopular member and, coincidentally, something conveniently goes wrong which prejudices his or her grievance. Thus, in *United Steelworkers of America, Local 7608*,[131] procrastination on the part of a union official led to the expiration of time limits for filing a request for arbitration. In *Jay Sussman*,[132] the Board found that the shop steward's failure to contact the complainant concerning his grievance was negligent. In neither case did the Board find the conduct in breach of section 68.

Where an unpopular member has succeeded on a section 68 complaint, the conduct of the union or its officials has been found to be egregiously hostile. Thus, in *Great Lakes Forest Products Ltd.*,[133] when members of the union local refused to work with the complainants, the union denied the complainants' membership in the union and then complained to the company about their transfer to the department. In *Toronto East General and Orthopaedic Hospital Inc.*,[134] both the union steward and the president of the local signed a petition demanding the dismissal of the complainant. And in *Toronto Hydro Electric System*,[135] a similar petition was circulated demanding that the complainant be removed as foreman of a job and this was signed not only by the president of the union but by the vice-president and treasurer as well. Finally, in *Leonard Murphy*,[136] the conflict was a personal one. It happened that the person sitting on a committee designed to review the merits of the complainant's grievance was the uncle of the employee chosen to replace the complainant after he was discharged.

In two cases the union actively pursued the complainant's discharge but the Board did not find its conduct in violation of section 68. The Board recognizes that the union has an obligation to police the collective agreement and this task may include, on occasion, the need to enforce union security clauses. Thus, in the first case the union requested the employer to terminate the employment of the complainant who refused to join the union or pay dues as required by the

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[129] *Toronto East General and Orthopaedic Hospital Inc.*, *supra*, footnote 16.

[130] *Toronto Hydro Electric System*, [1980] O.L.R.B. Rep. 1561.

[131] *Supra*, footnote 28.

[132] *Supra*, footnote 23.

[133] *Supra*, footnote 127.

[134] *Supra*, footnote 16.

[135] *Supra*, footnote 130.

[136] [1977] O.L.R.B. Rep. 146.

collective agreement.[137] In the second case, the union applied to the employer to discharge the complainant under a maintenance of membership clause when he was expelled from the union for refusing to pay fines.[138] In neither case was the Board able to conclude that the conduct of the union was arbitrary, discriminatory or in bad faith.

Apart from the complete mishandling of a grievance, unions or their officials have done a number of things prejudicial to the complainant's interests which have not resulted in a breach of section 68. Thus, grievance forms have been denied to the grievor[139] as has access to an appropriate union official,[140] erroneous opinions have been rendered based on a misunderstanding of arbitration cases,[141] settlement agreements have been executed by union officials who do not understand the import of the document[142] and, nevertheless, the Board has concluded that the union acted in accordance with its responsibilities under the Act. On the other hand, that duty has been violated where it has been shown that the union official deciding whether to take the complainant's grievance forward has a personal interest in not wanting to do so,[143] filed a grievance against specific individuals without informing them of his actions or giving them an opportunity to defend,[144] withdrew a grievance without adequate inquiry concerning the complainant's intention to return to Canada,[145] positively mischaracterized a complaint in such a way that the union did not file a grievance on the complainant's behalf,[146] or has done essentially nothing in pursuing the interests of the complainant regarding his grievance.[147]

(5) *Prejudicing an Employee's Grievance.*

It is not a violation of section 68 to speak candidly regarding the merits of the complainant's grievance and its possible success if processed even if this has the effect of discouraging the complainant

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[137] *Service Employees Union, Local 204, supra,* footnote 75.

[138] *George Zebrowski,* [1977] O.L.R.B. Rep. 143.

[139] *U.A.W., Local 1285, supra,* footnote 71.

[140] *Jay Sussman, supra,* footnote 23.

[141] *Concrete Construction Supplies, supra,* footnote 16.

[142] *John Adema,* [1979] O.L.R.B. Rep. 1.

[143] *Leonard Murphy, supra,* footnote 136.

[144] *John Farrugia, supra,* footnote 103. This violation was later cured by the action of the union, through its executive and membership, voting to pursue a policy grievance.

[145] *Consumer Glass Company Ltd,* [1979] O.L.R.B. Rep 861.

[146] *The Corporation of the County of Hastings,* [1979] O.L.R.B. Rep. 1072.

[147] *United Brotherhood of Carpenters and Joiners of America and Local Union 2737,* [1980] O.L.R.B. Rep. 1102.

from pursuing it further.[148] On the other hand, the union cannot sponsor a section 68 complaint as a condition precedent to any decision on its part to process a grievance further.[149] That decision is to be made on its merits and not under the cloud of any threatened law suit or comparable legal action.

> The Board wishes it to be crystal clear that Section [68] was not designed to be applied by trade unions as an outlet for evading responsibility for making hard decisions.[150]

Once the decision has been made regarding the disposition of a grievance, it may be contrary to the duty of fair representation not to inform the grievor of the availability of any appeal procedures.[151] Where the decision is to be made at a meeting of the union membership, whether or not the grievor is entitled to notice of the meeting may depend on whether it is a regularly scheduled meeting or a special one[152] and whether or not he is entitled to participate in the discussion. Thus it was held in *R.C.A. Ltd, Prescott, Ontario*[153] to be a violation of section 68 for the union not to notify the complainant of a union meeting where his grievance was to be discussed and a decision made as to whether it would be taken to arbitration. On the other hand, a contrary conclusion was reached in the companion case of *International Union of Electrical Workers, Local 523*[154] where the person wishing to make representations had been suspended from the union.[155]

Finally, regarding the grievance procedure, there have been occasional arguments by complainants that they have been prejudiced by the complicated nature of the grievance mechanism itself. Thus, in *Douglas Aircraft of Canada Ltd*,[156] it was necessary for the Board to

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[148] *Carlos Mendata Samuels, supra,* footnote 15. Obviously, this will depend on the good faith intentions of the speaker and the honesty with which he expresses his opinions.

[149] *Canadian Rogers Eastern Ltd, supra,* footnote 121.

[150] *Ibid.*, at p. 413.

[151] *Bartenders and Waiters Union Local 280,* [1972] O.L.R.B. Rep. 862.

[152] *The Steel Co. of Canada Ltd, supra,* footnote 28; *The Municipality of Metropolitan Toronto, supra,* footnote 45.

[153] [1974] O.L.R.B. Rep. 60.

[154] *Supra,* footnote 125. The cases involved the same series of incidents in the same local union. Joseph Pap, the successful s. 68 applicant in *R.C.A. Ltd, Prescott, Ontario* represented the complainant before the Board in this case.

[155] See also *Damiano Pedalino,* [1975] O.L.R.B. Rep. 874, a case whose real significance may be that the union and management member of the panel concurred in holding that a union need not notify a complainant of a general membership meeting at which the union proposed to recommend that the complainant's grievance not be pursued, while the disinterested chairman dissented. Shortly thereafter, the Act was amended to include s. 102(12) which permits a chairman or vice-chairman to sit alone in complaints alleging a s. 68 violation.

[156] *Supra,* footnote 13.

observe that there was nothing improper for the union, in advance, to give certain classes of grievances, such as discharges, priority over others and that there was no violation of section 68 merely because the "negotiated grievance procedure is cumbersome and cannot respond quickly to resolve a high volume of grievances".[157] For the same reason the Board held that there was no violation of section 68 for the lengthy period of time during which the complainant's grievance remained under consideration due to the "relatively complex and sophisticated type of grievance procedure set forth in the collective agreement".[158] The Board noted further in this regard:[159]

> However, matters such as the number of steps in the grievance procedure and the timing and location requirements for grievance meetings which are to be included in the collective agreement are not matters which could, except perhaps in the most extraordinary circumstances, form the basis of a section [68] complaint.

(6) *Reconciling Interests at the Bargaining Table.*

Much greater latitude is accorded the union in its effort to reconcile the variety of interests it represents at the bargaining table. Thus, the Board has said:

> This Board has in the past recognized that in an effort to obtain the maximum benefits for its membership a union may be forced to make critical choices and trade-offs that may affect its membership unequally, and that a union may indeed be required to go so far as to abandon the interests of certain individual members . . . .
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> Such trade-offs are the everyday stuff of collective bargaining and form a large part of the bargaining tactics of unions and management alike. There is nothing in section [68] to require the duty of sweeping egalitarianism suggested by the complainant. When a union has exerted equal effort on behalf of all of its members it is not chargeable with a breach of the duty of fair representation merely because equal effort has not borne equal fruit.[160]

In the particular case, the union, after making considerable efforts to accommodate the interests of the complainant at the bargaining table, reached a compromise with management regarding the complainant's wages that was less than satisfactory to him. As the Board observed, it is not bad faith merely because the union "declines to go to the brink of strike and beyond for the sake of the individual or minority".[161]

Neither was the union acting in bad faith merely because it had to abandon its efforts on behalf of the complainant to secure a reclassification where the evidence demonstrated it had done so only after repeated negotiations and the submission of the matter to the

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[157] *Ibid.*, at p. 748. In the particular case there was a delay of five years.

[158] *Chrysler Canada Ltd, supra,* footnote 111, at p. 655.

[159] *Ibid.*

[160] *Reginald Stanley Harcourt, supra,* footnote 117, at pp. 511-512.

[161] *Ibid.*, at p. 512.

membership.[162] As the Board said, it was "reasonable and proper for the union to choose to advance the interests of the majority of the members of the bargaining unit as directed by them rather than to further pursue the personal interest of one member to the possible detriment of the membership at large".[163] In response to the demands by an employer at the bargaining table, the union may agree to provide a differential in wage pay for permanent employees as compared to students, even though the latter are vehemently opposed.[164] The union is not obligated to exercise "brinkmanship" in its negotiations at the bargaining table.

> . . . [I]n an effort to obtain the maximum benefits for its membership a trade union may be forced to make critical choices and trade-offs that may effect its membership unequally and that a trade union may be required to go so far as to abandon the interests of certain individual members. Trade-offs between trade union and employers form the essence of collective bargaining. Trade unions frequently have to balance the interests of various groups within the bargaining unit, such as, for example, the skilled employee and the unskilled employee or the older employee and the younger employee when benefits are to be gained in improvements to the pension plan or the hourly rate. . . . The membership . . . does not act in bad faith and does not discriminate against students merely because it accepts a differential in wages between labourers and students and declines to go to the brink or beyond the brink of a strike or lockout.[165]

For the same reasons the Board was unwilling to find a union in violation of section 68 because a negotiating committee was unable to convince management of the efficacy of a proposal that would protect part-time employees from being required to substitute on shifts of absent full-time employees.[166] Particularly in negotiations, the Board said, the process of collective bargaining by a union "involves an internal balancing of interests between individuals, minority factions and majority factions in order to arrive at what it believes is the best bargain it can achieve for the collective group".[167]

Once the agreement has been negotiated, the Board seems disposed to accept whatever ratification process is consistent with previous practices and policies of the union. Thus, it has been held to be permissible for the union to permit its members who are not within a particular bargaining unit to vote with members of that unit for ratification of the contract where the union is concerned about establishing industry wide standards and the procedure accords with past practice.[168] However, once the membership ratifies a particular pro-

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[162] *Auty Printing Ltd.*, [1973] O.L.R.B. Rep. 36.

[163] *Ibid.*, at p. 39.

[164] *James Mason*, [1979] O.L.R.B. Rep. 116.

[165] *Ibid.*, at p. 122.

[166] *Royal Ontario Museum*, *supra*, footnote 23.

[167] *Ibid.*, at p. 109.

[168] *Jack P. Fogal*, [1976] O.L.R.B. Rep. 428.

posal, the union cannot thereafter negotiate a contract with the employer that is significantly different from that submitted to the membership.[169] And of course, if the union wishes to negotiate an addendum thereafter, it must notify all affected parties and accord them an opportunity to participate in the ratification vote.[170]

(7) *Determining a Standard of Care.*

These general principles when applied against the behaviour of union officials have had only a marginal effect on the standard of care required of them in their various capacities in administering the scheme of collective bargaining. In the relatively few instances where the issue has been canvassed, the Board has suggested a standard of conduct considerably below that of the "professional advocate".[171] Thus, it has been said that union affairs are largely "conducted by laymen with limited formal education, or elected officials who may have been chosen for qualities other than their legal training or understanding of parliamentary procedure"[172] and they "cannot be expected to exhibit the skills, ability, training and judgment of a lawyer".[173]

For this reason the Board has said that it will not "impose unrealistic standards of conduct upon unpaid union officials"[174] based upon what the Board "might have done in a particular situation after having the leisure and time to reflect upon the merits"[175] and that their conduct "must be judged in relation to . . . [their] experi-

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[169] *Diamond "Z" Association, supra,* footnote 27. However, it is not necessary, before an agreement is reached, for the negotiators to inform the committee overseeing collective bargaining of any proposed changes before these are submitted at the bargaining table, if that procedure accords with previous practices. *David Matthews,* [1976] O.L.R.B. Rep. 283.

[170] *Clifford Renaud, supra,* footnote 119.

[171] *Rutherford's Dairy Ltd, supra,* footnote 11. The Board stated: "While the union officials in this instance were experienced, they were not professional advocates or lawyers and accordingly the duty of care imposed on union officials is not the same as that imposed on lawyers." (At p. 244).

[172] *I.T.E. Industries Ltd, supra,* footnote 26, at p. 1006. See also *Massey-Ferguson Industries Ltd,* [1979] O.L.R.B. Rep. 1005, at p. 1006: "The wording of the section reflects a recognition of the limitations within which union representatives, who are often rank and file employees with limited training in industrial relations, work in the day to day representation of numerous employees." Accord: *Inter-Bake Foods Ltd,* [1981] O.L.R.B. Rep. 1145.

[173] *Douglas Aircraft of Canada Ltd, supra,* footnote 13, at p. 747. See also *Massey-Ferguson Industries Ltd, ibid.*

[174] *C.U.P.E., Local 1000, supra,* footnote 5, at p. 463.

[175] *The Steel Company of Canada Ltd, supra,* footnote 28, at p. 397.

ence and expertise''[176] or their qualifications,[177] though the importance of the grievance must also be taken into account.[178]

The view of the Board is perhaps best summarized in the decision of *Ford Motor Company of Canada Ltd*,[179] where it was stated:[180]

> In deciding whether a union has violated the Act the standards to be applied are important. We recognize that union affairs are conducted for the most part by laymen. In some situations there are experienced full-time officials of a trade union who conduct the union affairs; in other situations, the union affairs are conducted by employees in their spare time, while in yet other situations employees may be given a limited amount of paid time by the employers to engage in trade union matters. The Board does not decide cases on the basis of whether a mistake may have been made or whether there was negligence, nor is the standard based on what this Board might have done in a particular situation after having the leisure and time to reflect upon the merits. Rather, the standard must consider the persons who are performing collective bargaining functions, the norms of the industrial community and the measures and solutions that have gained acceptance within that community.

The monthly reports are filled with instances of union officers' neglect and incompetence,—permitting time limits on grievances or an arbitration to expire,[181] failing to refer a grievor to a proper union official,[182] completely misunderstanding the nature of a settlement agreement[183] or a disciplinary report,[184]—and even though the conduct is characterized as ''unprofessional business procedures'' or unbecoming ''laxness''[185] the Board is unwilling to find a violation of section 68. As the Board has said often enough, ''union officials are entitled to make honest mistakes''.[186]

It would, of course, place too onerous a responsibility on the union to expect that relatively minor union officials should have the same expertise and competence as more experienced, full-time paid union officers or that the latter should exhibit the professional skills of a lawyer and no one has ever seriously suggested this. Nevertheless, the Board may be placing too high a premium on the excuse that the

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[176] *Jay Sussman, supra*, footnote 23, at p. 355. In *Sussman*, the Board took into consideration that the union officer was handling his first grievance.

[177] *Antonio Melillo, supra*, footnote 5.

[178] *C.U.P.E., Local 1000, supra*, footnote 5.

[179] *Supra*, footnote 5.

[180] *Ibid.*, at p. 526. Quoted favourably in *Wakefield Harper, supra*, footnote 22, at p. 645.

[181] *United Steel Workers of America, Local 7608, supra*, footnote 28; *The Steel Company of Canada Ltd, supra* footnote 28.

[182] *Jay Sussman, supra*, footnote 23.

[183] *John Adema, supra*, footnote 142.

[184] *Concrete Construction Supplies, supra*, footnote 16.

[185] *The Steel Company of Canada Ltd, supra*, footnote 28, at p. 396.

[186] *Douglas Aircraft of Canada Ltd, supra*, footnote 13, at p. 747.

particular union official was inexperienced, unknowledgable or just plain incompetent. After all, the duty of fair representation is an institutional one. Generally, the complaint is that the *union* has failed to provide proper representation and the Board should insure that the union has undertaken some responsibility in training their personnel in the handling and processing of complaints through the grievance process. Certain types of complaints should not be permitted to escape the notice of even the most inexperienced official, particularly when the grievance involves a discharge. Every grievance officer should be well versed in the limitation periods for the filing of grievances or carrying it through the various stages of the grievance process. There are always going to be occasional lapses but these should not be excused solely because there is no systematized effort on the part of the union itself to properly instruct its grievance officers.[187]

The irony in the present Board policy is best illustrated in one of the early decisions of the Ontario Labour Relations Board. In *Gina Ercegovic*,[188] the complainant was discharged from her job and she immediately contacted her union steward who in turn relayed the information to the president of the local. By the time the union officers filed the grievance, the five day time limit had expired under the collective agreement. The Board concluded that the two elected officers did not take time to "read and comprehend the terms of the grievance procedure contained in that collective agreement"[189] and as a result "the grievor has been denied a fundamental benefit underlying the very purpose of according the [union] the privilege of employee representation".[190] Having suggested that their conduct "borders on a disgrace"[191] the Board went on to conclude that the complainant had not made out a case of unfair representation because the president of the union had just been recently appointed and was, therefore, inexperienced and unfamiliar with the practices in these matters. As for the union steward, her ignorance was so pervasive that

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[187] Enforcing a higher standard of care may have the effect of encouraging greater co-operation between management and the union in the processing of discharge grievances since a remedy may be directed at the employer as well as the union if the latter is found to have violated its duty under s. 68. Thus, inexperienced shop stewards may receive the assistance of more experienced management personnel in insuring that limitation periods governing grievances do not expire or they may be encouraged to waive such limitations when confronted with a possible s. 68 proceeding. For a more sympathetic view of the union position, see Vladeck, The Conflict Between the Duty of Fair Representation and the Limitations on Union Self Government in McKelvey (ed.), The Duty of Fair Representation (1977), p. 4.

[188] [1975] O.L.R.B. Rep. 676.

[189] *Ibid.*, at p. 678.

[190] *Ibid.*

[191] *Ibid.*, at p. 677.

she not only failed to forward the discharge grievance of the complainant but was, herself, victimized when she failed to forward her own discharge complaint.

These general duties, of course, are all dependent upon whether or not the union acted in a manner that was arbitrary, discriminatory or in bad faith. The Board will direct its attention to such things as the genuineness of the union's belief in what it was doing,[192] the reasonableness and sincerity of its effort[193] and whether it acted with honest conviction.[194] It has also articulated a set of standards by which the union must govern its conduct, ones which, the Board has admonished, are not "too impractical for the trade union to satisfy".[195] These standards will be explored in the following sections though it may be well to keep in mind that the duty of fair representation "most often comprehends conduct that is so wanton that the most modest of employee expectation to the benefits of collective bargaining have been betrayed by his trade union".[196]

B. *Defining the Nature of Fair Representation.*

(1) *"Arbitrary" Conduct.*

In the overwhelming majority of cases that come before the Labour Relations Board under a section 89 complaint for a section 68 violation, the principal allegation has been one of arbitrary conduct on the part of the trade union or its officials. Moreover, in all but one[197] of the fifteen cases in which a complainant has been successful to date[198] there has been a specific finding of arbitrary conduct.[199]

In attempting to define the term "arbitrary" the Board has used almost as many descriptions as there are cases reported. It certainly

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[192] *Service Employees Union, Local 204, supra,* footnote 75.

[193] *Auty Printing Ltd, supra,* footnote 162; *Scarborough General Hospital, supra,* footnote 71.

[194] *Auty Printing Ltd, ibid.*

[195] *Diamond "Z" Association, supra,* footnote 27, at p. 795.

[196] *Ibid.*

[197] *Ibid.*

[198] As of the September 1981 monthly report of the Ontario Labour Relations Report.

[199] The successful cases are as follows: *John Bourgeois,* [1972] O.L.R.B. Rep. 709, reported in [1974] O.L.R.B. Rep. 745; *I.A.W., Local 2-700, supra,* footnote 5; *R.C.A. Ltd, Prescott, Ontario, supra,* footnote 153 (only nominal damages of $1.00 awarded, however); *Diamond "Z" Association, supra,* footnote 27; *Clifford Renaud, supra,* footnote 119 (nominal damages of $1.00 awarded); *Leonard Murphy, supra,* footnote 136; *Great Lakes Forest Products Ltd, supra,* footnote 127; *Consumers Glass Company Ltd, supra,* footnote 145; *The Corporation of the County of Hastings, supra,* footnote 146; *Toronto East General and Orthopaedic Hospital Inc., supra,* footnote 16; *Ontario Hydro,* [1980] O.L.R.B. Rep. 1039; *United Brotherhood of Carpenters and Joiners of America and Local Union 2737, supra,* footnote 147; *Toronto Hydro Electric System, supra,* footnote 130; *Alexander Barna,* [1981] O.L.R.B. Rep. 815.

suggests an attitude of total unresponsiveness, as distinguished from mere "timidity",[200] on the part of the union or what has been described as a "not caring" attitude. Thus, the Board characterized as "unresponsive" and, therefore, arbitrary in *John Bourgeois*[201] the attitude of union officers who, having recognized they made an error in failing to assign the complainant to a work project, did nothing at all to rectify the situation. So too, the court reached a similar conclusion when complainants, bemoaning the fact that they were not advised of a meeting at which it was voted to end-tail their seniority after the merger of two plants, received the curt response from one union official: "we can do anything we feel like."[202] No less unresponsive, though the Board did not use that term, was the failure of union officials to advise a grievor of his right to appeal to the membership to overturn a decision of the executive not to arbitrate a discharge grievance, particularly when the grievor specifically asked the executive whether such an appeal was available.[203]

In *Consumers Glass Company Ltd,*[204] the complaint was that the union president withdrew the complainant's discharge grievance on the assumption that the grievor, who had been visiting in India, would not be returning to Canada. The Board characterized this as a "not caring" attitude and thus, arbitrary, especially in view of the fact that there was no particular need to expedite the decision and very little effort was made to contact the grievor.[205]

In *Toronto East General and Orthopaedic Hospital Inc.*,[206] the union steward and president of the local union originated and circulated a petition to management asking for the complainant's dismissal without first having investigated rumours that the complainant had released confidential information to the press concerning alleged acts of incompetence at the hospital in administering blood. The Board in describing the union conduct as, among other things, a "non-caring attitude" and arbitrary said:[207]

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[200] *C.U.P.E., Local 1000, supra,* footnote 5.

[201] *Supra,* footnote 199.

[202] *Clifford Renaud, supra,* footnote 119, at p. 969. This decision was a classic case of a "pyrrhic" victory. The Board awarded nominal damages of $1.00 and ordered the union to conduct a vote of the membership, a substantial majority of whom had voted to end-tail the complainants, to determine whether an adjustment to the complainants' seniority status should be submitted to the employer at the next contract negotiation. I am advised that the membership, not surprisingly, voted not to disturb the arrangement.

[203] *Bartenders and Waiters Union Local 280, supra,* footnote 151.

[204] *Supra,* footnote 145.

[205] In fact the complainant's return had been delayed because he was involved in a highway accident in India.

[206] *Supra,* footnote 16.

[207] *Ibid.*, at p. 563. For comparable characterizations, see *C.U.P.E. Local 1000, supra,* footnote 5; *John Adema, supra,* footnote 142; *Chrysler Canada Ltd, supra,*

> The union official owes it to the employee to address himself to the merits of any allegations raised against the employee and not demand his removal simply on the basis of rumour or unfounded suspicions. In the instant case [they] engaged in conduct specifically designed to achieve the complainant's discharge. Their actions appear not to have been preceded by any investigation of the facts surrounding the leaking of the information to the press, and at no time did they give the complainant a reasonable opportunity to respond to the allegations against him. . . . In other words, they demanded his discharge solely on the basis of false rumours and unfounded suspicions which they never bothered to investigate or seek to verify. . . . The conduct . . . indicated such a non-caring attitude towards the complainant as to amount to arbitrary conduct in violation of the union's duty to complainant under section [68] of the Act.

Commonly, it has been said to be arbitrary to act in a perfunctory fashion. The term "perfunctory" first appears in Ontario decisions in *I.A.W., Local 2-700*[208] where it was borrowed from one of the leading American decisions, *Vaca* v. *Sipes*.[209] In *I.A.W., Local 2-700*,[210] the shop chairman advised the complainant that he could grieve his ten day suspension following his return to work when in fact that delay would make it untimely under the collective agreement. The Board found this conduct arbitrary and concluded:[211]

> He treated the grievance in a perfunctory manner and his conduct was confirmed by the Business Repesentative who refused to consider the position of the complainant. While we recognize that the union is not a guarantor or an insurer for individual grievances, it is at least necessary for the union to consider the complaints of an employee when they are placed before it. No consideration whatsoever was attempted in this case and accordingly the complaint succeeds on the basis that the conduct of the union in disposing of the complainant's grievance was arbitrary.

Other descriptive phrases have been offered in defining the word "arbitrary". In *United Brotherhood of Carpenters and Joiners of America and Local Union 2737*,[212] the business agent did so little on behalf of the complainant, who had been laid off by the employer, that the Board could only characterize the behaviour as "indifferent and

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footnote 21; *Chrysler Canada Ltd, supra*, footnote 111; *Wakefield Harper, supra*, footnote 22; *I.T.E. Industries Ltd, supra*, footnote 26.

[208] *Supra*, footnote 5.

[209] *Ibid.* See also *C.U.P.E., Local 1000, supra*, footnote 5, where the Board notes that in *Vaca*, "Mr. Justice White juxtaposed the word arbitrary with the word 'perfunctory'. . .". (At p. 462).

[210] *Supra*, footnote 5.

[211] *Ibid.*, at p. 918. For the same reason in *Consumers Glass Company Ltd, supra*, footnote 145, the union was guilty of "perfunctory" conduct in withdrawing the complainant's grievance. For other decisions equating arbitrary conduct with perfunctory behaviour, see *Ontario Hydro, supra*, footnote 88; *Retail, Wholesale and Department Store Union, Local 414*, [1975] O.L.R.B. Rep. 335; *Diamond "Z" Association, supra*, footnote 27; *John Adema, supra*, footnote 142; *De Havilland Aircraft of Canada Ltd*, [1979] O.L.R.B. Rep. 933; *Chrysler Canada Ltd., supra*, footnote 111.

[212] *Supra*, footnote 147.

summary"[213] and thus arbitrary. In other cases it has variously been described by the Board as "superficial",[214] "implausible",[215] "capricious",[216] "off-handed",[217] "unreasonable",[218] "cavalier" and "insensitive".[219] More likely than not the Board will characterize the situation as one in which the union or its officials have failed to "direct",[220] "put",[221] "turn",[222] "apply",[223] or "address"[224] their mind or themselves[225]to the complainant's problem.

It is, therefore, considered to be arbitrary conduct to totally ignore[226] or blindly refuse to consider[227] a complaint or the interest and position of the complainant.[228] Thus, in *United Brotherhood of Carpenters and Joiners of America and Local Union 2737*,[229] the complainant, a senior carpenter, was permanently laid off from work with no explanation given. The complainant consulted the business

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[213] *Ibid.*, at p. 1106. For use of the term "summary" see also *C.U.P.E., Local 1000, supra*, footnote 5; *De Havilland Aircraft of Canada Ltd, supra*, footnote 211.

[214] *Ontario Hydro, supra*, footnote 211.

[214] Ontario Hydro, *supra*, footnote 88; *Retail, Wholesale and Department Store Union, Local 414, supra*, footnote 211.

[215] *C.U.P.E., Local 1000, supra*, footnote 5; *Antonio Melillo, supra*, footnote 5; *De Havilland Aircraft of Canada Ltd, supra*, footnote 211; *I.T.E. Industries Ltd, supra*, footnote 26.

[216] *C.U.P.E., Local 1000, ibid.*; *Diamond "Z" Association, supra*, footnote 27; *Antonio Melillo, ibid.*; *Walker Exhausts Ltd, supra*, footnote 17; *Chrysler Canada Ltd, supra*, footnote 21; *I.T.E. Industries Ltd, ibid.*

[217] *David Matthews, supra*, footnote 169.

[218] *Walker Exhausts Ltd, supra*, footnote 17; *De Havilland Aircraft of Canada Ltd, supra*, footnote 211; *I.T.E. Industries Ltd., supra*, footnote 26.

[219] *Toronto East General and Orthopaedic Hospital Inc., supra*, footnote 16.

[220] *Leonard Murphy, supra*, footnote 136; *Municipality of Metropolitan Toronto, supra*, footnote 45; *John Farrugia, supra*, footnote 103; *John Adema, supra*, footnote 142; *The Corporation of the Country of Hastings, supra*, footnote 146.

[221] *I.A.W. Local 2-700, supra*, footnote 5; *Francon Division of Canfarge Ltd., supra*, footnote 36; *C.U.P.E., Local 1000, supra*, footnote 5; *Nich Bachiu, supra*, footnote 13; *Antonio Melillo, supra*, footnote 5; *Wakefield Harper, supra*, footnote 22; *Walker Exhausts Ltd, supra*, footnote 17; *De Havilland Aircraft of Canada Ltd, supra*, footnote 211.

[222] *The Corporation of the County of Hastings, supra*, footnote 146.

[223] *Antonio Melillo, supra*, footnote 5; *The Regional Municipality of Durham, supra*, footnote 40; *Rolland Inc., supra*, footnote 33.

[224] *Retail, Wholesale and Department Store Union, Local 414, supra*, footnote 211; *E. B. Eddy Forest Products Ltd, supra*, footnote 22; *Massey-Ferguson Industries Ltd, supra*, footnote 172; *Massey-Ferguson Industries Ltd, supra*, footnote 94.

[225] *Diamond "Z" Association, supra*, footnote 27; *Antonio Melillo, supra*, footnote 5; *Toronto East General and Orthopaedic Hospital Inc., supra*, footnote 16.

[226] *I.A.W., Local 2-700, supra*, footnote 5; *Ontario Hydro, supra*, footnote 88.

[227] *C.U.P.E., Local 1000, supra*, footnote 5.

[228] *I.A.W., Local 2-700, supra*, footnote 5.

[229] *Supra*, footnote 147.

agent for the union but the latter did almost nothing on his behalf. The complainant, himself, had to secure the additional severance pay to which he was entitled and arrange to secure a copy of a grievance form after the business agent was ordered by the president of the local to file a grievance on the complainant's behalf. In addition, although the agent was advised of the reasons for the complainant's layoff, he never relayed this information to him. The business agent attempted to justify his conduct on the grounds that the complainant's grievance was insignificant compared to his concern to keep the company, which was in financial difficulty, in operation. The Board characterized this conduct as "indifferent and summary"[230] and thus arbitrary.

Once the matter has been placed in the hands of a union officer or it has come to his attention, he must then weigh and examine the relevant evidence.[231] Thus, the disposition must be made on the merits of the grievor's complaint[232] and not by reference to some facts or legal principles extraneous to the matters under consideration.

> To fulfill its duty of fair representation a union must process a grievance in a non-arbitrary manner, *i.e.*, it must direct its mind to the merits of a grievance and act on the available evidence; to determine the outcome of a grievance on the basis of an irrelevant fact or principle would be arbitrary.[233]

*Leonard Murphy*[234] is a decision which classically illustrates these principles. The complainants were discharged from employment allegedly for the reason that their work was unsatisfactory. Their positions were taken by the nephew of the president of the local and the son of the assistant foreman. When one of the complainants sought assistance from the local president (Clarke) in preparing his grievance, the latter refused to help. Shortly thereafter a committee of the union was established to review these grievances and, coincidentally, the president, Mr. Clarke, was one of the men chosen to sit on the committee. At the first meeting accusations against the complainants were formulated but no details as to place, times, or events surrounding the alleged offences were given. The grievors were not afforded an opportunity to present their side of the story and shortly following this meeting the action of the company was endorsed by the committee. Thereafter, the president of the local refused to discuss the matter at a meeting of the executive. However, at a general membership meeting it was agreed that the committee had not been properly constituted and the membership voted to send the grievance on

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[230] *Ibid.*, at p. 1106.

[231] *Francon Division of Canfarge Ltd, supra*, footnote 36.

[232] *Diamond "Z" Association, supra*, footnote 27; *Antonio Melillo, supra*, footnote 5; *Leonard Murphy, supra*, footnote 136; *E. B. Eddy Forest Products Ltd, supra*, footnote 22.

[233] *Leonard Murphy, ibid.*, at p. 152.

[234] *Ibid.*

to arbitration. However, at the very next meeting, the review committee was re-established properly but composed of the same members. The committee met for fifteen minutes without notifying the complainants, confirmed their previous decision, and then informed the complainants that the arbitration would not go forward and adjourned. Needless to say, the Board concluded that the actions of the committee were arbitrary. Special note was taken of the fact that the president and the replacement for one of the complainants were related and that this "irrelevant consideration", which had no relationship to the merits of the grievance, seems to have played a major role in the decision which the committee reached.

It has been held as well that a union may not take into consideration the fact that the complainants, working under an apprentice programme, crossed a picket line as required by their collective agreement in determining whether or not it should act on their behalf[235] and in *Ontario Hydro*,[236] the Board appears not to have been satisfied that the complainant's remarks about a dispatcher[237] was the real reason for which the complainant was later charged and fined by the union and, therefore, he was reinstated and compensated for loss of earnings.[238]

It has been recognized that there are factors beyond the merits of the grievance itself which the union may take into account. However, these "considerations must have their roots in the welfare of the bargaining unit and the bargaining process".[239] Grievances are not processed in a vacuum. Apart from the merits of the grievance itself, and the likelihood of success if it is referred to arbitration, which may in some cases be determinative, there are a number of considerations which a union, as bargaining agent for all employees in the bargaining unit, should properly take into account. Briefly, these may include the

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[235] *Great Lakes Forest Products Ltd, supra,* footnote 247.

[236] *Supra,* footnote 199.

[237] The complainant called him a crook, mafia and accused him of selling a job referral to which the complainant was entitled.

[238] It appears that his problems were triggered by a newspaper report that he had been convicted of fraud against a union welfare trust fund. Following that report, the union refused to accept his dues or place him on the out-of-work list. The international officers ruled that the local could not refuse his dues unless he was properly charged, tried and found guilty. Shortly afterwards, he was charged with having verbally abused the dispatcher.

[239] *Leonard Murphy, supra,* footnote 136, at p. 152. In *Municipality of Metropolitan Toronto, supra,* footnote 45, the Board said that "[w]hile the effective operation of the grievance machinery requires that unions also be allowed to consider factors beyond the merits of a particular grievance in deciding whether to process a greivance on to arbitration, considerations of this nature must have their roots in the welfare of the bargaining unit and the bargaining process and must not be based on irrelevant facts or principles". (At p. 147).

interests of the unit as a whole,[240] financial costs,[241] administrative convenience[242] and the maintenance of the integrity of the relationship between the employer and the union.[243]

The Board has carefully distinguished between arbitrary conduct and that behaviour which it has characterized as "mere errors in judgment, mistakes, negligence and unbecoming laxness".[244] It has been somewhat less successful in articulating the nature of this duty. It is obvious that ordinary mistakes and negligence on the part of the union or its officers are not to attract liability:[245]

> It is clear that in order to establish a breach of section [68] a complainant must do more than demonstrate an honest mistake or even negligence. The union must have committed a "flagrant error" consistent with a "non-caring attitude", or have acted in a manner that is "implausible" or "so reckless as to be unworthy of protection". In other words, the trade union's conduct must be so unreasonable, capricious, or grossly negligent, that the Board can conclude that the union simply did not give sufficient consideration to the individual employee's concerns. Honest mistakes or innocent misunderstandings are clearly beyond these parameters and do not attract liability.[246]

The Board has variously described the conduct to which liability will attach as flagrant errors,[247] gross negligence,[248] or interests which have been grossly disregarded,[249] reckless,[250] wilful,[251] wanton[252] and even "perverse"[253] or "shocking".[254]

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[240] *C.U.P.E., & Local 922, supra*, footnote 42.

[241] *Toronto East General and Orthopaedic Hospital Inc., supra*, footnote 16.

[242] *Nick Bachiu, supra*, footnote 13.

[243] *Ford Motor Company of Canada Ltd, supra*, footnote 5.

[244] *C.U.P.E., Local 1000, supra*, footnote 5, at p. 463. In *Royal Ontario Museum, supra*, footnote 23, the Board said that s. 68 was not designed to "guard against error by oversight, carelessness or even negligence". (At p. 109).

[245] *R.C.A. Ltd, Prescott, Ontario, supra*, footnote 153; *John Adema, supra*, footnote 142; *James Mason, supra*, footnote 164. This is generally the view in the United States as well.

[246] *I.T.E. Industries Ltd, supra*, footnote 26, at p. 1008. Some commentators have suggested that the duty of fair representation should reach ordinary negligence on the part of a union. See, for example, Flynn and Higgens, Fair Representation: A Survey of the Contemporary Framework and a Proposed Change in the Duty owed to the Employee (1974), 8 Suffolk U.L. Rev. 1096.

[247] *C.U.P.E., Local 1000, supra*, footnote 5.

[248] *De Havilland Aircraft of Canada Ltd, supra*, footnote 211.

[249] *Antonio Melillo, supra*, footnote 5.

[250] *C.U.P.E., Local 1000, supra*, footnote 5; *John Adema, supra*, footnote 142; *Chrysler Canada Ltd, supra*, footnote 21; *De Havilland Aircraft of Canada Ltd, supra*, footnote 211; *I.T.E. Industries Ltd, supra*, footnote 26.

[251] *John Adema, ibid.*; *De Havilland Aircraft of Canada Ltd, ibid.*

[252] *Diamond "Z" Association, supra*, footnote 27.

[253] *John Adema, supra*, footnote 142; *The Corporation of the County of Hastings, supra*, footnote 146.

[254] *Toronto East General and Orthopaedic Hospital Inc., supra*, footnote 16.

On the other hand, conduct which the Board modestly described as "bordering on disgrace" was held not to be arbitrary.[255]

The Board, of course, is attempting to describe in language what it is doing in practice. Repeatedly it has admonished the unions that to satisfy the requirements of section 68 they must engage in a process of "rational decision-making"[256] or as Professor Blumrosen has described it, an "appropriate decision . . . which would persuade a rational decision-maker".[257] What is meant by "rational decision-making" is perhaps best described by looking at those factors which have led the Ontario Labour Relations Board to conclude that a union or its officers did not act arbitrarily. Thus the Board has emphasized the fact that the union discussed the grievance fully with the employer in the process of attempting to resolve it and that it engaged in hard bargaining done at arm's length,[258] that the grievance was extensively and exhaustively examined and discussed[259] by experienced union personnel[260] who then, through an honest and reasoned exercise of judgment,[261] reached a decision on the merits[262] based upon sufficient[263] and relevant information[264] before them. It has impressed the Board that there has been a thorough investigation during which the complainant was kept abreast of the progress of the grievance,[265] afforded ample opportunity to review the facts[266]and present his point of view,[267] that the usual procedure and practices governing the disposition of such grievances has been followed[268] and that the final decision as to whether a grievance would go forward was left to a vote

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[255] *Gina Ercegovic, supra,* footnote 188.

[256] *C.U.P.E., Local 1000, supra,* footnote 5; *Nick Bachiu, supra,* footnote 13; *Wakefield Harper, supra,* footnote 22. This phrase appears to have been lifted from the discussion in Clark, *op. cit.*, footnote 3. The author says: "In essence this standard [the duty of fair representation] requires that unions adhere to rational decision-making processes." (At p. 1131).

[257] Blumrosen, *op. cit.*, footnote 3, at p. 1482.

[258] *Ford Motor Company of Canada Ltd, supra,* footnote 5.

[259] *Del-Mar Clothes,* [1977] O.L.R.B. Rep. 441; *Babcock & Wilcox Canada Ltd, supra,* footnote 14.

[260] *Chrysler Canada Ltd, supra,* footnote 21.

[261] *Massey-Ferguson Industries Ltd, supra,* footnote 172; *Chrysler Canada Ltd, supra,* footnote 111.

[262] *Ford Motor Company of Canada Ltd, supra,* footnote 5.

[263] *Chrysler Canada Ltd, supra,* footnote 21.

[264] *Francon Division of Canfarge Ltd, supra,* footnote 36.

[265] *Antonio Melillo, supra,* footnote 5.

[266] *Rupert S. Martin,* [1977] O.L.R.B. Rep. 671.

[267] *Steinberg's Ltd, supra,* footnote 13.

[268] *Ford Motor Company of Canada Ltd, supra,* footnote 5; *Antonio Melillo, supra,* footnote 5.

of the executive[269] or general membership,[270] or was based upon the advice of legal counsel.[271]

(2) *"Discriminatory" Conduct.*

The Board has been slow to work out a precise definition of the term "discrimination", preferring instead to deal with particular fact situations as they arise. At least two different approaches have been suggested.

In *C.U.P.E., Local 1000*,[272] the panel said that the term "discrimination" (along with the term "bad faith") described conduct in a subjective sense, that is, "that an employee ought not to be the victim of the ill-will or hostility of trade union officials or of a majority of the members of the trade union".[273] Thus, it was necessary for the complainant to canvass the union's motivation and to produce some evidence of subjective ill-will.

A year later, however, in *Douglas Aircraft Co. of Canada Ltd*,[274] a vice-chairman of the Board, sitting alone, rejected this restrictive view of the term "discriminatory". In a complaint which alleged discriminatory conduct on the part of the union for incorporating into a collective agreement a super-seniority provision benefiting certain officers of the union, the vice-chairman suggested that the term "discriminatory" lent itself to two possible interpretations. The first view, she said, was represented by *C.U.P.E., Local 1000*[275] and referred to "active discriminatory conduct" where the Board was required to look to the motivation of the parties to see whether the union acted out of hostility or ill-will. The second view was that the "union may not act in a manner that will result in discrimination"[276] where it made no difference whether or not the union was motivated by hostility or ill-will if, in fact, the act had the effect of being discriminatory. The vice-chairman suggested that both views were consistent with the decisions of the Board and concluded:[277]

> To summarize the position of the Board, therefore, we suggest that "discriminatory" in section [68] is designed to prevent distinctions in treatment accorded

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[269] *Antonio Melillo, ibid.*

[270] *Ford Motor Company of Canada Ltd, supra,* footnote 5.

[271] *Francon Division of Canfarge Ltd, supra,* footnote 36. For a criticism of any such requirement as "rational decision-making", see Finkin, *op. cit.*, footnote 3, at pp. 201-206.

[272] *Supra,* footnote 5.

[273] *Ibid.*, at p. 462.

[274] *Supra,* footnote 5.

[275] *Ibid.*

[276] *Ibid.*, at p. 783.

[277] *Ibid.*, at p. 789.

> individual employees or groups of employees which are made without the support of cogent labour relations reasons. The focus of concern is on the distinction itself rather than on the motive for the distinction. Thus a distinction made without malice may be discriminatory if it lacks the underpinning of reasonableness defined from a labour relations point of view. By the same token a seemingly reasonable distinction may become discriminatory if it is motivated by hostility.

This view would advance significantly the possible scope of protection afforded by the "discriminatory" aspect of section 68. The vice-chairman justified her conclusions on the grounds that this interpretation would more adequately eliminate the "mischief section [68] was designed to meet".[278]

The vice-chairman was careful to point out that previous Board references to "discrimination" which had adopted a more narrow definition were confined to dicta and that in any event these decisions did not purport to exhaust the possible ramifications of discriminatory conduct. In reviewing these decisions there is much to support her broad interpretation. The Board has variously referred to the necessity of representing each employee "in the same manner and without distinction"[279] or it has asked whether "in similar circumstances an appeal would have been launched on behalf of some other employee",[280] or whether a "grievance was dealt with by the union at any stage of the proceedings differently from a grievance filed by any other member of the union",[281] or whether another employee "in a similar position would have been dealt with differently",[282] or whether the "complainant has been treated differently from any other member who may have lost his good standing and been suspended",[283] or whether the actions of the union are consistent with the "practice in the plant",[284] or whether the complainant was "allowed the same access to the union as were other members of the union",[285] or whether "employees in like situations would have been treated any differently",[286] or whether the "benefits of representation are conferred [sic] one member of the bargaining unit and denied

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[278] *Ibid.* The vice-chairman also justified her conclusions on the grounds that American jurisprudence did not require evidence of hostility to support a finding of discriminatory conduct.

[279] *Rutherford's Dairy Ltd, supra*, footnote 11, at p. 244.

[280] *Local 4912 of the United Steelworkers*, [1972] O.L.R.B. Rep. 353, at p. 355.

[281] *Steinberg's Ltd, supra*, footnote 13, at p. 427.

[282] *The International Association of Machinists and Aerospace Workers, Local 2330, supra*, footnote 34, at p. 846.

[283] *International Union of Operating Engineers, Local 793, supra*, footnote 124, at p. 362.

[284] *U.A.W., Local 199, supra*, footnote 98, at p. 472.

[285] *R.C.A. Ltd, Prescott, Ontario, supra*, footnote 153, at p. 62.

[286] *Retail, Wholesale and Department Store Union, Local 414, supra*, footnote 211, at p. 338.

another without reasonable excuse",[287] or whether the "complainant was treated any differently than any other employee in his position would have been",[288] or whether the complainant was treated "differently than other union members on the basis of non-relevant considerations",[289] or the Board has cautioned against "distinguishing among members in the bargaining unit unless there are cogent reasons for doing so".[290]

The language quoted above seems to lend credence to the conclusion of the vice-chairman in *Douglas Aircraft* that discrimination under section 68 includes not only active discriminatory conduct, where the union acts out of hostility or ill-will toward the complainant, but also conduct which merely results in discrimination regardless of motivation. However, quotations such as this in isolation may be misleading. In any case where a complainant has alleged discrimination, the Board must first look to see if in fact there is any evidence of discrimination, otherwise the complainant is hardly in a position to complain. Only when there is such evidence need the Board examine further to see whether the union was motivated by some discriminatory considerations. When the Board finds discriminatory results, it then must examine the conduct of the union to see whether its conduct was either arbitrary, discriminatory or in bad faith. Thus, in *Rutherford's Dairy Ltd.*,[291] where the complainant alleged a violation of section 68 because the union determined not to process a grievance to arbitration, the Board after defining the nature of discrimination went on to say:[292]

> In other words, a union may make a mistake in the manner in which it represents employees; however, if that mistake was made in good faith and without *mala fides*, it cannot be found that the union has violated the provisions of Section [68].

Obviously the fact of discrimination can occur just as readily where the union makes a mistake in the processing of a grievance under a collective agreement as where it otherwise acts out of some hostile motive. Nonetheless, the Board concluded that the union did not act discriminatorily in its representation of the employee even though, because of its mistake, the complainant may have been treated "differently" than other members in a like position.

In *Local 4912 of the United Steelworkers*,[293] the Board did not have to deal with the question of motivation since the evidence which

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[287] *Diamond "Z" Association, supra*, footnote 27, at p. 795.

[288] *George Zebrowski, supra*, footnote 138, at pp. 145-146.

[289] *Rupert S. Martin, supra*, footnote 266, at p. 675.

[290] *E. B. Eddy Forest Products Ltd, supra*, footnote 22, at p. 768.

[291] *Supra*, footnote 11.

[292] *Ibid.*, at p. 244.

[293] *Ibid.*, footnote 280.

it examined with respect to the union's handling of a workmen's compensation claim permitted it to conclude on the preliminary issue that there was "nothing to suggest . . . that in similar circumstances an appeal would have been launched on behalf of some other employee".[294] In *Steinberg's Ltd,*[295] the Board concluded that there was no evidence to show that the complainant's grievance was treated any differently than if someone other than the complainant had been represented. The same conclusions were reached in *The International Association of Machinists and Aerospace Workers—Local 2330,*[296] where the union refused to take the complainant's grievance on to arbitration and *International Union of Operating Engineers, Local 793,*[297] where the complainant alleged that the union failed to refer him to an employer for work.

In *Ford Motor Company of Canada Ltd,*[298] the Board allowed that there were sufficient reasons for the union to distinguish between the activities of the complainants which justified their discharge and those of others who were reinstated and, therefore, the union did not discriminate in agreeing to a settlement which confirmed that discharge. In *Retail, Wholesale and Department Store Union, Local 414,*[299] the Board was unable to find on the preliminary issue that "other employees in like situations would have been treated any differently"[300] when the complainant charged that the union refused to take his grievance beyond the first stage of the grievance process. And in *Diamond "Z" Association,*[301] the Board suggested that the "benefits of representation" must not be "conferred [sic] one member of the bargaining unit and denied another without reasonable excuse".[302] However, in the particular case, the complaint was that the union negotiating team had negotiated a collective agreement significantly different than the one that was submitted to the membership for ratification and this had the effect of injuring everyone within the bargaining unit.

None of these cases support the vice-chairman's position in *Douglas Aircraft Co. of Canada Ltd,* nor do they contradict it. On the other hand, in *R.C.A. Ltd, Prescott, Ontario,*[303] the Board did find

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[294] *Ibid.*, at p. 355.

[295] *Supra*, footnote 13.

[296] *Supra*, footnote 34.

[297] *Supra*, footnote 124.

[298] *Supra*, footnote 5.

[299] *Supra*, footnote 211.

[300] *Ibid.*, at p. 338.

[301] *Supra*, footnote 27.

[302] *Ibid.*, at p. 795.

[303] *Supra*, footnote 153.

that the denial to a union member of access to a union meeting where his grievance was being considered constituted discriminatory conduct since the complainant "should have been allowed the same access to the union as were other members of the union".[304] This conclusion was reached even though there was no finding that the union was motivated by discriminatory purposes.

There is much to commend the view of the vice-chairman in *Douglas Aircraft of Canada Ltd.*[305] The Board would no longer be compelled to look beneath the surface of decisions made by unions to see whether it or its officers were motivated by some hostile purpose. Unions would be less able to subvert or prejudice the position of an employee by casual manipulation of the grievance process. The Board would simply compare the union's treatment of a particular employee against the way in which all other employees equally situated have been treated in similar circumstances in the past to see if, in fact, the employee has been treated in a discriminatory fashion. Once it has been found that the employee had been treated differently, the union would have the burden of demonstrating some "cogent labour relations reasons"[306] justifying this distinction.

On the other hand the decision may have the effect of overruling a large number of decisions where the Board has declared that a union is not guilty of arbitrary conduct merely because it has failed to pursue a grievance for reasons of inadvertence, negligence, inattentiveness or poor judgment.[307] After all, in each of those instances where a union fails to secure a remedy on behalf of a complainant, the effect may be an objectively discriminatory one and the Board is not expected to accept the argument that carelessness constitutes a "cogent labour relations reason".[308] Thus, in spite of the well-reasoned decision of the vice-chairman, it is unlikely that the Ontario Board will follow this decision in future cases.[309]

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[304] *Ibid.*, at p. 62.

[305] *Supra*, footnote 5.

[306] *Ibid.*, at p. 789.

[307] See for example *C.U.P.E., Local 100, supra*, footnote 5; *Gina Ercegovic, supra*, footnote 188; *John Adema, supra*, footnote 142.

[308] Unless, of course, the Board is willing to fashion such a "reason" on the proposition, as it has in "arbitrary conduct" cases, that to impose liability for mere errors of judgment or negligence would place too onerous a burden on labour unions.

[309] In fact, as nearly as can be ascertained, the case has never been cited or referred to since it was published. On the other hand, *C.U.P.E., Local 100, supra*, footnote 5, has been cited on a number of occasions, even with reference to its definition of discrimination. And in *De Havilland Aircraft of Canada Ltd, supra*, footnote 211, the Board specifically discounted "discrimination" by finding "no evidence of any ill-will or hostility" (at p. 937), thus suggesting that the union's objective state of mind is an essential consideration.

While the duty of fair representation has its origin in the United States and, in particular, in a case marked by racial antagonisms,[310] the term discrimination in section 68 is by no means confined to racial discrimination.[311] As suggested in *C.U.P.E., Local 1000*,[312] while the duty does discourage "discrimination on the basis of race, creed, colour, sex, *etc.*", it also regulates abuse due to political conflicts and "interpersonal breakdowns within a trade union".[313] In that regard, persons within the bargaining unit must not be singled out for invidious purposes from other members "unless there are cogent reasons for so doing".[314] Thus, in *Douglas Aircraft Co. of Canada Ltd*,[315] the union was able to justify the inclusion of the executive committee members, zone committeemen and shop stewards under a super-seniority clause of the collective agreement on the ground that it was in the best interest of all employees that these officials be free from ordinary layoffs.

The Board has also suggested that the duty of fair representation does not require that the union strike a judicial posture in the processing of a grievance:

> [T]he legislation contemplates that the grievances of employees will be examined by individuals who are familiar with the grievor and his work record and are thus able to realistically assess the merits of the grievance and its prospects for success at arbitration.[316]

Thus, the key to discrimination is not "reasonable apprehension of bias" but whether there is "evidence from which it can reasonably be inferred that the employee was, in fact, the victim of . . . discrimination".[317]

(3) *Bad Faith.*

Of the three terms used to describe unfair representation, "bad faith" has received the least attention by the Board. Perhaps this is

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[310] *Steele* v. *Louisville R.R. Co., supra*, footnote 4.

[311] *Ford Motor Company of Canada Ltd, supra*, footnote 5.

[312] *Supra*, footnote 5.

[313] *Ibid.*, at p. 462. Racial discrimination has rarely been asserted before the Ontario Labour Relations Board. In only two of the fourteen successful complaints has an allegation of discrimination been critical. In one of the cases the allegation was merely that a union member had been denied access to a meeting at which his grievance was to be discussed. *R.C.A. Ltd, Prescott, Ontario, supra*, footnote 153. In the other case the complainant was the victim of a petition circulated by other employees and union officials demanding his replacement as a supervisor. *Toronto Hydro Electric System, supra*, footnote 130.

[314] *Ford Motor Company of Canada Ltd, supra*, footnote 5, at p. 533; *E. B. Eddy Forest Products Ltd, supra*, footnote 22.

[315] *Supra*, footnote 5.

[316] *Vision '74' Nursing Home, supra*, footnote 71, at p. 461.

[317] *Ibid.*

simply because the meaning of the term is so obvious and union officials do not ordinarily vent their personal animus openly. In the few Board decisions which have considered the matter, they are unanimous in concluding that bad faith refers to a subjective state of mind, that is conduct which has been motivated by "ill-will",[318] hostility,[319] dishonesty,[320] malice,[321] personal animosity[322] or even "sinister" purposes.[323] Conversely, "good faith" has been described as "honesty of purpose".[324]

The principal thrust of the Board inquiry is to determine why the union acted or failed to act in the particular circumstances.[325] Unless in the unlikely event the union makes its subjective feelings obvious by express declarations to that effect, evidence of bad faith must be sought by examining the conduct of the parties and the circumstances under which the decisions were made.[326] In that event, the evidence will not be looked at in isolation and it is the totality of conduct that must be weighed and examined.[327]

The Board has suggested that it is not enough that the complainant show evidence of misunderstanding or mistake,[328] procrastination bordering on negligence,[329] poor judgment, irresponsibility and unawareness[330] or even unbecoming laxness and

[318] *C.U.P.E., Local 100, supra*, footnote 5; *Leonard Murphy, supra*, footnote 136; *The Municipality of Metropolitan Toronto, supra*, footnote 45; *De Havilland Aircraft of Canada Ltd, supra*, footnote 211.

[319] *Ford Motor Company of Canada Ltd, supra*, footnote 5; *C.U.P.E., Local 1000, ibid.*; *Diamond "Z" Association, supra*, footnote 27; *The Municipality of Metropolitan Toronto, ibid.*; *De Havilland Aircraft of Canada Ltd, ibid.*

[320] *Diamond "Z" Association, ibid.*; *Leonard Murphy, supra*, footnote 136.

[321] *Diamond "Z" Association, ibid.*

[322] *Chrysler Canada Ltd, supra*, footnote 21.

[323] *Leonard Murphy, supra*, footnote 136.

[324] *David Matthews, supra*, footnote 169.

[325] Thus the Board indicated in *Ford Motor Company of Canada Ltd, supra*, footnote 5, that "motive" may be especially significant in "assessing prohibited conduct" when considering the admonition against bad faith.

[326] Thus the Board in *U.A.W., Local 1285, supra*, footnote 24, while concluding in the particular case that the failure to comply with time limits in filing a grievance was not evidence of bad faith, indicated that in some cases it might be depending upon the particular circumstances. On the other hand, a union which acts "deceptively" and "misrepresents" its actions in seeking a settlement of a grievance may be found guilty of bad faith. *Babcock & Wilcox Canada Ltd, supra*, footnote 14.

[327] *United Electrical Union 504, supra*, footnote 19. The complainant accepted part of a settlement negotiated by the union but claimed the balance of the settlement was negotiated in bad faith. The Board said that it could not isolate parts of the settlement to determine if there was a violation of s. 68 but must view the settlement in its totality.

[328] *Rutherford's Dairy Ltd, supra*, footnote 11; *The Steel Company of Canada Ltd, supra*, footnote 28.

[329] *United Steelworkers of America, Local 7608, supra*, footnote 28.

[330] *Diamond "Z" Association, supra*, footnote 27.

unprofessional business procedures[331] if these are the result of human folly and shortcomings honestly made. Bad faith requires evidence of deliberate or intentional misconduct or perhaps conduct motivated by factors completely extraneous and counter to "legitimate bargaining concerns . . .".[332]

In most cases where bad faith was an issue, the circumstances have enabled the Board to conclude that the union acted in good faith. Thus, in *Steinberg's Ltd*,[333] the Board reviewed the actions of the union and was able to conclude that the ". . . whole course of conduct of all the union personnel involved suggests nothing but good faith . . .".[334] In *Ford Motor Company of Canada Ltd*,[335] the Board was impressed by the behaviour of the union in representing the complainants at various interviews and in the fact that nothing extraneous to the consideration of the claims on the merits appeared to have influenced their decisions in settling those matters. In *The Steel Company of Canada Ltd*,[336] the Board did find that the union failed to pursue arbitration by permitting the time limits for filing an appeal to expire but nonetheless preferred to label its inaction as attributable to unprofessional business procedures rather than conduct motivated by bad faith.

In *Retail, Wholesale and Department Store Union, Local 414*,[337] bad faith was discounted when the Board reviewed what it characterized as the "sufficient measures" taken by the union to determine whether the complainant's grievance should be pursued, while in *Diamond "Z" Association*[338] the Board reaffirmed the distinction between "inadequacy" in representation and "bad faith" representation:[339]

> In dealing with these complaints the Board has excused a respondent trade union from allegations of wrongdoing where it was shown that the grievor was the unfortunate victim of shortcomings that may have included his representative's poor judgment, irresponsibility and unawareness. . . . In these situations the Board has been of the view that the Legislature did not intend by the introduction of the standard of the duty of fair representation to protect the grievor from this category of human shortcoming. . . .

The fact that the union deliberately sets out to secure the discharge of the complainant may not necessarily be evidence of bad

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[331] *The Steel Company of Canada Ltd, supra*, footnote 28.

[332] *Leonard Murphy, supra*, footnote 136, at p. 153.

[333] *Steinberg's Ltd, supra*, footnote 13.

[334] *Ibid.*, at p. 428.

[335] *Supra*, footnote 5.

[336] *Supra*, footnote 28.

[337] *Supra*, footnote 211.

[338] *Supra*, footnote 27.

[339] *Ibid.*, at pp. 794-795.

faith if done within the permissible restraints of The Labour Relations Act. Thus, in *George Zebrowski*,[340] the complainant was expelled from the union after repeated attempts were made requesting him to pay legitimate fines that had been assessed by the union for his failure to attend meetings. Subsequently, at the union request and in conformity with a maintenance of membership clause in the collective agreement, the employer discharged the complainant.[341] The Board refused to find bad faith on the part of the union in view of the fact that the union made every attempt to accommodate the interests of the complainant and to permit him to re-establish his relationship with the union in good standing before requesting his dismissal from the company when the complainant failed to comply. Likewise, in *Service Employees Union, Local 204*[342] the Board was unwilling to find bad faith on the part of a union which requested that the employer discharge the complainant pursuant to a maintenance of membership clause where the latter refused to join the union or pay membership dues. While the union processed the grievance, it refused to pursue the matter to arbitration on the grounds that the language of the agreement was clear and that the discharge did not involve a breach of that agreement. The Board noted that one of the responsibilities of a union is to police the agreement not only for the interests of particular individuals but also to protect the interests of the membership as a whole and to insure the integrity of the bargaining unit.

And there are, of course, limits beyond which the duty of good faith does not require a union to go. Thus, in *Reginald Stanley Harcourt*,[343] the Board was satisfied that the union did everything possible in attempting to accommodate the interests of the complainant before compromising his position at the bargaining table in order to secure the interests of all the employees in the collective bargaining unit. Beyond this, said the Board, the Act does not demand "heroism or self-sacrifice".[344]

In five of the complaints where the complainant was successful on a section 68 application, the issue of good faith appears to have been determinative. In *Diamond "Z" Association*,[345] a trade union was certified as the bargaining agent for a group of retail store employees. Shortly thereafter, it negotiated the first collective agreement with the employer, which allegedly differed significantly from

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[340] *Supra*, footnote 138.

[341] The union's conduct was consistent with s. 46(2) of The Labour Relations Act of Ontario, *supra*, footnote 2.

[342] *Supra*, footnote 75.

[343] *Supra*, footnote 117.

[344] *Ibid.*, at p. 512.

[345] *Supra*, footnote 27.

what the membership had been assured would be included in the agreement when it had previously been presented by the union officers to the membership for ratification. The grievors, employees within the bargaining unit, initiated proceedings under section 68 alleging violation of the union's duty of fair representation. The Board identified the issue as whether the "employees affected have been treated honestly and in good faith", that is, "whether the trade union by its conduct has acted fairly in the interest of employees in dealing with the employer with respect to their terms and conditions of employment".[346] Without attempting to define precisely the nature of the particular violation[347] the Board concluded that the employees "were victims of their union's misrepresentation"[348] and found that it had violated its duty of fair representation. The sole basis for this conclusion appears to have been the behaviour of the union officers in misrepresenting to union members the nature of the agreement reached with the employer. The Board noted some thirteen discrepancies between the terms of settlement reached with the employer as compared to that submitted for ratification.[349]

The second successful complaint involving a bad faith allegation occurred in the case of *Leonard Murphy*.[350] The complainants, Murphy and Shaw, were discharged from their jobs in the press room of a newspaper and replaced by the son of the assistant foreman and the nephew of the president of the union local, William Clarke. It so happened that Clarke, together with the president of the complainants' chapel,[351] one Gannon, were appointed by the chapel to review the grievances. These appointments were not in conformity with the collective agreement but, nevertheless, the committee met and with embarrassing dispatch and little concern or regard for the rights of the grievors or the merits of their position, decided to confirm the action taken by the employer. When it subsequently came to the attention of the union that the committee was unlawfully constituted, the membership at a general meeting voted to reconstitute the committee properly but composed of the same two members who, needless to say, reconfirmed their previous decision even in the face of a vote at the general meeting to send the grievances on to arbitration.

[346] *Ibid.*, at p. 796.

[347] *I.e.*, whether bad faith, discriminatory, or arbitrary conduct.

[348] *Supra*, footnote 27, at p. 798.

[349] Up to 1975, s. 68 had been invoked for the purpose of protecting individuals or groups of individuals from invidious treatment by officers of the trade union. What makes this decision remarkable is the suggestion that the entire membership of the union may use s. 68 for purposes of policing and controlling the activities of officers who are supposed to be representing their collective interest at the bargaining table.

[350] *Supra*, footnote 136.

[351] The bargaining unit covering the press room.

The Board could only conclude that the actions of these officials were both arbitrary and in bad faith. With regard to the latter finding, the Board held that when "arbitrary conduct is motivated by a factor[352] so extraneous and so counter to legitimate bargaining concerns it may reasonably be characterized as sinister".[353] The Board observed that the "full extent to which the grievors' rights were ignored indicates to this Board that they were the subject of the Union Committee's hostility".[354]

In *Ontario Hydro*,[355] the complainant was laid off from a construction project and the next day registered on the local's out-of-work list. Six months later when he showed up at the hiring hall to pay his monthly dues, the dispatcher would not accept them and he was notified that he would not be put back on the out-of-work list. This decision had apparently been triggered by a newspaper report that the complainant had been convicted of fraud against a welfare trust fund of the union though the complainant was never informed of the reason. Shortly thereafter the international union officers ruled that his dues could not be refused unless he was properly charged, tried and found guilty and following this his fees were accepted. The union then filed charges against him but not on the grounds for which his fees were initially refused but for the reason that he had slandered the union dispatcher. While the complainant was notified of the hearing, he chose not to attend and was found guilty and assessed a fine. Subsequently, the union refused him a transfer slip to another local because of the outstanding charges and he was excluded from the out-of-work list until the fines were paid. The Board found the union's whole course of conduct in bad faith because the union had failed to notify the complainant why he was initially taken off the out-of-work list and there was not, in any event, sufficient justification for the charge of misconduct.

In *United Brotherhood of Carpenters and Joiners of America and Local Union 2737*,[356] the complainant was permanently laid off from a company that was experiencing severe financial difficulty. After some procrastination the union business agent filed a grievance on the complainant's behalf but despite persistent inquiries the same agent never advised the complainant of the reason for his layoff or the fact that the employer was denying the grievance. Because of the lack of time the complainant was denied the opportunity to take the matter to

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[352] That factor being the relationship of Clarke with his nephew that seemed to play a pivotal role in determining the outcome of the proceedings.

[353] *Leonard Murphy*, *supra*, footnote 136, at p. 153.

[354] *Ibid.*

[355] *Supra*, footnote 199.

[356] *Supra*, footnote 147.

arbitration. The Board held that because the business agent had "knowingly misrepresented" the status of the complainant's grievance, he had acted in bad faith.

Finally, in *Toronto Hydro Electric System,*[357] members and officers of a union held a meeting, about which the complainant was not notified, and signed and circulated a petition to management demanding that the complainant, a union member, be removed as supervisor over certain employees. The Board concluded that the action of the union in failing to notify him about these events, or the content of the petition against him, was evidence of bad faith.

(4) *General Criteria Applied by the Board.*

The Board has identified a number of general factors relevant to a determination of whether or not the union has acted in a manner which is arbitrary, discriminatory or in bad faith under section 68.

Thus, when a complainant brings a matter to the attention of his or her union, to what extent does the union conduct a full and proper investigation,[358] extend to the complainant a fair opportunity to present his or her side of the case,[359] make every effort to clarify the issues,[360] weigh and examine all the evidence presented to it,[361] where appropriate discuss the matter fully with the company[362] and then arrive at a decision after due and deliberate consideration.[363] Thus, in *Del-Mar Clothes Ltd,*[364] the Board was moved to say in concluding that the union had not acted in an arbitrary manner: "We can think of few cases of potential grievance in which the matter was so intensively and exhaustively examined and discussed at various levels of union staff as in this case."[365] And in *Rolland Inc.,*[366] where the union decided not to pursue a grievance to arbitration, the Board pointed out that the union had accepted the grievance in the first instance, reviewed the complainant's evidence and relevant docu-

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[357] *Supra,* footnote 121.

[358] *Local 30, Sheet Metal Workers' International Association, supra,* footnote 14; *Nick Bahiu, supra,* footnote 13; *Del-Mar Clothes Ltd, supra,* footnote 259; *Walker Exhausts Ltd, supra,* footnote 17.

[359] *Ryancrete Sterling Products, supra,* footnote 15; *George Magold,* [1975] O.L.R.B. Rep. 758; *Nick Bachiu, ibid.*

[360] *The Municipality of Metropolitan Toronto, supra,* footnote 45.

[361] *Nick Bachiu, supra,* footnote 13.

[362] *Steinberg's Ltd, supra,* footnote 13.

[363] *Francon Division of Canfarge Ltd, supra,* footnote 36; *Antonio Melillo, supra,* footnote 5; *Del-Mar Clothes Ltd, supra,* footnote 259; *Rolland Inc., supra,* footnote 33; *I.T.E. Industries Ltd, supra,* footnote 26.

[364] *Ibid.*

[365] *Ibid.,* at p. 446.

[366] *Supra,* footnote 33.

ments, met with the grievance committee and then met with the company, and only then decided on the basis of the available information that the grievance was not likely to succeed and should be withdrawn.

On the other hand, in *Leonard Murphy*,[367] the union was found to be in violation of section 68 when the Board determined that it had neither given the complainants an opportunity to present their case nor engaged in any real discussion or investigation relative to the facts of the case. And in *Toronto East General and Orthopaedic Hospital Inc.*,[368] the Board was led to conclude that officers who had signed and circulated a petition asking for the complainant's dismissal, without first conducting an investigation concerning the accusations against the complainant, were acting in violation of section 68.

Certainly, the Board will consider the effort which the union has actually exerted on behalf of the complainant.[369] And if additional facts are forthcoming, has the union expressed a willingness to reassess its position[370] or if the union made a mistake, did it immediately undertake to redeem itself?[371] Thus, in *John Bourgeois*,[372] the union was held to be acting in violation of section 68 not for having failed initially to honour the request of a company that the complainant be assigned to a particular project in accordance with established practice, but because of its failure subsequently to rectify this oversight once it was apprised of its mistake.

This raises an interesting subsidiary question. If internal review procedures are provided and the reviewing bodies act in a manner which is in good faith and not arbitrary or discriminatory, will this cure the previous misconduct even though the reviewing body does not act favourably in response to the petition of the complainant?

The Board has provided some preliminary, but by no means definitive, answers to this question. In *Steinberg's Ltd*,[373] after the complainant was discharged he launched a grievance pursuant to the terms of the collective agreement. Preliminary to the filing of a grievance the union representative had attempted to effect a settlement which was not satisfactory to the complainant. When the complainant refused to accept its terms the union representative advised

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[367] *Supra*, footnote 136.

[368] *Supra*, footnote 16.

[369] *Reginald Stanley Harcourt*, *supra*, footnote 117; *Walker Exhausts Ltd*, *supra*, footnote 17; *Chrysler Canada Ltd*, *supra*, footnote 21; *Concrete Construction Supplies*, *supra*, footnote 16.

[370] *Local 4912 of the United Steelworkers*, *supra*, footnote 280.

[371] *The United Steelworkers of America, Local 3767*, *supra*, footnote 28.

[372] *Supra*, footnote 199.

[373] *Supra*, footnote 13.

him that a grievance "would not do him any good".[374] The grievance was turned down by the District Council of the union on the grounds that the employer's decision was not unjust and therefore did not merit further action on his behalf. The complainant appealed to the joint executive board and when unsuccessful appealed further to the International, where after an extensive investigation the appeal was finally denied.

In considering the section 68 complaint, the Board not only reviewed the preliminary actions of the union but the subsequent appeal procedures as well. At each level of appeal, it suggested that the union acted in good faith and not in an arbitrary or discriminatory fashion.

The Board does suggest that good faith in the processing of the appeal may cure the original defect in the handling of the complaint when, after reviewing the union's actions and concluding that the union did not act in a manner which was arbitrary, it went on to conclude that "[i]n any event, following his subsequent discharge, he was given an opportunity to appeal [the] decision not to process the grievance and he availed himself of that right".[375] After asserting it was not concerned with whether the union made the correct decision, the Board reviewed the actions of the appellate tribunal and concluded that at every stage the union acted in a manner which was neither arbitrary nor discriminatory.

However, in *Leonard Murphy*,[376] while the Board acknowledged that the union for some period of time had made every effort to rectify its previous misconduct in the handling of complainants' grievances, it said that its "remedial action . . . cannot cure the previously established violation because it cannot absorb the delay already caused the grievors in the proper resolution of their claim".[377] Since the employer was refusing to appoint its nominee to an arbitration board because of the union delay, it was necessary for the Board to enter an appropriate order in accordance with its finding that the union had previously acted in violation of section 68 in the representation of the complainants. The Board does not say what course of action, if any, it would have taken if the union, once it had begun acting in good faith, had nevertheless determined that the grievance did not merit referral to arbitration.

The Board in assessing the action of a union in a section 68 complaint will also consider evidence of the honesty and conviction with which the union reached the conclusion that any further action on

[374] *Ibid.*, at p. 425.

[375] *Ibid.*, at p. 427.

[376] *Supra*, footnote 136.

[377] *Ibid.*, at p. 154.

its part would be useless,[378] or if negotiations were undertaken with the employer, the effort which the union made to effect a reasonable settlement on the complainant's behalf.[379] No less important is evidence of the effort which the union has made in attempting to accommodate the desires of the complainant. Thus, in a case where the union did not refer the complainant to any jobs because he was in arrears in payment of union dues, the Board referred to the fact that the union had attempted to accommodate the complainant by permitting him to go on reduced dues at one stage and then later giving him the opportunity of paying his back dues at a reduced rate.[380] And in *George Zebrowski*,[381] where the union requested the discharge of the complainant under a maintenance of membership clause in the collective agreement after he had been expelled from the union, the Board noted that the union had done everything possible to allow the complainant to re-establish his membership in good standing and thus avoid being discharged. Finally, in *Rupert S. Martin*,[382] after the union refused to refer the complainant to any jobs under a hiring hall arrangement because of the employer's strong objection to the quality of his work, the union made every effort to provide the complainant with referral slips for any work he was able to obtain on his own initiative.

Of course, if the union is able to show that the complainant accepted a settlement worked out on his behalf, it is not likely that the Board will find a violation of section 68 unless there has been some serious misrepresentation.[383]

The Board will also look at the history of previous representation of the same complainant on the part of the union.[384] In one case, in the seven months prior to the hearing, the union had processed seventeen grievances on behalf of the complainant, four of which were scheduled for arbitration, a remarkable record by any standard.[385]

The Board will also take into consideration the experience or inexperience of the person who made the decision prejudicial to the

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[378] *Scarborough General Hospital*, *supra*, footnote 71; *E. B. Eddy Forest Products Ltd*, *supra*, footnote 22; *John Adema*, *supra*, footnote 142.

[379] *Auty Printing Ltd*, *supra*, footnote 162; *Ford Motor Company of Canada, Inc.*, *supra*, footnote 5; *E. B. Eddy Forest Products Ltd*, *ibid*; *Babcock & Wilcox Canada*, *supra*, footnote 14; *York University*, *supra*, footnote 73.

[380] *International Union of Operating Engineers, Local 793*, *supra*, footnote 124.

[381] *Supra*, footnote 138.

[382] *Supra*, footnote 266.

[383] *United Electrical Union Local 504*, *supra*, footnote 19.

[384] *Scarborough General Hospital*, *supra*, footnote 71; *Wakefield Harper*, *supra*, footnote 22.

[385] *United Automobile Workers, Local 1285*, *supra*, footnote 71.

complainant's interests,[386] the importance of the matter to the complainant,[387] the implications to the other members in the bargaining unit,[388] the effect any decision on the complainant's behalf might have on the union's relationship with the employer[389] and the financial costs to the union.[390]

The Board may also be persuaded by evidence that the union has followed its normal procedures in representing the interests of the complainant[391] or adhered to past practices.[392] It may be useful to show that the complainant was afforded the right to appeal the decision of the union[393] and that, in fact, the decision was reviewed by the executive of the union[394] or the membership at large and the complainant is accorded the opportunity of attending and participating in the merits of that decision.[395] It also appears to be of some importance that the decision-maker does not rely solely on its own judgment but attempts to secure the advice of some independent third party or legal counsel.[396]

It was quite commonplace in the early decisions under section 68 for the Board to say that it was not concerned with whether or not the union made a correct decision in the representation of an employee. Thus, it was asserted that the union could "make a mistake in the manner in which it represents employees" so long as it did so "in good faith and without *mala fides*".[397] On a number of occasions, the Board has repeated the admonition that it will not engage in "unin-

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[386] *Gina Ercegovic, supra,* footnote 188; *Antonio Melillo, supra,* footnote 5; *The Corporation of the County of Hastings, supra,* footnote 146.

[387] *Antonio Melillo, ibid.*; *The Corporation of the County of Hastings, ibid.*

[388] *Antonio Melillo, ibid.*; *Rupert S. Martin, supra,* footnote 266.

[389] *E. B. Eddy Forest Products Ltd, supra,* footnote 22; *Wakefield Harper, supra,* footnote 22.

[390] *Wakefield Harper, ibid.*

[391] *Sheet Metal Workers, Local 540, supra,* footnote 13; *Chrysler Canada Ltd, supra,* footnote 21.

[392] *James Mason, supra,* footnote 164.

[393] *Steinberg's Ltd, supra,* footnote 13; *I.T.E. Industries Ltd, supra,* footnote 26.

[394] *Wakefield Harper, supra,* footnote 22; *I.T.E. Industries Ltd, ibid.*

[395] *The International Association of Machinists and Aero Space Workers, Local 2330, supra,* footnote 34; *United Electrical Radio and Machine Workers of America, Local 523,* [1974] O.L.R.B. Rep. 262; *The Municipality of Metropolitan Toronto, supra,* footnote 45; *John Farrugia, supra,* footnote 103.

[396] *Service Employees Union, Local 204, supra,* footnote 75; *Francon Division of Canfarge Ltd, supra,* footnote 36; *The Municipality of Metropolitan Toronto, ibid.*; *Wakefield Harper, supra,* footnote 22; *Walker Exhausts Ltd, supra,* footnote 17; *Concrete Construction Supplies, supra,* footnote 16; *Betty Lavoie,* [1981] O.L.R.B. Rep. 1098.

[397] *Rutherford's Dairy Ltd, supra,* footnote 11, at p. 244, quoted favourably in *Steinberg's Ltd, supra,* footnote 13, at p. 428.

formed second guessing about a process of decision-making that resides at the heart of the administration of the collective agreement . . .''.[398]

> The practical effect of such ''second guessing'' would result in a union refusing to settle claims or result in dampening the union's inclination to resolve grievances. This would profoundly hamper the scheme of the Act which contemplates the grievance procedure as one of the tools in promoting industrial peace.[399]

Thus, it has been said that it is not for the Board ''to say what we think might have been the wisest course for the union to adopt in the circumstances'',[400] or to determine ''whether the union was right or wrong in its assessment'',[401] or, for that matter, determine ''whether the Board would have reached the same or some other decision on the merits of the original dispute between the parties''.[402]

Nevertheless, the Board on a number of occasions has undertaken to evaluate the merits of the union's decision in determining whether or not the union violated its duty of fair representation. Thus, in a decision involving the meaning of a collective agreement, the Board in concluding that the union had not violated section 68 added: ''The latter terms [of the collective agreement] certainly appear to be reasonably capable of the interpretation place [sic] upon them by the union.''[403] And in a case where the union refused to file a grievance on behalf of the complainant, the Board concluded that this was perfectly proper in light of the evidence that a medical officer had ''ruled that complainant was medically unfit to perform'', adding: ''[w]e are unable to see what else the respondent union could have done in their representation of the complainant.''[404]

In another case the union decided not to file a grievance on behalf of the complainant concerning the scheduling of overtime and the Board concluded that the complainant in any event had ''failed to establish that he had a proper grievance'' in the matter.[405] In the case previously cited where the Board suggested that it would not second guess the union in its role in settling grievances, it nevertheless offered as an ''alternative ground for dismissing this complaint'' the

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[398] *C.U.P.E., Local 1000, supra*, footnote 5, at p. 463.

[399] *Ford Motor Co. of Canada Ltd, supra*, footnote 5, at p. 527. See also *Chrysler Canada Ltd, supra*, footnote 100 and *Massey-Ferguson Industries Ltd, supra*, footnote 172.

[400] *Service Employees Union, Local 204, supra*, footnote 75, at p. 781.

[401] *Francon Division of Canfarge Ltd, supra*, footnote 36, at p. 557.

[402] *Ontario Hydro, supra*, footnote 88, at p. 371. See also *C.U.P.E. and Local 922, supra*, footnote 42.

[403] *Auty Printing Ltd, supra*, footnote 162, at p. 40.

[404] *Amalgamated Transit Union, supra*, footnote 73, at p. 127.

[405] *U.A.W., Local 1285, supra*, footnote 71, at p. 420.

fact that the complainant's grievance lacked merit.[406] In another case where the union refused to take a grievance to arbitration the Board reviewed the complainant's evidence and testimony before the Board including "the manner in which the complainant gave his evidence and the credibility, clarity and consistency of his answers" and concluded that the union's position "was not an unreasonable one".[407] And finally, on at least one occasion the Board did not even evaluate the merits of a section 68 complaint and instead examined the merits of the union's position and concluded that it was correct in its interpreation as to when seniority should be calculated for the complainant under that agreement.[408]

In *Antonio Melillo*[409] the Board attempted to rationalize what appeared on the surface to be an inconsistent policy:[410]

> In determining whether Section [68] has been violated by the trade union, the Board has stated that it does not assume the posture of an arbitration board and adjudicate the merits of the complainant's grievance against the employer. While the Board does receive and consider evidence of all the circumstances surrounding the grievance, it does so for the limited purpose of determining whether the union has acted in an arbitrary, discriminatory, or bad faith manner in the representation of the complainant. . . . The policy behind this approach is not difficult to fathom. On the one hand, the fact that a grievance appears meritorious may lend credence to an employee's claim that he had been unfairly represented. . . . On the other hand, the fact that a grievance does not appear to have merit will generally be supportive of the trade union's defence to an unfair representation complaint. . . . Nor is it to say that a meritorious grievance will necessarily be dispositive of the union's defence. The merits of the complainant's grievance is but one of a number of factors (albeit an important one) of which the Board may take account in arriving at a judgment about whether the union has dealt with his grievance in a proper manner.

It would appear that the mere fact that the union has made a mistake or that the Board would have reached a different conclusion, while not dispositive of the issue of fair representation, may nevertheless be one additional factor among the many others we have already considered upon which the Board may rely in reaching its conclusion as to whether the union acted in bad faith, discriminatorily or arbitrarily.

## III. *Conclusion.*

There is much to commend in the jurisprudence of the Board in cases involving the duty of fair representation. The Board has judiciously

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[406] *Ford Motor Co. of Canada Ltd, supra,* footnote 5, at p. 534.

[407] *I.T.E. Industries Ltd, supra,* footnote 26, at p. 1003.

[408] *Chrysler Canada Ltd, supra,* footnote 97.

[409] *Supra,* footnote 5.

[410] *Ibid.,* at pp. 617-618. See also *Massey-Ferguson Industries Ltd,* [1977] O.L.R.B. Rep. 216 and *U.A.W., Local 1459, supra,* footnote 14.

sought to avoid unduly interfering in the affairs of trade unions while attempting to secure certain minimal protections for individuals or groups within the bargaining unit. There are some curious imbalances that need to be addressed. For example, the Board should give greater recognition, and thus protection to certain critical job interests involved in job dismissals or seniority reclassifications. Its decision should recognize more fully the institutional nature of the duty of fair representation in the process of grievance administration. A more rigorous standard should be applied to union representation where there is an obvious conflict of interest between the union and the member or group it purports to represent.

On the whole, however, the Board has made a good beginning. If section 68 is not the "Magna Carta" some of its ardent champions preferred, it certainly has not been without effect in making unions more conscious of their duties and responsibilities in representing the interests of their constituency. Obviously, there is a considerable distance which the Board must travel in ensuring that employees will realize fair, adequate and meaningful representations under what is essentially a private sector of contract administration. It would be unfortunate if the Board were not sensitive to the difficulties and complexities that necessarily attend the reconciliation of interests within a bargaining unit and the Board must not succumb to the temptation of substituting public for private judgments in this regard. By the same token it would be equally unfortunate if that concern were to make the Board any less responsive to these occasional lapses of institutional accountability in the representation of individual and group interests.