Cited as:
Dezentje (Re)

Jan Dezentje, Gordon Dombrosky and Denis Roy, applicants, and Jim Bendfeld, William Warchow, International Brotherhood of Electrical Workers, Local 424, the General President's Committee for Plant Maintenance in Canada and Catalytic Maintenance Inc.

[1999] Alta. L.R.B.R. 267

[1999] A.L.R.B.D. No. 12

Board File: GE-01140

Alberta Labour Relations Board

A.C.L. Sims, Q.C., Vice-Chair, F. Kuzemski and Z. Asbell, Members

May 13, 1999.

Appearances:

For the applicants: Simon Renouf (counsel), Jan Dezentje, Gordon Dombrosky, Denis Roy.
For the respondent W. Warchow: Julien Landry, Q.C., (counsel), William Warchow.
For the respondents, J. Bendfeld and IBEW 424: Murray McGown, Q.C., (counsel), Jim Bendfeld.
For the respondents General President's Commitee: Barrie Chivers (counsel), Steve Smillie, Don Oshanek, George Henry.
For the respondent Delta Catalytic: Philip G. Ponting, Q.C., (counsel), Terry Burton.

Unions -- Definition -- s. 1(x) -- General President's Committee not a trade union within meaning of Code -- Relationship between International union (parent) and Local discussed.

Collective agreement -- Definition -- s. 1(f) -- General President's Committee agreement ratified by each union -- Agreement binding on Locals.

Collective bargaining -- s. 59(2) -- "Persons resident in Alberta" -- Committee not complying with requirement -- Agreement not inevitably set aside -- Remedy is direction for future rounds of

bargaining.

Collective bargaining -- s. 59(4) -- Bargaining committee must include representative of Local on whose behalf negotiations conducted -- Committee not complying with requirement -- Agreement not inevitably set aside -- Remedy is direction for future rounds of bargaining.

Unions -- Employer support -- s. 146(1)(b) -- General President's Committee funding arrangements questioned -- No direct or indirect dependency established -- Complaint dismissed.

Unions -- Fair representation duty -- s. 151 -- Breach established in part.

Unions -- Fair representation duty -- s. 151(1) -- "Persons acting on behalf of trade union" discussed -- Union liable for acts of its officers -- General President's Committee not a "trade union" or assigned any role in representation of employees under collective agreement -- Under Constitution and collective agreement International and Local of trade union jointly assumed responsibility for representation of employees.

Unions -- Fair representation duty -- s. 151(2) -- Defence of good faith not available on facts of case.

Unions -- Fair representation duty -- s. 151(3) -- Not appropriate case to refer to arbitration -- Compensatory order issued.

Board -- remedial power -- s . 11(2) -- Costs -- On facts of case order of solicitor/client costs appropriate.

Certain employees, Dezentje, Dombrosky and Roy (the "complainants") complained that each of Bendfeld, Warchow, IBEW Local 424, and the General President's Committee for Plant Maintenance in Canada violated the duty of fair representation in the matter of their grievances which included the termination of their employment. They also filed complaints that the agreement negotiated by the General President's Committee (the "GPC") was not a collective agreement and that the GPC funding arrangements constituted prohibited employer support for a trade union.

Held, the GPC was not a "trade union" within the meaning of s. 1(x) of the Code. The GPC acts as an agent for individual International trade unions in the negotiation of the GPC agreement. The GPC is not a party to the collective agreement in its own right, has no employee members, does not organize employees nor purport to represent any.

The Board discussed the relationship between the International of IBEW and Local 424. Each is a trade union in its own right, and each are separate legal entities with individual rights and responsibilities.

The GPC agreement is a collective agreement ratified between employers and each signatory

International union. The agreement is entered into by the International union on behalf of its constituent locals and is binding on Local 424.

The Board found that the GPC negotiating committee failed to include a representative of the locals on whose behalf the agreement was being negotiated. Notwithstanding the failure to comply with s. 59(4), the Board held that it was not inevitable that the collective agreement would be set aside, and instead, the Board provided directions for future negotiations.

The GPC funding arrangements were held not to constitute prohibited employer support and no breach of s. 146(1)(b) was established. The GPC is not a trade union so there could be no direct violation of the section. Neither was there an indirect violation. The funding arrangements posed no threat to the independence of the trade unions involved. The unions absorbed the costs of their own representatives at bargaining, as well as the costs associated with servicing of the collective agreement. There was no evidence of the creation of any relationship of dependency. The GPC has a long history of independent bargaining. The funding arrangements are not donations, but were negotiated through collective bargaining. The funds are spent independently of the employers and without any accountability to employers either directly or indirectly.

The allegations of a breach of the duty of fair representation against Bendfeld were dismissed as being without merit. Bendfeld conducted appropriate investigations and analyzed the case well. He was found to have acted reasonably in all of the circumstances.

The allegations against Warchow were sustained. He was found to have failed to communicate with the complainants, failed to communicate the employer's offer to one of the complainants in a timely manner, failed to take steps to advance the matters in a timely manner, was less that frank with officials of the International and the complainants, failed to allow the complainants to respond to allegations raised against them, and his "investigation" was found to be seriously flawed.

Although Warchow was a "person acting on behalf of a trade union" within the meaning of s. 151(1), the Board found that it was not appropriate to attribute personal liability to him for the loss suffered by the complainants. Board found doctrine of vicarious liability of employers for acts of employees applicable. It was open at all times for the International or the Local to bring pressure to bear on Warchow to do his duty.

As the GPC was not a trade union nor assigned any role in the representation of employees under the collective agreement, therefore, the GPC owed no duty to the complainants under s. 151(1) .

Under the collective agreement the International and Local 424 jointly assumed responsibility for the representation of employees under the agreement. As far as s. 151(1) of the Code is concerned, the International and the Local are jointly responsible.

The defence of "good faith" in s. 151(2) was held not to be available to the respondent Warchow in the circumstances of the case.

The Board held that this was not an appropriate case to send the grievances to arbitration under s. 151(3). The Board looked to the passage of time and the particular circumstances of the case and found that a order for compensation would be the appropriate remedy.

The Board also found this to be an appropriate case in which to order certain enumerated solicitor/client costs under s. 11(2).

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PART 1
INTRODUCTION

1 The giant Syncrude and Suncor Oil Sands Plants in Fort McMurray, Alberta take an army of tradespersons to maintain. Catalytic Maintenance Inc. contracts to provide this maintenance work, supplying some employees year round and many additional employees for periodic "shut-down" bursts of maintenance activity.

2 Until April, 1991, the three complainants, Jan Dezentje, Gordon Dombrosky and Denis Roy, worked for Catalytic as electricians providing long term maintenance services at Syncrude. In April 1991, in the circumstances we describe below, the three complainants were either laid off or terminated. All three filed grievances with their Union, Local 424 of the International Brotherhood of Electrical Workers. Dissatisfied with the way these grievances were handled, the three filed complaints with the Labour Relations Board.

3 The three employees worked for Catalytic under the terms of an agreement called The General Presidents' Committee Agreement for Maintenance (the "GPC agreement"). GPC agreements are agreements entered into by the General Presidents of each of the various building trade unions, including the IBEW.

4 Stripped of side issues, this case raises two broad questions.

1. Does the unique form of collective bargaining used to negotiate labour agreements for maintenance work comply with the Labour Relations Code's prescriptions?
2. Did the Trade Union and its representatives discharge the obligation owed to the complainants to represent them fairly in matters arising out of the collective agreement.

5 While in a general sense these two issues can be isolated; factually and legally they have become intertwined at every turn. Reasons for this include:

1. The question of which trade union (or which representative of a trade union) owes the complainants the duty of fair representation depends upon how one views the structure of the GPC agreement.
2. Initially at least, the complainants argued that they were unfairly represented with respect to rights they say arise out of an agreement claimed to be illegal because it contravened the Labour Relations Code.
3. One of the complainant's major concern about the GPC arrangement is the allegation that Union and management roles become blurred. This, they allege is what led to their loss of employment.

6 For clarity we will deal with the legality of the GPC agreement first, separate from the duty of fair representation questions, alluding as necessary to the interrelationship between the two.

PART 2
The General President's Agreement

7 A description of industrial maintenance helps explain how the GPC system of collective bargaining has developed in Canada. It is a phenomenon that has developed on a Canada wide basis, straddling the various provincial labour law regimes. It predates some provincial labour laws, particularly the amendments introduced into Alberta law in 1988.

1. The Nature of Industrial Maintenance Work

8 Large industrial plants are built by construction employees. Construction unions customarily exist along craft lines - electricians, millwrights, labourers, pipefitters and so on, each with their own Union. Normally, these Unions operate hiring halls that supply the trades persons to the construction contractor as needed to build the project for the owner.

9 Once a plant is built, the construction contractor leaves and hands the plant over to the owner, who generally retains a work force to operate the plant. If the employees in that work force choose to unionize they must generally do so on an "all employee" basis, in bargaining units that transcend the craft lines of the construction trades. Some owners do all their maintenance "in-house" using their own work force. However, this is unworkable in some plants where major maintenance can only be undertaken by shutting down the production process. Syncrude is one such plant.

10 The cost of a shut-down, in lost production, can be astronomical. Therefore, any maintenance work that requires a shut-down must, wherever possible, be planned in advance and carried out as quickly as possible. This requires assembling a large but temporary workforce of skilled trades people to work flat out for as short a shut-down period as possible. Once this work is over this work

force leaves and production resumes. Only those trades people required for day-to-day plant maintenance remain.

11 Several companies have grown to meet this market for routine and shut-down maintenance work. Catalytic is one such company. What such companies can offer owners is the ability to maintain their plant, both routinely and for shut-downs, without having to engage their own workforce of construction trades persons. Such contractors develop expertise in the timing and execution of such work. They also maintain labour relations agreements with the craft or building trades Unions that give them access on an "as needed" basis to the large pool of construction trades persons needed for short-term work. As a result, plant owners have found it advantageous to contract out their maintenance work.

12 Before moving on to the structure of collective bargaining, we note a couple of realities of maintenance work that affect the collective bargaining processes. First, for many of the trades persons involved the short-term shut-down maintenance work is very much like construction work. It is carried out on a call-out system through the Union hiring hall, each call lasting only as long as the job. Second, for those who work on the longer-term day-to-day maintenance, their work begins to look much more like the steady employment of the plant operators working directly for the plant's owners. They develop a familiarity with the plant, work regular schedules rather than the frantic pace of shut-down work, and often settle into the local community. Thus, within the maintenance contractor's work force there are employees with significantly different outlooks and interests - those who see the work as analogous to short-term construction employment and those who see it as analogous to long-term plant work. At the root of this case rests the inherent tension between those two different outlooks.

13 An off-shoot of this difference involves the question of managerial independence and Union involvement in supervision. In a traditional workplace, the Union/Management dividing line is often clear (turning on the definition of an employee). There is a presumed inherent conflict between Union employees and those by whom they are managed. On a construction project these lines are sometimes less clear. First, there is the high degree of control and direction exercised by the (non-employer) owner, and by the architects or engineers who represent the owner's interests.

14 Second, it is common to have Union trades persons acting as working supervisors, lead hands and so on, directing other Union employees. The power to hire and fire issue diminishes in importance (along with the inherent conflict question) because, in construction work, the job in any event only lasts for so long. Construction employees can usually be dismissed on a few hours notice, so concepts of just cause and seniority play virtually no part in the labour relations arrangements, in sharp contrast to industrial labour relations where such issues are paramount. Here again one sees the tension between the construction versus the industrial outlook.

15 Lastly, the same high costs of a shut-down make plant owners, and the maintenance contractors they employ, highly vulnerable to work stoppages caused by collective bargaining. This

has led employers and unions to search for ways to arrive at satisfactory collective agreements without the threat of a strike during a plant shut-down. The method historically adopted has been a "pick-up contract" which is an agreement to incorporate by reference into the maintenance contract, the prevailing local construction trades rates negotiated from time to time. Article 12.000 of the collective agreement in this case (Exhibit 1, Tab 72) and the attached Wage and Benefits Schedule provides an example of this pick-up rates mechanism.

2. The General President's Committee

16 The maintenance industry bargaining structure that has emerged in Canada involves the building trade unions forming a type of consortium to negotiate site specific multi-trade collective agreements with those contractors who have maintenance contracts with the owners of major plants.

17 In order to qualify for a GPC agreement, a contractor must be unionized and have a relationship with a building trade union that participates in the GPC. The contractor must have demonstrated its commitment to unionized work for at least a one-year period. The contractor must employ three or four different trades at the project owner's site and agree to hire others from the hiring halls as needed. The contractor must apply to the GPC and have a letter of commitment from the project owner.

18 Building trade unions, like many other Unions, are bi-level structures. They consist of an International Union with a Constitution and Bylaws. These International Unions each create or "charter" Local Unions that operate with their own local bylaws but within and subject to the International Constitution. This chartering arrangement creates many constitutional links between the various Locals and the International Unions. For example, members customarily belong to a local as well as the International. International bodies or their officials act on appeal from local decisions, and delegates from locals constitute the voting delegates at International conventions.

19 Much legal debate goes on about the separate or integrated nature of such trade union structures, which do not easily fit with normal corporate notions. In practice, there is a three-in-one relationship with members, locals and Internationals linked together by a variety of constitutional, and thus contractual, commitments.

20 The International Trade Unions, through their respective International Presidents (acting through delegates) formed the General President's Committee for plant maintenance in Canada. This committee has a constitution and bylaws of its own (Exhibit 12 - Tab 2). The organization's objectives are set out as follows:

> Section 1: To co-ordinate and harmonize the activities, functions and interests of the Member International Unions working together to form this Committee.
>
> Section 2: To promote the growth and development of all Building and

> Construction Trade Unions and to foster and develop the employment of Building and Construction tradesmen in the Maintenance Industry.
>
> Section 3: To establish and maintain legal and proper business relations and agreements between this Committee and its Member International Unions and other responsible parties, either individuals or associations, to the extent that the best interests of the Maintenance Industry be served.
>
> Section 4: To endeavour to bargain and secure maintenance type union agreements with any employer or any association of employers that may undertake long term or short term maintenance in Canada.
>
> Section 5: The objects and principles of this Committee shall be to enter into collective agreements with Employers in order to obtain the best possible wage rates and working conditions in the maintenance industry.

21 The constitution goes on to say the member International Unions have organized the committee "... to act in concert through the Committee in the negotiation and administration of the collective agreements and to ensure relative equity and uniform interpretation and application ...". This same clause goes on to say the International Unions "... have empowered the Committee to act as the exclusive and irrevocable agent of the Member International Unions and of each Member International Union."

22 The Committee has a one delegate per International Union system, with an ability to appoint alternatives. The Committee's Officers, as its agent, shall handle all matters pertaining to certification and/or collective agreements for Maintenance. The Committee also appoints an Executive Director to handle its day-to-day business. Mr. Steve Smillie has held this position throughout the time covered by these events.

23 Article X Section 1 makes it clear that, while the GPC negotiates the collective agreements, it is up to each Member International Union to sign and accept the agreements thus negotiated.

> Section 1: A Member International Union shall only be bound to collective agreements negotiated by the Committee in the event that such Member International Union executes such collective agreement.

24 Section 5 provides that the negotiating committee must have one delegate from each Member International Union. We will review below the way GPC negotiations have been carried out, but first we will review the way in which the Committee's work is funded.

3. Funding the GPC structure

25 Funding for the GPC's operations comes from a per-employee-hour payment provided for in the various site-specific collective agreements. Catalytic's Syncrude and Suncor site agreement for 1991 provides, for example:

> Article 29.000 - Administration Fund
>
> 29.100 The employer shall contribute an amount of two (2) cents per hour to a maximum of forty (40) hours per week to the General President's Maintenance Industry Administration Fund.
>
> Effective July 1, 1991 this amount shall increase to three (3) cents per hour for each hour worked. Effective January 1, 1992 this amount shall increase to five (5) cents per hour for each hour worked.

26 Remittances to this fund go directly to the GPC. They are not channeled through the Local Unions or through the member International Unions. There are no deductions from the employee's pay cheques. The monies are paid by the Employers directly. Figures from 1990 show that there were GPC contracts in place at 20 sites in Canada, and that the Suncor and Syncrude sites in Fort McMurray were by far the largest. Together, the GPC contracts from these two sites covered 44% of the total person-hours worked. This in itself is not surprising given the massive size of these two plants in comparison to virtually any other industrial site in Canada. These figures are for all trades. Across Canada, the 1990 figures show that electricians worked 10.8% of the hours worked. These figures fluctuate depending on the hours worked, both in total, and by trade, and on the activity in the industry. For example, the electrician's hours at Catalytic's Syncrude site varied between 126 thousand hours in 1991 down to 60 thousand hours in 1993.

27 Mr. Smillie explained that the GPC fund began in Alberta in 1985 with the renewal of the Alberta maintenance agreements that year. The GPC put forward the argument that the size and complexity of their multi-trade union operation required money if they were to be organized in a business like and professional way. The Employers agreed to a 2 cent-per-hour-worked formula to go into a fund for the Committee. The Committee in turn took responsibility for publishing the collective agreements and some other administrative matters. This arrangement was modeled on similar arrangements in the steel and power industries. It is used in other industries as well (see Exhibit 36 for examples). Before the GPC funding arrangement in 1985, the bargaining costs were assessed to each International Union. In 1993 the income from such payments for all of Canada amounted to $312,766, while GPC expenses for the year were $309,206. Beyond some minor interest income, the GPC's funding comes entirely from these cents-per-hour remittances.

28 Mr. Smillie outlined the Committee's expenses and produced its accounts. Basically, the

Committee spends its money on maintaining an office in Oakville, Ontario, Mr. Smillie's salary as Executive Director, and the travel and related expenses for the GPC annual general meeting.

29 Mr. Smillie's role as Executive Director is set out in Article 5 of the GPC constitution. In addition to his support role in bargaining, described below, he provides ongoing advice on the meaning of the various contracts, trying to maintain consistency and uniformity between the various unions, employees and provinces.

30 None of the funds remitted to the GPC are used for welfare benefits for Union members. Such matters are handled through other funds. Nor do such funds go to pay the wages or expenses of the International Representatives of the individual unions who are paid directly by their unions.

31 Mr. Smillie says the Employers who remit the cents-per-hour payments to the GPC have no input into the decision as to how the funds will be expended nor are they given any accounting. Mr. Burton from Catalytic confirmed this.

4. GPC Negotiations

32 Mr. Smillie described his role in the negotiation of the various GPC site agreements as being to provide administrative support. He facilitates getting input from people at the local level and reviews that input for the Committee. He arranges meeting rooms, prepares background materials and, once negotiations are complete, he arranges the signing, printing and filing of the resulting contracts. During negotiations it is the members of the Committee who act as spokespersons at the bargaining table, not Mr. Smillie.

33 Mr. Smillie says his standard routine for getting negotiations going is to send out notices to the Committee members (the delegates of the Presidents of the International Unions) telling them to contact the Local Unions affected and to get suggestions for change and input. Once the responses start coming in, Mr. Smillie and Committee members meet with the local business agents to sort out the main issues for presentation to the Employers. Once the bargaining demands are established, the negotiating committee meets with the Employer as often as needed to get a contract.

34 The negotiating committee has one representative from each International Union. Mr. Smillie says local representatives are involved in the initial meetings, but the formal bargaining committee just has one representative from each International Union.

35 The General President's Committee has a chairman. Mr. Bill Warchow, the representative of the President of the IBEW, served as GPC Chairman throughout the significant events in this case. However, most of his activities in this case were carried out in his role as an International representative for the IBEW, not in his role as GPC chairman.

36 When a settlement is reached it is obviously approved by the bargaining committee. It is then distributed to each International Union. Mr. Smillie and Committee representatives then go back

into the area and go through the proposed contract with the Local Union representatives from the various trades and explain the changes. Once this is done, Mr. Smillie goes back and prepares individual collective agreements for signature. If an International Union does not like a deal negotiated by the GPC it is not obliged to sign. Local trade unions never enter into or sign the GPC agreements directly.

5. The GPC Negotiations in 1991

37 On October 23, 1990, the GPC held one of its periodic meetings in Fort McMurray with the Local union members involved in maintenance. The time for negotiating the next contract was coming due. A proposal was put forward from some of the local unions that the agreement simply be extended for six months. This proposal led Mr. George Pheasey, then corporate manager of labour relations for Catalytic, to write to Mr. Bill Warchow in his capacity as chairman of the GPC.

38 Mr. Pheasey opposed an extension, and instead urged that negotiations be opened up early with a view to completion before the Alberta construction negotiations got underway. He said, in his letter:

> It is ESSENTIAL, and this cannot be overemphasized, that we provide a reliable and stable service to our clients. This is a responsibility of the GPC, the Local Unions, Catalytic Maintenance Inc. and your members and our employees. Our clients are purchasing a service and we as partners cannot afford to provide a poor service. Clients view work disruptions and threats of work disruptions as poor service and hence our responsibility to provide vehicles to prevent these disruptions.
>
> ...
>
> Negotiations for all construction agreements are taking place in 1991 and the present scheduled opening of the GPC agreements would coincide with construction negotiations. The ability and the desire of the local unions to address their attention to the GPC negotiations to ensure adequate dialogue and communications between all parties would be hampered. Opening GPC negotiations early would resolve this.
>
> It is also no secret that there are those who see the GPC agreement negotiations as a means of supporting their goals for construction settlements. This short-term approach and attitude to the contract maintenance industry and to the service we must provide cannot be allowed to prevail.

39 He asked that the GPC address the issue at their AGM scheduled for early December. They did so, and decided in favour of early negotiations. On December 13, 1990, Mr. Smillie, on behalf of the GPC sent a notice out to the GPC members to that effect. It cited as reasons for the decision the hope of early benefits for the members and the ability to give attention to the maintenance contract before the distractions of Alberta construction bargaining. The members of the GPC (the various International representatives) were asked:

> ... to contact your local union representatives in Alberta and ask for written suggestions for changes to the agreement to be returned to you by January 18, 1991. Once you have received this information, please send a copy to myself for compilation as soon as possible.

40 The notice went on to say that the GPC intended to schedule meetings in Alberta to review the input before the end of January 1991.

41 This led Mr. Warchow to write to the business manager of IBEW Local 424 on January 4th asking the Local to submit their proposals for amendments to the agreement by January 18th. Mr. Bendfeld says this was in fact done, and discussions were held at the Local level. On January 14, 1991, suggestions from Fort McMurray were sent in to the GPC for changes to the agreement (Exhibit 40).

42 Mr. Warchow's letter to the Local also confirmed the dates for two "experience review meetings", one to be held in Fort McMurray on February 5, 1991, and the other in Edmonton for February 6th. A similar meeting was set for Calgary on February 7, 1991. Shortly afterwards, Mr. Warchow had Mr. Bendfeld, the IBEW Local 424 business representative resident in Fort McMurray, arrange a meeting to be attended by all the Local 424 maintenance employees in Fort McMurray. This was set for the evening of February 4th.

43 Mr. Warchow's call for input obviously got circulated, because it led Mr. Dezentje to write directly to Mr. Warchow, on January 26, 1991, with a couple of proposals of his own (Exhibit 30).

44 Mr. Smillie says the Local meetings Mr. Warchow arranged in February for Calgary, Edmonton and Fort McMurray were part of the process used by the GPC members to ensure that they each understood their Local Union's issues.

45 The sign-in sheet for the GPC meeting in Edmonton for February 6th (Exhibit 39) shows that Mr. Bob Lynn attended on behalf of IBEW Local 424, as well as Local representatives for most of the other building trade union locals. The sign-in sheet for Calgary shows that Mr. John Briegel was present on behalf of Local 254 (Local 424's sister Local for southern Alberta). There is no sign-in sheet in evidence for the Fort McMurray meeting, but Mr. Bendfeld says at least he was present.

46 The GPC Committee met with the Employer for negotiations towards the Alberta GPC agreements in Calgary between March 5th and March 8th. While Mr. Warchow was the GPC

Committee chair (as well as the IBEW representative) he was away during this period and Mr. George Henry, the International Representative of the Boilermakers, took his place as chair.

47 Catalytic called Mr. Terry Burton to give evidence. He is currently the Manager - Labour Relations for Delta Catalytic Corp. In 1991 he was the Assistant Director of Labour Relations for Catalytic, reporting to George Pheasey who was then the Director. He was Catalytic's chief spokesperson in the 1991 GPC negotiations.

48 Mr. Burton's notes of the GPC negotiations (Exhibit 45) are detailed and record the competing issues dealt with in the bargaining. The discussion at the outset on March 18, 1991, records that both sides recognized that timing was important and that it was in all their interests to get the bargaining out of the way before the 1991 round of construction bargaining started. There were obviously fears that, on the one hand, announcing the wage rate formula might prejudice construction industry bargaining, and on the other that some might try to strike the Syncrude shut-down to force a high settlement so as to help construction bargaining. This, in the longer term, would harm the maintenance industry.

49 The parties arrived at a collectively bargained settlement and signed a Memorandum of Settlement (Exhibit 1, Tab 71) dated March 18, 1991, which covered Catalytic's seven Alberta projects. A similar document was apparently signed for another contractor, Foster-Wheeler. This memorandum included an Item #2 - Leave of Absence Policy - discussed in detail below. Based on this memorandum Mr. Smillie drew up separate collective agreement documents for each contractor for each site. And for each of these he prepared a separate signing page for each International Union. On March 28, 1991, Mr. Smillie sent Mr. Pheasey and Mr. Burton his record of the items which were discussed but did not find their way into the collective agreement (that is, agreed upon items that were not to be dealt with as collective agreement provisions). This included two issues that are significant for the duty of fair representation complaint - base crew and leave of absence policy.

50 The Memorandum of Settlement's duration clause provided:

> It is understood that this Agreement shall be in full force and effective from March 18, 1991 to December 31, 1993 and shall continue from year to year thereafter unless notice of desire to negotiate changes or termination is given by either party at least sixty (60) days prior to such anniversary date. Changes by mutual consent of the parties are not excluded during the lifetime of this Agreement.

51 Mr. Smillie says the deal was to go into effect immediately because it had improvements in pay and benefits the Union wanted. There was no specific discussion of implementation being held back pending ratification by each individual Union President. The Memorandum of Settlement was not made subject to any membership vote. However, it was understood by all parties to be subject to the signatures of each of the International Presidents as far as each of their unions were concerned,

in accordance with the GPC constitution.

52 Mr. Warchow says the IBEW had no ratification vote for the IBEW version of the GPC agreement. Mr. Warchow got the printed document at the end of negotiations. He sent it on to V-P Woods, who in turn sent it to International President Barrie in Washington who eventually signed the document in November, 1991.

53 Mr. Smillie prepared an information document highlighting the key changes, to go to the local union representatives explaining to them, and through them to the members of the various unions, the changes that had been achieved. This document, picked up by the complainants, figures prominently in their duty of fair representation complaint.

6. Is the General President's Committee a Trade Union?

54 The Labour Relations Code contains definitions for the terms "trade union" and "bargaining agent". It also defines "collective agreement," a term used in the definition of bargaining agent.

> 1(b) "bargaining agent" means a trade union that acts on behalf of employees in collective bargaining or as a party to a collective agreement with an employer or employers' organization, whether or not the bargaining agent is a certified bargaining agent;
>
> 1(f) "collective agreement" means an agreement in writing between an employer or an employers' organization and a bargaining agent containing terms or conditions of employment, and may include 1 or more documents containing 1 or more agreements;
>
> 1(x) "trade union" means an organization of employees that has a written constitution, rules or by-laws and has as one of its objects the regulation to relations between employers and employees;

55 The complainants argue that the GPC is, or acts on behalf of, a trade union. There can be no doubt that it acts on behalf of trade unions, that is its main purpose. However, to be a trade union it must fit the definition in s. 1(x), which requires that it be an organization of employees. The complainants maintain that:

> "... it is effectively acting as a trade union in the negotiation of collective agreements, and that its member organizations including the IBEW do purport to represent employees. This makes it an organization of employees. It certainly has a written constitution that has as one of its objects the regulation of relations between employers and employees."

56 We are unable to accept this logic. At all times, when the GPC purports to do things that trade unions do it does so on behalf of its member International Trade Unions. It is acting as their agent, not taking over their role as principal. It is each individual International Trade Union President that signs the collective agreement that results from bargaining. Despite section 4 and 5 of its objects, the GPC never actually becomes a party to a collective agreement in its own right. The GPC has no employee members and neither organizes employees nor purports to represent them, except through their status as agents of the constituent Unions. It is not sufficient to say that, because its constituent members are all organizations of employees, it must be an organization of employees. Trade Unions form all sorts of entities, many of which clearly would not meet the definition under section 1(x). Parentage alone is insufficient. It is not just that the GPC lacks the direct connection with employees. It is also that, under the GPC constitution, under the collective agreements, and in day-to-day practice, it is the various International Unions working in concert with the Local Unions within the relevant territorial jurisdiction, that maintain that direct connection.

57 The collective agreement, like Article X, Section 1 of the GPC Constitution discussed above, makes it patently clear that it is the Unions and not the GPC in its own right, that are the contracting parties. It begins:

> This Agreement is entered into ... by and between CATALYTIC MAINTENANCE INC., of Calgary, Alberta ... and those INTERNATIONAL UNIONS OF THE AFL-CIO listed hereunder ...
>
> [The International Brotherhood of Electrical Workers is specifically listed].

58 The section headed "covenants" reinforces this conclusion:

> Whereas, in order to ensure relative equity and uniform interpretation and application, the Unions, through the duly appointed and constituted General Presidents' Committee for maintenance in Canada, wish to negotiate and administer the said collective agreement in concert, each with the other, and all with the company.
>
> ...
>
> Whereas, the company and the Unions desire to mutually establish hours of work and working conditions for the employees on an area basis.
>
> It is therefore agreed by the undersigned company and the undersigned unions that in consideration of the mutual promises and covenants contained herein, the

Project Agreement be made as follows: (emphasis added)

59 The GPC's responsibilities under the agreement are set out in summary form in Article 2.000:

Article 2.000 - Authority & Responsibility of the Committee in Administering the Agreement

2.100	With the Company to interpret and administer the terms and conditions set forth in the agreement.
2.200	To screen and police each company seeking use of the Agreement in order to assure proper application and interpretation.
2.300	To review and instruct member Unions and/or the Company in interpretation and application of terms and conditions (subject to Step V of Grievance Procedure) when the Company or employees of any given Union depart from Agreement Conditions.
2.400	With the Company, through a Subcommittee, visit the location of each maintenance job prior to commencement or as often as necessary to initiate and maintain the cooperation of the Local Unions.
2.500	To prepare and distribute duly negotiated collective agreements for signing.

60 The recognition clause includes another provision recognizing the Unions as the principals and the GPC as the Union's agent for administration and interpretation.

The Company and the Unions:

3.202	Recognize the Union as herein duly constituted for the purpose of bargaining collectively and administering this Agreement for the members of their respective Unions. The responsibility for interpretation and administration of this Agreement rest in the Committee.

61 We find that the General President's Committee is not a trade union within the meaning of section 1(x) of the Labour Relations Code.

7. The Relationship between the Local and the International of IBEW

62 As noted above, IBEW is itself a trade union, yet it carries out most of its local activities

through chartered locals, each one a trade union in its own right. The IBEW Constitution (Exhibit 23) sets out the three-way relationship between Local Unions, the International Union, and the membership. It provides, in Article XXII Section 3:

> Section 3 The acceptance of an application for membership, and the admission of the applicant into any L.U. of the I.B.E.W., constitutes a contract between the member, the L.U. and the I.B.E.W. and between such member and all other members of the I.B.E.W.

63 Subsection 4 requires each member to "agree to conform to and abide by the Constitution of the I.B.E.W. and its Local Unions.

64 The law on the relationship between parent trade unions and their locals is complex for several reasons. First, much of the interrelationship depends upon the constitution(s) of the organization involved. Sometimes the "parent" organization is in fact simply a federation of free-standing trade unions, each with their own independent constitutional existence. At other times the locals are only creatures of the parent organization, subject to its terms for their governing rules and their very existence. Questions like whether the parent has members, whether it can represent employees in bargaining and what role it has in the affairs of a local fall, at the outset at least, to be decided by the constitution(s) involved.

65 Second, labour laws vary over time and across the country. Statutes have defined trade unions sometimes so as to include parent unions and sometimes so that only local trade unions can hold bargaining rights. Sometimes definitions are extended so as to allow councils of trade unions or other composite bodies to hold bargaining rights. A further nuance to these definitions is sometimes added through the statutory provisions granting limited legal personality to trade unions, which might otherwise just be unincorporated organizations not amenable to suit at common law. Again, sometimes these provisions reflect a distinction between locals and parent unions, sometimes not. Where each organization meets the statutory definition of a trade union, the effect may be to create two distinct legal personalities out of organizations whose constitutions link them intimately together.

66 This last phenomenon comes into play here. Each of IBEW and IBEW Local 424 may qualify as a trade union within the meaning of the Labour Relations Code. This implies two separate legal actors each with independent rights and responsibilities under the legislation. Yet constitutionally, and in day-to-day practice, the two organizations are highly integrated. Constitutionally, the IBEW and IBEW Local 424 are distinct entities, but these entities remain interrelated in ways the Labour Relations Code's structures do not address. One can analyze these interrelationships in terms of agency law, but this is at best artificial for it takes little account of the third party in the triangle, the members who are members both of the Local and the International and have constitutional rights and responsibilities in relation to both levels of the organization.

67 The Local/International relationship comes up in a number of ways in this matter, including:

- The collective agreement in this case is made by the IBEW, yet it includes provisions that refer to the Local Union, including the pick-up of wage rates from another collective agreement; one that is negotiated by the Local Union.
- The individual member's union participation is through the vehicle of the Local Union. It is Local 424 that provides the hiring hall, collects the Union dues, hires the business agent, holds the meetings, and conducts internal union investigations and trials. This is true even when the member is employed under an IBEW negotiated collective agreement like the GPC agreement.
- The two individuals who handled the complainants' grievances in this case were Mr. Jim Bendfeld, a Local 424 business agent and Mr. Bill Warchow, an IBEW International Representative. While they each were responsible for distinct phases of the grievance process, there was a measure of ongoing contact between them over the entire period making it difficult to draw any bright line either between the two of them as individuals or between their employing organizations.
- The duty of fair representation under Section 151 falls upon a trade union or person acting on behalf of a trade union. On its face, it offers no guidance as to how to relate its provisions to a situation like the one at hand where a local and its parent organization split the representational activities involved under the agreement.
- Section 59(4) imposes a requirement for a bargaining committee's membership, yet provides scant guidance about how locals should be represented in multi-union multi-site bargaining of the kind engaged in here.

68 We address these points when they arise throughout this decision. We alluded earlier to this case involving a tension between construction-worker-like short-term maintenance and more industrial style long-term maintenance. This tension exhibits itself in relation to these IBEW/IBEW Local 424 issues. Local 424's membership works primarily in construction and maintenance, most of it in jobs that are of limited duration due to the nature of construction or shutdown maintenance work. Longer term maintenance is the exception to the more general rule. Negotiations for construction collective agreements are carried out under the auspices of the registration bargaining provision of the Alberta Labour Relations Code. The bargaining is done by the Local Union, under its own rules and procedures, but within that statutory framework. For some other collective agreements, the Local bargains directly with the Employer, for example when non-GPC maintenance work or shop work is involved. Again, Local 424's own rules prevail. These processes no doubt create expectations about what might be or ought to be done when the GPC contract comes-up for bargaining. In particular, it results in demands like those pursued initially by the complainants in this case, for a ratification process so that those within the Local can accept or reject the agreement.

69 One further element adds to this tension. Local 424 has jurisdiction over construction and related work for all of Northern Alberta. The local has several sub-locals (or units) of which Fort McMurray is one. The membership of this sub-local has a high concentration of those who are employed at either the Syncrude or Suncor plants in longer-term maintenance.

70 When a shut-down comes, employees from the other sub-locals flood into these sites, but only for the duration of the shut-down. This gives those working long-term maintenance a disproportionately high influence in the sub-local compared to the total person-hours worked under the GPC maintenance agreement. There is nothing wrong with this, but it does help to explain why frustration develops when those active locally cannot always carry the day on the decisions that affect the wider group of employees. This is in part because the concerns of long-term resident employees are different, and at times diametrically opposed to those of the short-term employees. Nowhere is this contrast more pronounced than on issues like base crew or leave of absence, where some longer-term employees could secure their employment, while shorter term employees would have their work guaranteed only through the strictly managed rotating opportunities available through the hiring hall.

71 We find the IBEW meets the definition of a trade union under the Labour Relations Code. The IBEW Constitution provides that membership in the IBEW also involves membership in the Local. It is an organization of employees with a written constitution whose objects quite clearly encompass those required by the statutory definition.

72 The IBEW Constitution also quite clearly contemplates that the IBEW will at times enter directly into collective agreements, without encroaching upon the Local Union's rights to do so. This is accomplished through a variety of provisions. Article IV - International President - provides, in part:

> Sec. 3 The IP is empowered as follows:
>
> (12) To enter into, or authorize an I.V.P., representative, or assistant to enter into, agreements with any national or international labor organization or association of employers, or with any company, corporation or firm doing an inter-state, or inter-provincial business in electrical work, to cover the entire jurisdiction of the I.B.E.W.
>
> (13) The I.P. or his representatives shall not enter into agreements affecting wages, hours and conditions of employment where local union agreement, covering such employment already exists, without first notifying at least thirty (30) days in advance of such agreements, the local unions so concerned or affected, in a district, and then only by procuring consent of a majority of the local unions in the district or the individual local union affected by this

agreement.

The following statement of the Law Committee non-concurring in the solutions which would have amended Article IV, Section 3(13) was adopted by the 31st International Convention:

When negotiating agreements with any national or international labor organization, or association of employers, or with any company, corporation or firm doing an inter-state, or inter-provincial business in electrical work, it is imperative that the I.P. have the authority to negotiate and enter into these agreements, or withdraw from these agreements, as circumstances so require.

Article XVII - Rules for Local Unions - provides:

Sec. 6. L.U.'s are empowered to make their own bylaws and rules, but these shall in no way conflict with this Constitution. Where any doubt appears, this Constitution shall be supreme. All bylaws, amendments and rules, all agreements, jurisdiction etc., of any kind or nature, shall be submitted in duplicate form to the I.P. for approval. In the case of agreements, however, additional copies are required by the I.O. ...

No L.U. shall put into effect any bylaw, amendment, rule or agreement of any kind without first securing such approval. All these shall be null and void without I.P. approval. The I.P. has the right to correct any bylaws, amendments, rules or agreements to conform to this Constitution and the policies of the I.B.E.W.

Approval of L.U. collective bargaining agreements by the I.P. does not make the International a party to such agreements unless the I.P. specifically states in writing that the International is a party to any such agreement.

Sec. 7. This Constitution and the rules herein shall be considered a part of all L.U. bylaws and shall be absolutely binding on each and every L.U. member.

> Sec. 8. All L.U. bylaws or rules in conflict with this Constitution and the rules herein are null and void.
>
> Sec. 9. Except when decided otherwise by the I.P., agreements between L.U.'s and employers must contain a condition that the L.U. is part of the I.B.E.W. and that a violation or annulment of agreement with any L.U. annuls all agreements entered into with the same employer, corporation or firm and any other L.U. of the I.B.E.W.

73 As a matter of constitutional capacity, it is beyond question that the IBEW as well as an IBEW Local can negotiate a binding collective agreement in the circumstances described in Article IV, Section 3.

74 As we found above, the collective agreement (Exhibit 1-Tab 72) is between the Employer, Catalytic Maintenance Inc., and each individual signatory International Union, including the IBEW. The fact that each other trade in the GPC has executed a similar agreement does not take away from this basic Union-Employer relationship. The definition of a collective agreement in section 1(f) of the Labour Relations Code is flexible enough to include such a multi-agreement document.

75 The collective agreement clearly contemplates a role for the IBEW, for the GPC (as discussed above), and for the Local Union.

76 Section 2.400 has the GPC "... through a subcommittee, visit the location of each maintenance job prior to commencement or as often as necessary to initiate and maintain the cooperation of the Local Unions."

77 Article 4.300 links the agreement to the Local's hiring hall:

> The Company will contact the appropriate Union local first to secure the necessary tradesmen ...

78 Article 7.000 sets out the grievance procedure. The Local Union Business Representative has a role at Step II. The International Union Representative handles the grievance at Step III. Step IV involves a Union Management GPC Committee, while Step V involves traditional arbitration.

79 Article 10.000 provides "the Business Manager of the applicable Local Union shall be consulted in advance of the termination of the Steward." Article 11 elaborates on the role of the Local Union in supplying trades persons. Article 12.000 Wages, and the attached Wage and Benefit Schedule, ties in the wage rates in the Local Construction Agreement (the Registration agreement negotiated, in part at least, by Local 424) to the GPC agreement.

80 In practice, under this collective agreement, it is through the local trade union that the individual union members exercise their rights of membership. Their union dues are deducted on behalf of and remitted to Local 424, although per-capita dues are then remitted on to the International. Grievances are processed at the outset by Local 424 representatives. Collective bargaining proposals are drawn from the Local, although they are channeled through the International and the GPC. Union meetings take place at the Local level. In substance, although the agreement is entered into by the International Union, almost all the main features of union representation from the point of view of an employee are carried out using Local 424 as the vehicle.

81 This is not something imposed on Local 424 unwillingly. It is an active participant, by its constitutional connections, its day-to-day activities and its acquiescence in this long-term symbiotic arrangement. We find that this collective agreement entered into by and in the name of the IBEW is nonetheless binding upon and entered into on behalf of the IBEW and its constituent locals with territorial jurisdiction over the work in question. In the case of the Syncrude site work carried out by Catalytic Maintenance, this means Local 424. In substance "the trade union" in this case is an amalgam of the IBEW and it's Local with territorial jurisdiction, Local 424. Without the Local's existence (its structure, members and resources), the IBEW would be inadequate to act alone as a bargaining agent.

8. Local Union Bargaining Representatives

82 The complainants complained at the outset that the GPC bargaining process was flawed in two respects: it included no Alberta representatives on the committee, and it was invalid because the resulting collective agreement was never submitted to the membership for a ratification vote. They subsequently withdrew their complaint about ratification since, under section 59(6) and (7) such ratification is clearly at the option of the trade union involved. They also withdrew their argument that ratification was a right protected by the Charter of Rights and Freedoms.

83 The pertinent subsections of section 59 are:

> 59(1) A notice to commence collective bargaining must contain or be accompanied by a statement showing the name and address of the person or persons resident in Alberta who are authorized to do all of the following on behalf of the employer, employers' organization or bargaining agent:
>
> (a) bargain collectively;
> (b) conclude a collective agreement;
> (c) sign a collective agreement.
>
> (2) When an employer, employers' organization or bargaining agent is served with a notice to commence collective bargaining, it shall forthwith serve

> on the other party to the collective bargaining a statement showing the name and address of the person or persons resident in Alberta who are authorized to do the things referred to in subsection (1) on behalf of the employer, employers' organization or bargaining agent.
>
> (3) In addition to the statements referred to in subsections (1) and (2) the parties to the collective bargaining shall exchange the names and addresses of the persons who comprise the bargaining committees appointed to bargain on behalf of the parties.
>
> (4) The bargaining committee appointed to bargain on behalf of a party must include at least 1 representative from the employers or trade union locals, as the case may be, on whose behalf the negotiations are being conducted.

84 The complainants argue that the 1991 GPC negotiations did not include at least one representative from the trade union local on whose behalf the negotiations were being conducted. Indeed, they suggest, in face-to-face negotiations with Catalytic, the IBEW had no representative at all since Mr. Warchow was absent. As Mr. Warchow was at all times an Ontario resident, the IBEW had no Alberta resident at all involved in the negotiations.

85 In answer to the complaints under section 59, the Employer argues

> ... they [the Union] took no umbrage with the fact that the representatives of their local would be through the GPC process and structure. The employer did not and does not object to the structure. The historical success of the viability of the process shows that the structure has not impeded or produced unacceptable results.

86 In a similar vein the GPC argues

> ... that there have been a long history, spanning many decades, of Maintenance Collective Agreements negotiated and administered in this fashion. There is strong evidence of custom and usage supporting the system.

87 All this is true. However, the 1988 revisions to the Labour Relations Code introduced subsection 59(4). It is bargaining that must conform to the statute and not the statute to long established patterns of bargaining.

88 Subsection 59(3) requires the naming of bargaining committees. The first question we must answer is what group, in the context of the GPC negotiations, constituted "the bargaining committee." Is it the representatives of each of the General Presidents, as specified in the GPC Constitution, or is it a broader group, including all those persons invited to be present at the pre-negotiation meetings conducted in Calgary, Edmonton and Fort McMurray? We find it is the former. While the larger meetings no doubt functioned to provide the General President's representatives with valuable input for the bargaining process, they did not purport to do more than

that. The negotiations themselves, conducted in Calgary on March 5th - 8th, included no representatives from this wider group.

89 The next question is whether subsection (4) applies at all. The resulting collective agreements are all entered into by the parent international building trade unions. In this situation, can it be said that there are trade union locals "on whose behalf the negotiations are being conducted"? While we can envision circumstances where this might not apply, in this case we find that it does. The negotiated collective agreement, as detailed above, clearly involves and even depends upon the local unions. They are the source of labour through their hiring halls. They are directly involved in many aspects of the agreement. On the facts of this case we find the GPC negotiations are conducted on behalf of the various building trade union locals, including Local 424.

90 Reviewing the membership of the GPC, we find none of the individuals acted as a representative of any of the trade union locals on whose behalf the negotiations were conducted. All were appointed as representatives of the General Presidents and none as representatives of a local.

91 We agree with the complainants that subsection 59(4) is designed to "... ensure that the collective bargaining process is not unduly remote from the needs and interests of the employees who are being represented." Section 59(1), however, serves a more mechanical purpose of ensuring that the bargaining process can be commenced in Alberta.

92 We do not accept the GPC's submission that only a trade union local can complain under this section, precluding complaints from affected individuals like the three individuals in this case.

93 Subsection (4) clearly contemplates multi-party bargaining. Its minimum requirement is for one representative of the trade union local on whose behalf the negotiations are being conducted. The GPC negotiating committee bargains on behalf of a variety of different building trade locals. The section does not require a representative from each local, nor a representative from a local from each International Union. However, even this minimum has not been met.

94 A breach of section 59(4) might, in some cases, lead the Board to set aside a collective agreement. However, we do not see that as an inevitable result. In this case the complainants withdrew their request to void the agreement. Even if they had not done so, the evidence of substantial pre-and post-negotiation consultation with officials and members of the locals would have led us to restrict our remedy to the one we now grant. In future rounds of collective bargaining, if conducted under the GPC structure, the IBEW and the General Presidents' Committee are directed to ensure that the bargaining committee includes at least one representative of the local unions on whose behalf the negotiations are being conducted. That representative (or those representatives) must be selected by the trade union locals who will be involved in the resultant collective agreements rather than by the General Presidents' Committee itself.

95 While section 59(1) may have been ignored, it is in our view a moot issue. Bargaining actually commenced and agreements were concluded. We see no purpose to issuing an order for the future,

since the Board can respond to any difficulties at the time. The difficulties to which section 59(1) is directed have not been a problem in GPC bargaining.

9. Complaints under Section 146(1)(b)

96 The complainants allege that the GPC per-hour remittance made by Catalytic (and all other GPC contractors) contravenes section 146(1)(b) of the Labour Relations Code. That section reads:

> 146(1) No employer or employers' organization and no person acting on behalf of an employer or employers' organization shall:
>
> (a) participate in or interfere with
>
> (i) the formation or administration of a trade union, or
> (ii) the representation of employees by a trade union,
>
> or
>
> (b) contribute financial or other support to a trade union.
>
> (2) An employer does not contravene subsection (1) by reason only that the employer
>
> (a) in respect of a trade union that is a bargaining agent for his employees
>
> (i) permits an employee or a representative of a trade union to confer with him during working hours or to attend to the business of the trade union during working hours without deduction in the computation of time worked by the employee and without deduction of wages in respect of the time so occupied,
> (ii) provides free transportation to representatives of the trade union for purposes of collective bargaining, the administration of a collective agreement or related matters, or

(iii) permits the trade union to use his premises for the purposes of the trade union,

(b) makes to a trade union donations to be used solely for the welfare of the members of the trade union and their dependents, or
(c) expresses his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

97 The Code contains two other provisions supportive of the same public policy. Section 36(1) provides:

> 36(1) A trade union shall not be certified as a bargaining agent if its administration, management or policy is, in the opinion of the Board,
>
> (a) dominated by an employer, or
> (b) influenced by an employer so that the trade union's fitness to represent employees for the purposes of collective bargaining is impaired.

98 Section 131(1) provides:

> 131(1) Any collective agreement entered into between an employer or an employers' organization and a trade union may be declared by the Board to be void when in its opinion the administration, management or policy of the trade union is
>
> (a) dominated by an employer, or
> (b) influenced by an employer so that the trade union's fitness to represent employees for the purposes of collective bargaining is impaired.

99 We have found that the GPC is not a trade union. The applicants argue that section 146(1)(b) nonetheless applies.

> In practice, as the evidence of Mr. Smillie made abundantly clear, the GPC operates in a collusive relationship with employers, including Catalytic, and unions including IBEW. It effectively operates as a union-operated (but employer funded) labour broker in defiance of all norms of trade union probity. That these practices are financed by the employers, who benefit from them is, in the circumstances, hardly surprising. Nevertheless these practices clearly violate the

> spirit and letter of Alberta labour law, specifically section 146(1)(b). Even if the Board were to find that the GPC is not a trade union, the financial contributions made to the GPC afford financial or other support to IBEW in breach of section 146(1)(b) as they relieve IBEW of the cost of maintaining the GPC as an umbrella bargaining agency. Clearly such financial contributions do not come within the exceptions set out in section 146(2). The payments are not donations, and they are not used solely or at all for the welfare of the members of the trade union or their dependants.

100 The GPC argues that, because of a decision made early in these proceedings, the complainants cannot now, directly or indirectly, challenge the validity of the collective agreement under section 131. It argues that the complainants realized early that their efforts to set aside the agreement were at odds with their section 151 claim that they were not fairly represented under that same agreement. They chose to accept the agreement as valid and proceed under section 151. We agree with this submission. However, while this precludes any order vacating the agreement, it does not preclude us considering the propriety of the GPC funding arrangements and, if appropriate, granting any appropriate directives short of voiding the collective agreement.

101 The GPC advocates a purposive interpretation of the prohibitions in section 146(1). It refers us to the early decision of:

> Amalgamated Meatcutters and Edwards and Edwards Ltd. [1952] CLLC 17,027 (Ont. LRB).

102 The case involved the question of whether a union dues check-off arrangement prior to certification constituted company domination under a provision equivalent to Alberta's section 36. The Board said, in that case:

> The section is clearly aimed at "company-dominated" trade unions which are not entitled to be certified, on the theory that a trade union fostered by an employer cannot be considered as having been freely chosen by employees. The section designates conduct by means of which an employer might seek to confine the broad right conferred by section 3 and is therefore to be called into play where that purpose appears. We consider it is intended to be applied where employer activities are of such a character or are of such proportions that it is reasonable to infer that the employees have not exercised a free choice in the matter of the selection of a bargaining agent, or where an employer has given material assistance to a trade union in connection with its organizational or other activities; where, in other words, the particular applicant is not truly the chosen bargaining agent of the employees concerned. It is argued that because of its explicit language, section 9 need only be literally construed and mechanically applied. We suggest that it can properly be interpreted only by reference to what

> is its obvious intent: to prohibit the certification of any trade union which, because of the nature of its relationship with an employer, is not qualified to act on behalf of employees in their relations with their employer.

103 The GPC also referred us to:

> Loblaws Workers' Council and Super City Limited [1964] 3 CLLC 16,005 (Ont. L.R.B.)

104 In that case, the Union sought to certify some employees of Super City, a grocer connected to Loblaws. The Union had been the bargaining agent for Loblaws employees for many years. Under the Loblaws collective agreement, a couple of Union officials who were Loblaws employees had received paid time-off for Union business to the extent that Loblaws had been paying for them for several years while they worked full-time for the Union. An intervenor in the Super City certification alleged this contribution by Loblaws to the Union rendered the Union unfit to be certified at Super City because of employer domination. The Board found that, since the Loblaws contribution was protected by the equivalent of section 146(2)(a)(i) it could not amount to employer domination of the Union.

105 The Board in the Super City case took a purposive view of section 146. It was influenced by the longevity and, by implication, the robustness, of the Union-Loblaws relationship. It obviously felt this arrangement, sanctioned by the collective agreement, did not create a dependency that undermined the Union's independence or fitness to act. The GPC argues from this:

> If the purpose of the prohibition is to ensure the Union's ability to act as a bargaining agent independent of the employer there seems to be no reason in logic why payment made to representatives of trade unions not employed by the employer should constitute a violation of the Act while similar payment to representatives of the Union employed by the employer would not constitute a violation.
>
> ... the acid test is whether the employer's relationship with the Union affects the Union's ability to act as a bargaining agent independent of the employer.

106 While the GPC maintains, as we have found, that it is not a trade union, it concedes that it acts as the representative of the International Unions and their respective locals. "Therefore payments to the GPC may be characterized as indirect payments to the Unions." Should we so hold, the GPC referred us to:

> Mons White and Pacific Maritime Agencies Ltd. (1977) 2 CLRBR 168.

107 In that case, the employer, pursuant to a collective agreement between Pacific Maritime

Agencies Ltd. and the Seafarers International Union, had made payments for the operation of the Union hiring hall upon which the employer drew for its labour supply. The Canada Board analyzed the equivalent terms to section 146, 36 and 131 in light of the basic freedoms guaranteed by the Canada Labour Code - the freedom of employers and of employees to freely join organizations or trade unions and to participate in their activities. They said, at page 169:

> To give these freedoms meaning and substance certain regulatory schemes and prohibited conduct are legislated in Part V.
>
> Section 184 dictates certain prohibited employer conduct Subsection (1) is a general proscription against employer interference in union activity, while s-s. (3) prohibits several historically proven common forms of employer opposition to employee exercise of the freedom to join and participate in union activity. Subsection (1) basically tells employers that the exercise of employee freedom to join or participate in a union is a matter between the employee and unions. The employer is not to "interfere with the formation" of any trade union or to "interfere with ... the representation of employees" by any trade union. It is directed to preventing employers from interfering with the employee right to join a trade union.
>
> The second and necessarily corollary protection of the freedom of section 110(1) is to prevent employers from controlling or dominating a union so that it is not an effective vehicle for furtherance of the objectives enunciated in the preamble and the policy implicit in the legislation. Unions are to act independent of employers in the interest of employees. Consequently, employers must not "interfere with the ... administration" of any trade union or "contribute financial or other support to a trade union."

108 It is this second aspect that is important in the case before us. The complainants are not suggesting the employer has or can influence the employees' selection of the Union, only that the funding arrangement impairs the Union's freedom to act in the employees' best interests. The Board went on to discuss how the equivalent of s. 141(1)(b) and s. 146(2) should be interpreted using a purposive approach.

> Parliament recognized that the literal meaning of section 184(1) is extremely broad and listed some matters in s. 184(2) which are expressly deemed not to contravene section 184(1). These are obviously not the only forms of employer-union cooperation that are outside the ambit of section 184(1). To read s-s. (1) and (2) that restrictively would be to impute to Parliament an intention to narrowly circumscribe the "co-operative efforts" Parliament intended "to

continue" by enacting Part V and to ignore that Parliament sought to "extend its support" to co-operative efforts "to develop good relations."

Further, such a narrow construction of s-s (1) and (2) would preclude all relationships of a business nature between a union and employer. Employers would not be able to lease property from unions, retain professional or technical services from a union, support union educational programs or even purchase union literature because it would be a "financial or other support to a trade union". Such a severe demarcation between union and management relations would promote a non-communicative entrenchment of labour and management and would be totally counter to "co-operative efforts" and "the development of good industrial relations." The test is not intended to be the form of the relationship between the union and employer but whether the employer's relationship with the union affects the union's ability to act as a bargaining agent independent of the employer. This test is implicit in Parliament's enactment of section 134(1) of the Code by which collective agreements are deemed not to exist and certification must be denied if the Board is satisfied a union "is so dominated or influenced by an employer that the fitness of the trade union to represent employees of the employer for the purpose of collective bargaining is impaired."

The union-employer arrangement complained of by White is a common practice in the maritime industry in Canada. It is a characteristic of this industry (as in the construction industry) that employer demand for employees is not constant. The employers are numerous and require varying complements of manpower depending on economic activity in the industry. To meet the needs of their members, the unions establish hiring halls from which employees are dispatched as required by employers. This is a worthwhile service to employees who are dependent on the industry for their livelihood. It is a worthwhile service to the country by establishing an orderly mechanism for supplying manpower when needed to serve the economic interests of employers and employees. It is a beneficial service to employers by providing them with a central source of manpower.

This service is administered by unions, in this case the S.I.U. and unions are primarily financed by dues collected from their members. Because employers also benefit from this service, it is not unreasonable to expect that unions would seek to sell their service or receive contribution to their expenses from employers. This is what is provided for in this collective agreement - "the

company will contribute ... for the dispatch services provided by the union."

This type of contribution does not undermine the freedoms advanced in section 110(1). Indeed it is most akin to a fee for services in the nature of a business transaction. It is not an interference with or erosive of the union's effective performance as an independent representative of employee interests and we do not find it to be violative of section 184(1). We therefore dismiss White's complaint.

109 Catalytic also relies upon the Mons White decision. It suggests the payments to the GPC are very similar to the fee for service arrangements in that case. It argues that:

- The GPC is the glue that holds this multi-union and multi-employer bargaining structure together.
- The GPC offers a substantial service to the employer by creating a multi-craft collective agreement whereby the employer can access competent and qualified persons through local union hiring halls to perform the work of the company.
- There is no evidence of any collective bargaining issues arising that would lead the Board to conclude that the GPC independence was either questioned or compromised.
- The terms and conditions of the resultant collective agreements are commercially competitive.
- The rights of recognition are fully protected and the individual's rights are ensured through a grievance and arbitration process.
- Most importantly, Catalytic does not get an exclusive GPC agreement. Other qualified employers can and do get GPC agreements.

110 In answer, the complainants argue that, unlike the facts in Amalgamated Meat Cutters, the contributions sent to the GPC are not union dues obtained through check-off, they are funds coming directly from the Employer. They argue that none of the exceptions in section 146(2) apply. They also argue that, contrary to the Mons White decision, the exceptions to section 146(1) set out in section 146(2) are exhaustive. The Mons White decision, in their view "is driven by its unique facts" and "is unpersuasive and does not rely upon authority." Taken literally, the complaints suggest, it "would reduce section 146(1)(b) to virtual meaninglessness." Instead, the general complaints refer us to Adams, Canadian Labour Law, second edition, pages 10-15 to 10-24.1 where the author reviews, in a general sense, the scope of the section and its exceptions.

111 In this situation, since the GPC is not a trade union, there is no direct violation of Section 146(1). However, payments to a non-union might amount to indirect payments to a union, and thus still constitute a violation. The Board must look at the substance of the transaction, not just its form.

In doing so in this case, we find the approach in the Mons White case helpful. We agree that the express purposes of the Alberta Labour Relations Code, as set out in its preamble, do contain strong parallels to the Canada Code. It speaks of maintaining a "mutually effective relationship" and "a common interest in the success of the employing organization". We accept the proposition that the GPC arrangement does cost money and does provide benefits to both sides, both in terms of its attention to the necessary administration and in its coordinating role. A major challenge for unionized construction has been to maintain productivity by avoiding inter-union disputes (and often the attendant work stoppages) over work jurisdiction or differences in employment terms between trades. The GPC adds value for unions and employers alike in achieving this goal.

112 On the other side of the equation, we do not see the GPC funding arrangement as creating a threat to the ability of the trade unions to act as vigorous and independent spokespersons for the employees they have the statutory license to represent. Each of the signatory unions is a major trade union in its own right. While the unions are relieved of some of the added cost of conducting integrated multi-trade bargaining, they still absorb the cost of their own representatives, the costs of servicing the collective agreements and so on. There is no substantial evidence of the creation of any dependency from the monies going to the GPC.

113 The GPC structure has a long history of successful and independent bargaining. It is not unlike other industry bargaining arrangements operating elsewhere, both in the construction and maintenance industries, and in the industries described in the Mons White decision. These funds are not donations, they are collectively bargained payments into a fund maintained and spent independently of the employer and without accountability, directly or indirectly. The fund arose at the Union's request, not that of the Employer.

114 Weighing these factors, and adopting a purposive interpretation of section 146 that accords with the Code's objectives, we find that section 146 has not been breached. There has been no direct contribution to a trade union, since the GPC is not a trade union within the meaning of the Code. While a payment to an organization like the GPC might amount to an indirect contribution, and thus still violate the section, we do not find that to be the case in this situation. The payments are not a contribution of support. They are like the payments referred to in Mons White, payments for a service of benefit to the industry. We therefore dismiss the complaints under Section 146.

PART 3
The Duty of Fair Representation

115 In early April 1991, the three complainants all worked as electricians for Catalytic on long-term maintenance. A scheduled shut-down was about to occur. All three sought to move from long-term maintenance over to the shut-down crew because of the opportunity for extra overtime hours. During this period, Mr. Roy's father became ill and Mr. Roy took a leave of absence to visit him in Ontario.

116 In the past, when work was short, Catalytic had followed a policy of offering short-term leaves of absence to long-term electricians to avoid laying them off. Near the end of this shut-down, Catalytic laid off Mr. Dezentje, Mr. Dombrosky and Mr. Roy without offering a leave of absence. The complainants all believed their lay-offs were improper and all filed grievances. These grievances were handled initially (Step II) by Local 424 Assistant Business Representative Jim Bendfeld and then (Step III and beyond) by IBEW International Representative William Warchow.

117 The grievances were filed in March and April 1991. Fourteen months later, in May 1992, Mr. Warchow wrote to them indicating essentially that their grievances were over. The grievors allege that their Union and both men failed to represent them fairly under Section 151 of the Labour Relations Code, which provides, in part:

> 151(1) No trade union or person acting on behalf of a trade union shall deny an employee or former employee who is or was in the bargaining unit the right to be fairly represented by the trade union with respect to his rights under the collective agreement.

118 We heard much evidence about the grounds alleged in the grievances and the interaction between the three grievors and the Union while these grievances were being processed. We also heard evidence falling into four categories that provided the context within which these events played out. These areas concerned: (1) the complainants' involvement in the Union, particularly in opposing certain Union members; (2) a prior grievance involving Mr. Dezentje and Mr. Dombrosky; (3) a prior grievance involving Mr. Roy; and (4) charges laid by the complainants under the Union's constitution against some of the same Union members referred to under (1).

119 In analyzing this evidence, we must distinguish between:

> The way the grievances were handled - This concerns the quality of the representation provided, as distinct from the substance of the grievances themselves.
>
> The substance of the grievances - The grievors had firm views on the basis for their grievances and were specific on the grounds they wanted to pursue. We need to assess the substance of these issues to judge the quality of representation and to assess whether they relate to "rights under the collective agreement."
>
> The motive behind any lack of fair representation - Evidence was adduced about relations between the grievors and union or company officials, some of which is relevant both to why the Union responded the way it did as well as to the reasons for the grievors' layoffs. In addition, the four areas of evidence noted above each bear on motive and credibility.

120 In evidence and argument, the parties tended to present some of the evidence about the motives alleged for the Union's lack of diligence as if that evidence was relevant to, and should have been presented to the Employer as part of the case on the grievance itself. However, as we describe below, the issues raised in the grievance were deliberately limited by the grievors who first drafted the documents and who later made it clear which grounds they wanted advanced on their behalf.

1. Outline

121 The Union respondents are alleged to have breached their duty of fair representation in relation to grievances filed in April and May of 1991 concerning the lay-offs. These grievances were processed during the rest of 1991 and early 1992 when Mr. Warchow wrote to each complainant telling them the grievances were over. Mr. Bendfeld handled the initial level, and handed matters over to Mr. Warchow during May and June of 1991. The complainants met with Mr. Warchow on July 10, 1991, in Fort McMurray. After that, they heard virtually nothing until May, 1992. In fact, Mr. Warchow advanced the Dombrosky and Dezentje matters, but not Mr. Roy's matter, to Step IV of the grievance procedure in November, 1991, but failed to achieve a satisfactory result.

122 We review the steps taken during this fourteen-month period below. However, before we do so we must review the evidence that gives the context in which these grievances arose and in which the Union's response unfolded. Well before their termination, the three complainants were involved in issues at the worksite that they believed continued to influence events, clouding the grievances and the quality of the Union's representation:

> Activity within the Union. The complainants were actively pursuing issues within the Union Local about the GPC negotiation process, the substance of the negotiations, and about the propriety of officers of the Union, particularly Mr. Fradette, accepting temporary assignments as a managerial employee.
>
> Mr. Dezentje's and Mr. Dombrosky's defamation grievance. An incident occurred in October, 1990, which led Mr. Dezentje and Mr. Dombrosky to file a grievance. Although the main substance of this grievance was settled, each grievor took the position they had been defamed and therefore wished to continue with a grievance or sue certain Catalytic employees over this matter.
>
> Mr. Roy's performance warning grievance. In March, 1991, an incident arose following which Mr. Roy's performance was questioned. He grieved this successfully but felt he had been picked upon in a discriminatory way.

> Charges under the Union constitution. Mr. Roy decided to bring charges under the Union constitution against three Union members who worked for Catalytic from time to time as acting supervisors. He filed these charges the day before the lay-off of Mr. Dezentje and Mr. Dombrosky. These internal charges went to trial boards, and were then appealed up to the International President's level. All three complainants also brought Union charges against John Fradette.

123 In summary form, the complainants felt that anyone who took a temporary position as a supervisor should withdraw from all Union activity, particularly as an officer, and that a failure to do so resulted in an inevitable conflict of interest. All three opposed certain officials within the officials Union. All three experienced difficulties at work, which they believe were a result of the positions they had been taking, the individuals they had opposed, and the conflicts they felt existed.

124 At the same time the three also believed that if Union members acting in a supervisory capacity did anything to them of which they disapproved, it was open to them and appropriate to bring those individuals to task using charges under the Union constitution. This is an attitude that did not sit well with the Union hierarchy who felt employment matters should be dealt with by grievance, not by Union charges. Nor did it sit well with Catalytic management who felt it inappropriate for persons temporarily acting as managers to be subjected to retaliatory action by way of Union discipline over managerial decisions. To the three complainants, this simply proved their point that Union brothers could not "work both sides of the line" without an inherent conflict existing.

125 We canvas these four areas because:

- All these events are relevant to the motivation and credibility of those involved in the lay-off or termination issues that arose in April and May of 1991.
- Virtually all the communication from the complainants about the April and May, 1991 lay-off or termination grievances cast back to these other events and issues. This correspondence is very difficult to follow without an understanding of this background.
- The quality of representation cannot be looked at in the abstract. The complex and interrelated manner in which the three complainants presented their concerns has to be a factor in assessing the manner in which the trade union and its representatives responded. It must also be recognized that at least some of the positions the complainants were advancing were less related to the grievances and more related to their long held views about how Local 424 and the General President's Agreement should operate.

2. The background events

(a) Activity within the Union

126 Local 424 of the IBEW is a composite local with several subgroups or "units" within its structure of which Fort McMurray is unit 3. It represents electrical employees throughout Northern Alberta (although other IBEW locals represent employees working outside construction). The Fort McMurray unit has a chairperson who sits on the Local's Executive Committee. That same person chairs the Unit III meetings unless the Union business manager or President are in town.

127 Mr. John Fradette acted as Unit III chairperson throughout these events. He was a journeyman electrician employed by Catalytic. From time-to-time Mr. Fradette would accept promotions within Catalytic's ranks to an acting area supervisor's position, which is considered managerial and out of the bargaining unit. In fact, his managerial assignments grew to about half his working days. This caused some controversy within Unit III.

128 Mr. Roy says that at a Union meeting in the mid-80's a question came up about whether the Local should allow employees like John Fradette to take a temporary position as a supervisor while still keeping their union seniority. Mr. Roy said he questioned how long temporary could mean. He objected to the practice saying "you cannot serve two masters."

129 Mr. Roy says he never discussed the issue at work with Mr. Fradette. However, he says another Union member, Blaise Ryan, approached him (Roy) once and accused him of denying people opportunities. Mr. Roy says his position in reply was that "you had to decide which side of the fence you were on."

130 Mr. Dombrosky first dealt with Mr. Fradette in July, 1989 because of a wildcat strike precipitated by a multi-trade group called the "United Trades Action Committee". At the time of this strike, Mr. Fradette was on the Local 424 Executive Board, but was also acting as a temporary supervisor for Catalytic. A couple of meetings of the striking workers were held in Fort McMurray. Mr. Dombrosky says Mr. Fradette walked into one of these meetings and Dombrosky told him he could not be there because he was management. Mr. Dombrosky says things got heated and words were exchanged until other members broke things up.

131 Mr. Dezentje says he too first dealt with Mr. Fradette during the 1989 wildcat strike. He says he stayed on the job and that Mr. Rankin and Mr. Fradette came and asked him to leave the job. He had no further dealings with him at that time. Sometime later, he said Mr. Bendfeld asked Mr. Dezentje, in Mr. Fradette's presence, for his opinion on supervisors being on the Local Union Executive Board.

132 All three complainants felt that anyone taking an acting managerial position should withdraw (or be forced to withdraw) from the Union and its activities. Under the Union's Constitution, such a withdrawal can be accomplished by taking what is called a "participatory withdrawal". This step allows the individual back into the Union but precludes their participation in the interim. A consequence is to vacate any Union office they hold, which, in Mr. Fradette's case, would mean no

longer being eligible to act as Unit III chairperson.

133 Mr. Amyot was one of those also concerned about what he believed was Mr. Fradette's conflict of interest. He says it was a "hot topic", with some feeling the Union should not hold back a member from opportunities for advancement. To him, the position on the Union's executive board was the issue, it was alright for Mr. Fradette to stay in the Union. He noted that being an acting supervisor meant supervising other trades (which was alright) as well as electricians.

134 The Unit III records show two motions being put forward on this topic. In October, 1989, Mr. Dombrosky moved that the unit "... grant Brother John Fradette a Participatory Withdrawal" (Exhibit 15). He suggested Mr. Fradette was in a conflict of interest being a member in good standing and a supervisor for Catalytic. The motion was defeated 23 to 1. On June 27, 1990 (Exhibit 1 - Tab 75) the minutes show the following two resolutions:

> Motion that members indicate if they are in favour of a member being in Management and a Union officer or not in favour.
>
> In favour - 0
> Not in favour - 22
>
> Motion that members indicate if they are in favour of a Member in Management being forced to take a P.W.C. (participatory withdrawal card) by the Union
>
> In favour - 0
> Not in favour - 27

135 Mr. Dombrosky is not sure if he made these motions but he certainly supported them. He says this issue was coming up regularly on the job site and at Union meetings.

136 In May 1990 the Local sought and received an opinion from IBEW Vice-President Ken Woods on the issue. His opinion was (Exhibit 11):

> As a guideline, it is suggested that once a member takes a position out of the bargaining unit, or out of "scope" and is in the position to act on behalf of the employer in matters relative to labour relations i.e., has the right to hire or fire or effectively recommend some, such members should be granted Participating Withdrawal Cards. In the aforementioned circumstances "the L.U. has the right to require such a member to take out a withdrawal card if it so desires."

> However, I emphasize the fact that it is up to the discretion of the local Union under the automony granted as per the Constitution for each Local Union to make the decision as to at what level outside the "scope" of the collective bargaining agreement a withdrawal card is granted.

137 Mr. Dezentje and Mr. Dombrosky continued to pursue the Fradette conflict of interest issue after April, 1991. Also, on June 26, 1991, well into the grievances, Mr. Dezentje proposed (unsuccessfully) the following motion (Exhibit 1 - Tab 76) and at this point, several Union officials had been charged by the Complainants:

> Any Union officer should temporarily forfeit any Union business while under investigation/changes, as is commonly practiced by people in trustworthy positions.

138 Ian McColm has worked for Catalytic since 1981 and is a personal friend of Denis Roy. He described the debate within the Union about Mr. Fradette's acting in a supervisory capacity. He went on to describe a conversation he had with Mr. Fradette sometime in 1991. Mr. Fradette expressed the view that he was not happy with what Mr. Roy was doing over the Executive Board issue, and felt he was harming Mr. Fradette's chances of getting an elected office in the Union such as business agent. While Mr. McColm could not recall exact words, the impression Mr. Fradette left him with was "what goes around comes around."

139 Mr. McColm says Mr. Fradette knew he and Mr. Roy were personal friends and believed the comments were addressed to him because Mr. Fradette knew they would get back to Mr. Roy. A few days later, Mr. McColm indeed told Mr. Roy what had been said. Mr. McColm could not recall exactly when this took place. He knew that Mr. Roy had contemplated laying Union charges against Mr. Fradette over this issue. Mr. Fradette apparently felt (whether due to charges or not he couldn't say) that Mr. Roy had portrayed him in a bad light before the Union membership.

140 Mr. Fradette was also called by the complainants to testify about his past dealings with them. He has been an IBEW Local 424 member for almost 20 years. He has been with Catalytic since 1984. He says he has been a foreman and supervisor from time to time. He explained that Area Supervisors report to the Field Superintendent.

141 He served as chairman of Unit III (the Fort McMurray unit) during 1991. This was an elected position involving a seat on the Local's Executive Board. It had a three-year term and he ran twice, ending sometime in 1992, when Doug Till replaced him. He identified as members of the Unit 3 committee at the time Doug Till, John Sgambaro, Mitch St. Louis and others.

142 He said that, as Unit III chair he had no particular role in negotiations, either for the GPC or otherwise, since this was looked after by Mr. Lynn the business manager. The same was true for processing grievances, which were dealt with by the business agents and business manager.

143 Mr. Fradette conceded there had been disputes about his holding supervisory positions while Unit III chairperson. He knew the complainants were raising these issues, but could not recall clearly who raised the issue when.

144 Asked about his responsibilities when acting in a supervisory capacity he testified that he could name-hire individuals, but only with a Field Supervisor's approval. He could transfer employees between jobs. He could discipline as could a foreman (an in-scope position), but would have to go "up the line" for approval. He said leave of absence requests also had to get approval. He said Labour Relations personnel usually dealt with grievances on behalf of management.

145 Supervisory duties attracted premium rates, using the foreman's pay as a base. Neither the supervisors nor the Area Superintendent's position are in the bargaining unit. When he and others went into such temporary positions they could remain on the Union benefit plan with the company still remitting the premium. Each time he accepted such a position he got a release (approval) from the Union, first in writing and then just by a phone call to Local business agent Jim Bendfeld.

146 Mr. Fradette explained that, in the past, the Employer brought people in to act as shutdown supervisors, but they began using long-term on-site people acting in temporary positions instead because of their experience with the plant.

(b) Dezentje and Dombrosky's bucket wheel grievances

147 An incident occurred on October 3, 1990, that led Mr. Dezentje and Mr. Dombrosky to file a grievance, threaten a lawsuit and pursue complaints under the IBEW Constitution.

148 The two of them worked day shift. An opportunity arose for some night shift work on the bucket wheel over the Thanksgiving weekend. They volunteered and were scheduled for the shift. While at home waiting to begin this night shift, they were called and told that they need not come in because of "a change in manpower." Catalytic's Acting Field Superintendent, Mr. Russell Hillier, had apparently assigned John Sgambaro (the job steward) and Gerry Wood to the night shift instead. We heard evidence from several witnesses about how this happened, and what followed as Mr. Dombrosky and Mr. Dezentje pursued the incident.

149 Mr. Dombrosky's evidence is that on Tuesday, October 2, 1990, he and Jan Dezentje were working under their foreman, John Chris, at the plant. Mr. Chris approached the crew and said John Fradette had called wanting electricians who could work nights on the bucket wheel. This was a desirable shift involving overtime. He and Mr. Dezentje volunteered and went home to rest up, expecting to report back at 6:30 p.m. the next day.

150 At about 10:15 a.m. on the Wednesday, Mr. Rolly LaBossiere of Catalytic called to say there was a manpower change and they were to report back to work right away. They went back to the site, but on the way back Mr. Dezentje saw Mr. Sgambaro leaving to go back to Fort McMurray. Mr. Chris told Mr. Dombrosky there had been telephone calls saying they had been bumped from

the bucket wheel job. They asked Mr. Chris to investigate why. He found out that it had been Russell Hillier who made the change.

151 Mr. Chris' evidence is that he had a crew of six electricians working with him. He got a call from John Fradette asking if he had people available to go to a bucket wheel shutdown for three or four days. Four of his crew said no, leaving Mr. Dezentje and Mr. Dombrosky. Mr. Chris sent them home to get an eight-hour rest before going to the bucket wheel.

152 Mr. Chris says he told Mr. Fradette that Mr. Dezentje and Mr. Dombrosky were the ones he was sending to the job. Later, he says, Mr. Ivan Westby, Catalytic's Field Superintendent, came round and said to him that there was going to be some trouble about the two people scheduled for the job. Mr. Chris says Mr. Westby implied, without saying it directly, that somebody wanted someone else to go, but for reasons he did not know. Mr. Chris says that other electricians were apparently then assigned to the bucket wheel job.

153 Russell Hillier's account is that the client (Syncrude) had a fire at the bucketwheel and wanted 10 or 12 electricians. He called other areas to see who was available, locating Mr. Dombrosky and Mr. Dezentje. He then got a call from an Area Supervisor, Mr. Tony Fullword saying that because it was important work in the mining area (where another maintenance contractor had the work, which Catalytic wanted) they should use a couple of other electricians he had who had more experience. Mr. Hillier says he went along with this. He did not ask who these other electricians were, and since he was not an electrician himself, was in no position to judge experience or qualifications. Mr. Hillier says that no one denigrated Mr. Dombrosky or Mr. Dezentje to him, all he was told is that two other people had more experience.

154 Mr. Ian McColm was an electrical foreman at the time working with his own crew in another area of the plant. He testified that he received a call from Mr. Russell Hillier asking if he could let John Sgambaro go for a job in the mine. Either in the first or a second call, Mr. Hillier asked if he could recommend anyone else and he said he could let Gerry Wood go as well since he was to be laid off.

155 Mr. John Fradette says he recalls someone looking for electricians to go to the mine and calling John Chris to see if he had any electricians available. He learnt that Mr. Dezentje and Mr. Dombrosky were available and says he passed this on to Tony Fullwood.

156 Later that day he recalled Mr. Sgambaro and Mr. Fullwood being in the foreman's office where the three of them met. They got into a discussion about who was going and who was not. He says they (apparently Catalytic, through Mr. Fullwood) wanted to make sure they sent the best guys to the mine. Mr. Fradette says he said he would send Mr. Sgambaro because he was the job steward and would do an excellent job. Catalytic was apparently trying to get Syncrude to give it a crack at getting back the maintenance work in that area. Mr. Fradette says, in summary, that he told Mr. Fullwood, "If you want two names - it's Sgambaro and Woods". Mr. Fullwood was not an electrician himself.

157 Mr. Fradette maintains he thought these two would be going in addition to the others, not in substitution. He says it was John Chris who later told him that Mr. Dezentje and Mr. Dombrosky were not going. He says he went to talk to Mr. Fullwood about it and it was Mr. Fullwood who told him that Russell Hillier had decided not to send the two of them. Mr. Fradette, who was the complainants' witness, denied he said anything against the two of them and denied being the source of any unsubstantiated rumours.

158 When they were back at the site, Mr. Dezentje and Mr. Dombrosky asked Mr. Chris to arrange a meeting with Russell Hillier to find out why they had been bumped from the bucket wheel job, which he did. The evidence of the meetings that day is a little mixed up, but without material differences.

159 Mr. Hillier says John Chris came to see him and he (Hillier) said he would talk to them (the complainants) once he had reviewed their personnel file. He says he did so, found nothing adverse and so sent them out to the bucketwheel job.

160 Mr. Hillier's recollection is that Mr. Dezentje and Mr. Dombrosky came to see him with Doug Till. He says they were a little perturbed and felt somebody was questioning their credentials. In his view this was not so, the conversation had just been:

> "I have got people who have got more experience in that area and because of the importance of the project - he had a couple of people he felt more qualified."

161 He says then and later Mr. Dombrosky and Mr. Dezentje pestered him about revealing who he had spoken to, but that he never revealed the name which he did not think important because the person had only expressed an opinion.

162 Mr. Chris, along with Mr. Dezentje and Mr. Dombrosky, went to see Russell Hillier in his office and asked for an explanation of the manpower change. Mr. Hillier's explanation was that they required two good electricians and "these guys didn't fit the bill." He said two front line supervisors had made this evaluation, but he would not say who. He refused the invitation to put this in writing.

163 Mr. Dezentje and Mr. Dombrosky say Mr. Hillier told them he'd been told by two front line supervisors that they (Dezentje & Dombrosky) wouldn't do because their workmanship was not up to Catalytic's standards. Mr. Hillier said that he hoped, by having this talk with them, their performance would improve. Mr. Dezentje and Mr. Dombrosky asked Mr. Hillier to put these matters down in writing and also to let them confront the two front line supervisors personally. Mr. Dombrosky said Mr. Hillier said he would but wanted to meet with Mr. Dezentje and Mr. Dombrosky individually first. They refused this unless they had Doug Till, the job steward, present. Another meeting was arranged.

164 Mr. Till was present at this next meeting where Mr. Hillier apologized to Mr. Dombrosky and Mr. Dezentje, saying he had read their files, which were clean. He said he shouldn't have

listened to rumours. Mr. Dombrosky says that, right after this, Mr. Till met separately with Mr. Hillier. After this Mr. Till told them "your right, John Fradette was one of those supervisors."

165 Doug Till's evidence is that he presented the contract terms to Mr. Hillier and told him he could not do what he had done and should rectify the situation. In doing so he appears to have been referring to Article 11.500, which featured later in the termination or lay-off grievances. He says Mr. Hillier rectified the matter in an amiable way during a meeting between Hillier, himself and the two complainants. Mr. Till recalls Mr. Hillier saying they had been moved off the scheduled bucket wheel job because he'd been told they were "not of top notch character." He says that in the meeting Mr. Hillier apologized for this, but did not volunteer who it was that had given him that information.

166 Mr. Till says he tried to pin Mr. Hillier down on this but Mr. Hillier "did some backpedalling" and he was unsuccessful. Mr. Till agrees that he later told Mr. Dombrosky and Mr. Dezentje he thought it was John Fradette, but says this was just his own conclusion, not based on anything Mr. Hillier had told him. He says that Mr. Dombrosky was adamant whoever said these things had to apologize.

167 Mr. Dezentje and Mr. Dombrosky say they understood from Mr. Hillier that they would meet with these two unnamed supervisors that afternoon. Instead, they only met with Russell Hillier and Ivan Westby. Mr. Hillier apologized once again for listening to rumours and told them they would be reinstated back to the bucket wheel without any loss of pay (which they were). They asked once again to meet the two supervisors and were told "no deal - that he'd talk to his lawyer."

168 Mr. Till says he later (within a couple of days) asked John Fradette directly whether it was him who had spoken to Hillier and says Fradette didn't say yes or no. He just asked him "did you slime these guys or what?" and got no reply.

169 Mr. Fradette says he talked to Doug Till about these issues a few times, but only after the grievances had been filed. He says he cannot recall Mr. Till asking him whether he had said anything against Dombrosky or Dezentje, but he says that since he did speak to him several times, he may have asked that question. He can recall being asked the same thing by Mr. LaBossiere. He says the question of their performance did come up in discussions between himself and Doug Till, but again, only after the grievances had been filed.

170 The resolution up to that point did not satisfy Mr. Dezentje and Mr. Dombrosky. Therefore, they wrote a joint letter to IBEW Local 424 (Exhibit 1 - Tab 1) outlining their view of the events that had taken place. The nub of their complaint was that, despite an apology from management, reinstatement to the job and no loss of pay, the two of them wanted to confront the source of the rumours and force a more public apology. Their letter said:

> We request for the above topic to file a grievance with the intention to get a signed, dated apology from the two Frontline Supervisors; to be delivered to

> every Area Supervisor to be posted on all areas at the plant site, in order to clear our names and to correct the slander that could destroy our livelihood as electricians. Furthermore, we would like to see the appropriate disciplinary action taken to discourage the falsifying of information to management in the future. Correspondingly, we would like to know why the misleading information was provided to the management without any evidence of the facts.

171 The letter went on to allude to Article 2, Section 2 (7) of the IBEW Constitution, and alleged that Job Steward Sgambaro and others had contravened the IBEW Constitution by discriminating on the job against Mr. Dezentje and Mr. Dombrosky.

172 On October 19, 1990, Mr. Dezentje and Mr. Dombrosky filed a grievance with Catalytic setting out the same complaint seeking a signed apology from the two front-line supervisors for circulation, around the site.

173 Mr. Dombrosky says a meeting was held at the plant about this grievance attended by Mr. Wolansky the Superintendent, Mr. Rolly LaBossiere the Project Labour Relations Manager, Doug Till, Jim Bendfeld, Mr. Dezentje and himself. Mr. Dombrosky says they wanted to get the names of the two supervisors to confront them. He says it could have been a solution if they had been given the two names and if a letter of apology had been posted around the site.

174 Mr. Wolansky apologized once again. Mr. Dombrosky says he told Mr. Wolanski then "I know how the game is played - 6 months from now your going to lay me off." He says Mr. Wolanski replied "no Gord - if that happens come and talk to me."

175 On October 30th Mr. LaBossiere from Catalytic replied to Mr. Bendfeld at the Union denying the grievance, pointing out that an apology had been given and full restitution made. He went on to say "as to posting signed and dated apologies from the Supervisors, please be advised it is not a course of action we would ever entertain."

176 Mr. Fradette says he recalls Mr. LaBossiere having called him to ask "if he had anything to do with Jan & Gord's situation" to which he replied that he had not.

177 Mr. Bendfeld pursued the matter further with management and on November 22, 1990, procured from Catalytic a letter attesting to their abilities and offering a further apology (Exhibit 1 - Tab 4) stating in part:

> Mr. Dombrosky and Mr. Dezentje have proven themselves to be capable and reliable employees. Their work record shows that, in the areas of safety, performance, reliability and competency, they have always conducted themselves in a satisfactory manner.

178 Again, this did not satisfy the complainants and on November 29, 1990, at their insistence,

Mr. Bendfeld forwarded the grievance on to the next step which involved sending it to International Representative Bill Warchow, with a copy to Mr. George Pheasey of Catalytic. Mr. Dombrosky says Mr. Warchow never contacted them about this matter. At the same time Mr. Dombrosky and Dezentje went to Edmonton and retained Mr. Robert Blakely, a labour relations lawyer, to write to Catalytic. Mr. Blakely advised Catalytic that they intended to sue the person who defamed them and asked for that person's name. Mr. Pheasey replied that:

> ... any discussion carried on with respect to these individuals were carried on within the confines of the normal exchange of information between supervisors in an employment situation. Should your clients wish to proceed with a civil action that is certainly their prerogative. It is not our intention to suggest names of persons to your clients whom they may wish to proceed against.

179 This is the only reply they got relating to their grievance.

180 On February 4, 1991, Mr. Warchow attended an information meeting in Fort McMurray about the GPC agreement. Mr. Dombrosky and Mr. Dezentje took the opportunity to approach him about this "defamation grievance." Mr. Warchow replied "there is no grievance - its over". They asked "what about discrimination?" to which he said, "show me discrimination." They replied that their reputation had been damaged. Their position, throughout, was that the two undisclosed supervisors should be forced to write letters of apology for posting throughout the plant. As Mr. Dombrosky put it: "If you're man enough to do the crime be man enough to do the time."

181 Mr. Warchow's evidence is that he received the referral from Mr. Bendfeld and spoke to him to find out the details. He understood that the employees had been made whole and an apology given. As far as he was concerned the grievors had got all they could achieve and the grievance was over. He says he told Mr. Dezentje as much at the February 4, 1991 meeting. He recalls Mr. Dezentje saying he wanted a retraction posted throughout the plant, and his telling him he could not grieve that point and the matter was resolved.

182 Mr. Warchow says that while the formal grievance was advanced to his level, it was not unusual to still have the grievance resolved locally, which he felt it was in this case. He did not write to Mr. Dezentje and Mr. Dombrosky, nor to Mr. Bendfeld saying that the grievance was over. He says he may have had a telephone discussion with Mr. Pheasey about the case, but if so he cannot recall it.

183 Mr. Dezentje and Mr. Dombrosky continued to write and to complain about this matter, up to and after the April, 1991 events. On May 5, 1991, they wrote to Mr. Blakely saying their dismissal made it "urgent to solve the identification of the two front line supervisors who gave Mr. Russell Hillier the slanderous information about us..." The letter confirms that IBEW had already told them that "there is no article or clause dealing with slander in our work agreement and therefore we had to lay private charges against these individuals who are legally not yet identified." This statement to Mr. Blakely is significant in assessing Mr. Dezentje and Mr. Dombrosky's ongoing assertion that

IBEW and Mr. Warchow failed to properly pursue their defamation grievance. The letter goes on to ask Mr. Blakely to sue Mr. Russell Hillier to get him to reveal the identity of the "two front line supervisors".

184 On June 19, 1991, Mr. Blakely wrote to Messrs. Dezentje, Dombrosky and Roy advising them he could not help them further and suggested their best bet was to proceed internally within IBEW.

185 The facts on this aspect of the case are relevant not because of the bucket wheel grievance itself. Instead it is because of what this evidence reveals about the motives at play to the extent they influenced the subsequent layoff or the Union's conduct in processing the lay-off or termination grievances. Our conclusions are mixed. We find that Mr. Hillier indeed made the decision to put Mr. Sgambaro and Mr. Woods into the bucket wheel job. We find he did so because Mr. Sgambaro had seen an opportunity for extra overtime and Mr. Fradette had recommended Sgambaro for the position, along with Woods. We accept the evidence that Catalytic was vying for more work in the mine area and that this was a factor for Mr. Hillier and Mr. Fullwood. We also find that Mr. Fullwood accepted Mr. Fradette's and probably Mr. Sgambaro's comments about the complainants as unflattering.

186 Obviously, management first made a decision to send the complainants home and then to recall them once it had been decided to send Woods and Sgambaro in their place. It was management that made this decision, not Mr. Fradette. When they were confronted with the issue the next day, they reversed themselves virtually immediately. We believe they admitted what was true; that the decision was made somewhat hastily without investigation based on an off-hand comment or two.

187 In our view, that should have been the end of the matter. The Employer's representatives, quite properly in our view, refused to get drawn into a dispute about who had said what to whom. Minor supervisory decisions in any workplace are often influenced by off-hand comments and opinions. Few employers would countenance disclosing just who said what in such situations. They admitted the decision was wrong and rectified the consequences with dispatch.

188 We find that Mr. Dezentje and Mr. Dombrosky's motive for pursuing this issue doggedly was not related to the bucket wheel incident alone. Instead, it was a result of their ongoing dispute with Mr. Fradette over his acting in a managerial role while he was still active in the Union leadership. We suspect that if it had been anyone but Mr. Fradette involved, they would have let the issue rest.

189 We are not persuaded that Mr. Fradette deliberately tried to get them bumped off the job due to their activities within the Union. Indeed, no such suggestion was put to him in evidence (although he was the complainants' witness). Rather, we find he made some relatively mild comment more to help Sgambaro than to thwart Dombrosky and Dezentje.

190 We find that Mr. Dombrosky is and Mr. Dezentje's decision to keep pursuing this issue

annoyed management. First, they threatened to sue, a prospect few employers welcome. Mr. Pheasey's response indicates that their position was firm, they were not going to expose themselves and their staff to lawsuits. This was particularly so because they had promptly made sure that neither grievor suffered any loss on account of the incident. Second, the grievance seeking disclosure and a posted apology lacked any support within the collective agreement. In our view, what remained of the grievance had no merit and no chance of success.

191 Third, Catalytic saw clear advantages to the Union, the client, and to itself in continuing to use experienced long-term electricians in acting supervisory roles, particularly during shutdowns. However, it was not willing to have those same persons threatened by disgruntled employees through internal union charges. On this point, the Union and the Employer were in agreement. It was only the complainants who failed to see the inappropriateness of internal union charges arising out of the exercise of supervisory duties. Again, on this point we find the grievors were not acting reasonably. In fact, we believe they too felt it inappropriate; it is just that their solution was different. They wanted Mr. Fradette to quit his Union office so someone else could take his place.

192 Mr. Dezentje and Mr. Dombrosky continued to complain about their bucket wheel grievance through the time of their lay-off and well into the time when the lay-off grievances were being pursued. This served to confuse their correspondence, making it difficult at times to know just what their complaints were really about.

(c) Roy's performance warning grievance

193 An incident occurred on February 27, 1991, involving Mr. Roy which resulted in his getting a written warning. Mr. Roy was working on a crew with Mitch St. Louis as his foreman. Mr. St. Louis wrote a memo to Mr. Gerry Rolseth, the Extraction Electrical Supervisor, reporting what he alleged were instances of unsafe practice by Mr. Roy (Exhibit 1, Tab 43). Mr. Roy took exception to this and filed a grievance alleging that the written warning given to him was without cause.

194 After winning his grievance Mr. Roy also decided to lay internal union charges against three of the individuals involved, Mr. Gerry Rolseth, Mr. Mitch St. Louis and Mr. John Sgambaro. Mr. Roy's charges, and documents from the trial boards, show there was some significant background about how this written warning came into being.

195 The incident started out in the electricians' shack in extraction where Mr. Roy was making some extension cords. Mr. John Sgambaro came into the shack and started talking to Mr. Roy. He pointed out to him he had a wire crossed. Apparently Mr. Roy challenged Mr. Sgambaro on this, betting him $20.00 that he hadn't wired it incorrectly. Whether Mr. Sgambaro accepted this bet remained in dispute, but it became clear the wiring was wrong, although easily corrected and something that would have been discovered in any event through routine testing.

196 Mr. Sgambaro then left and went into the coffee shop where about 50 workers were having coffee. It appears Mr. Sgambaro started talking about Mr. Roy having welched on his bet. Mr. Roy

came in and was razzed by employees about this, and he clearly took it that Mr. Sgambaro had been criticizing the quality of his work.

197 Mitch St. Louis, Mr. Roy's foreman, then entered the lunchroom. He apparently spoke to Mr. Sgambaro and heard the discussion going on. He approached Mr. Roy, who by then was sitting talking to his partner, and said to Mr. Roy that "he'd lost all confidence in his workmanship." Mr. Roy reacted angrily to this and the two left for the shack where they had a discussion, first heated and then calmer as they talked things through. During the course of this argument, Mr. Roy had challenged Mr. St. Louis, saying that if he was going to make allegations like that he should put them in writing.

198 Later that day, Mr. St. Louis wrote-up a two page memo setting out five concerns about Mr. Roy's work, addressed to Mr. Gerry Rolseth, the Acting Supervisor. At 7:00 p.m. that night, Mr. Roy says Mr. Rolseth called him into the office and showed him the memo. Mr. Roy asked him to tear it up and they could just discuss these issues. Mr. Rolseth declined and told Mr. Roy it was going to go on his file. Mr. Roy took exception to this, and later contacted Mr. Bendfeld to arrange to file a grievance.

199 It is obvious from Mr. Roy's charge against Mr. Rolseth that he saw all this as an illustration of his broader concern about Union members taking temporary management assignments. He says, in part:

> I thought as a responsible supervisor he would have had the Company in mind and being an I.B.E.W. (brother) member he would have had foremost in his mind the responsibility of keeping a harmonious relationship between my-self, my foremen Mitch St. Louis and John (Gevani) Sgambaro.
>
> One reason why our executive board agreed to give special permission to our members to go off the collective agreement and on to a Company pay-roll as a temporary supervisor and then go back to the collective agreement either back as a foremen or on tools without going on the books was to give our union an added advantage of having one of are own at the elm [sic] as a supervisor rather than having to work under a pipe fitter or a boiler maker etc. so he could be in a better position to handle a situation like this one. Unfortunately it just does not work as it is very difficult for the brother to forget where his loyalty lies and not forget who is paying his wages.
>
> This is a prime example where the company comes first and the brotherhood last.

200 On March 6th, with the help of his shop steward Doug Till, Mr. Roy filed a formal grievance complaining that the warning was without just cause and alleging that, as a result of it, he had lost

30 hours overtime for which he sought compensation.

201 Mr. Bendfeld convened a meeting to discuss Mr. Roy's grievance. It was held March 19, 1991, with Mr. Roy present along with Pat Synnott, Ivan Westby, Russ Hillier, Gerry Rolseth, Mitch St. Louis, Jim Bendfeld, Doug Till and Mr. Roy's partner, Harry Babiuk. Mr. Bendfeld's notes (Exhibit 12-Tab 5) show that they went through the points set out in the written warning. Mr. Synnott is shown as saying "...[foreman] giving verbal warning re concerns of Denis' work in an attempt to correct, got blown out of proportion, Denis requested it in writing, will rip-up warning but won't write letter saying untrue." Mr. Bendfeld's notes conclude with "Westby and Hillier say nothing comes from a verbal warning - nothing serious - if serious it is put in writing. No prejudicial effect upon the employee's position in future grievance proceedings."

202 Mr. Roy agrees that his grievance was in fact resolved on March 19th at this meeting, that this was done with Mr. Bendfeld's help, and that he was satisfied at the time with the resolution achieved.

203 Mr. Westby for Catalytic formally replied to Mr. Roy's grievance on April 3,1991 (Exhibit 12, Tab 6) saying:

> In response to Mr. Roy's grievance, it was by Mr. Roy's request that the foreman's verbal warning be put in writing. Also by his request, in his grievance, all the same written documentation has been discarded and is not on file.
>
> Mr. Roy's request for overtime payment has been denied.

204 Notwithstanding this resolution, Mr. Roy chose to pursue this matter through internal Union charges.

(d) The internal Union charges

205 The three complainants all felt that Union matters should be completely distinct from Employer matters. They pursued that position through the Union Local, unsuccessfully, in respect to the issue of temporarily acting in management. A parallel view they held with equal conviction was that no Union member should ever take any step that might harm another. They believed, despite clear advice to the contrary from the Union, that this extended to whatever that person said or did while acting in a temporary managerial position.

206 They also believed that, if they suffered any harm, character attack or discipline due to another Union member's actions, they were fully entitled to pursue that issue by laying charges under the Union's constitution, in particular Article 27, Section 1, Subsection (7), which reads:

> Section 1 Any member may be penalized for committing anyone or more of the

following offences:

...

(7) Wronging a member of the IBEW by any act or acts (other than the expression of views or opinions) causing his physical or economic harm.

207 The grievors understood, but did not agree with, the Union's position that charges should not be laid in respect of steps taken by Union members carrying out their supervisory or managerial duties, particularly when those actions could be the subject of a grievance. Notwithstanding this, Mr. Dezentje and Mr. Dombrosky laid Union charges and so did Mr. Roy, each partially at least over workplace discipline.

208 On October 16, 1990, Mr. Dombrosky and Mr. Dezentje wrote to Local 424 raising complaints about the bucketwheel incident. Mostly, this letter spoke in terms of a grievance. However, it was headed:

> Re: Slander with the intention to discredit our names, degrade our workmanship, reputation, and destroy our livelihood as qualified electricians on the job and our good standing in the IBEW.

209 At the end of the letter the two report that day shift foreman Roy Johnson had violated the IBEW Constitution by disparaging their work. They also reported that Job Steward John Sgambaro had allowed electrical work to be done by another trade, also alleged to be contrary to the Constitution. Nothing further came of this complaint.

210 On April 22, 1991, Mr. Roy wrote to IBEW Local 424 in Edmonton preferring three separate charges against Union members Gerari Sgambaro, Mitch St. Louis and Gerry Rolseth (Exhibit 1-45). This occurred on the day before the lay-off.

211 Mr. Roy complained under Article XXVII, Section 7 of the IBEW Constitution. His letter forwarding the charges states, in part:

> I would like to exercise my right to prove that the written warning was a deliberate attempt to harm my reputation on the Syncrude Site and consequently harm my 20 year reputation with the I.B.E.W. after I made all attempts to solve the issue without it going to a written statement.

212 The charges set out particulars against the three:

- John (Gerari) Sgambaro is accused of watching Denis Roy's work, noticing a mistake Denis had made and telling people in the lunch room about it.

Mr. Roy says the mistake would have been caught and corrected in the ordinary course of things. Instead this public discussion implied to those present that he was an unsafe workman. He said it cost him a written warning and a loss of reputation. He asked for his "day in court" before the trial board.

- Mitch St. Louis is accused of having overheard the lunch room discussion and then approaching Mr. Roy and telling him he'd lost all confidence in his ability as an electrician. Mr. Roy says he told him if he was going to make accusations like that, to put them in writing. Mr. St. Louis did so, which led to Mr. Roy's grievance. Again, Mr. Roy asks for his day in court.
- Gerry Rolseth is accused of calling Mr. Roy into his office and giving him the two page warning written by Mr. St. Louis. In respect to Mr. Rolseth, Mr. Roy's complaint goes on to describe his views on conflicts of interest.

213 On May 23, 1991, Mr. Roy sent this documentation about the Union charges to Mr. Warchow, stating, in his covering letter (Exhibit 1- 47(b)):

> Bill, truthfully, I'm tired of all this pettyness that's going on site between power hungry temporary IBEW supervisors and Catalytic permanent supervision such as Ivan Westby field superintendent that single out some of their long term employees for unnecessary permanent lay-off while they could go on a maximum 60 day temporary lay-off according to section 55 of the Alberta Employment Standards Code, and also write-up unnecessary written warnings on long term employees to perceive them as a problem employee.

214 Mr. Roy thus saw his lay-off linked to the facts behind the warning he received which he wanted to use the Union charges to expose. However, later on in the letter to Mr. Warchow he goes on to speculate that it is Catalytic that is laying him off to save the extra 1% and 2% holiday pay it had to give to long-term employees.

215 On May 31, 1991, Mr. Dezentje and Mr. Dombrosky wrote to International Vice-President Ken Woods, laying charges against John Fradette under the Union Constitution Article 27, Section 7 - "wronging a member of the IBEW by any act or acts causing economic harm." They charged him with laying them off in a discriminatory fashion on April 23rd. They also charged him with "working for, or on behalf of any employer ... whose position is adverse or detrimental to the IBEW", and a couple of other charges, the relevance of which is highly doubtful. Again, they raised their conflict of interest argument.

216 On May 28, 1991, Mr. Woods wrote to the two advising that rather than accepting the charges he was going to have International Representative Wayne Brazeau investigate the matter.

217 On June 6, 1991, Mr. Roy wrote to International Vice-President Woods telling him he is

going to present himself in front of the trial board

> ... to correct a wrong done that was done to me from my first grievance March 6, 1991 with the motive of putting an end to a mine "click" [sic]

218 In that same letter, Mr. Roy also preferred charges against John Fradette under the Union Constitution, just a few days after Mr. Dezentje and Mr. Dombrosky. Their letters were very similar. The charges against Mr. Fradette went directly to V-P Woods because of Mr. Fradette's membership on the Local's Executive Board. Mr. Roy also charged him with "wronging a member of the IBEW by any act or acts causing economic harm." He accused him of "knowingly [committing] a discriminatory act regarding the lay-off procedures he applied to me between April 23, 1991 and April 25, 1991." He went on to cite a series of other alleged constitutional infractions.

219 V-P Wood quickly wrote back to Mr. Roy saying, on June 10th (Exhibit 1-51):

> In view of the fact your charges appear to stem from an alleged grievance against Catalytic Inc., a maintenance contractor at Fort McMurray, which should be dealt with through the grievance procedure under the General Presidents' agreement I am assigning Representative William Warchow to investigate this matter and report his findings to the writer.
>
> In the meantime, your charges against Mr. Fradette are being held in abeyance pending the outcome of the aforementioned investigation.

220 Here, it is Mr. Warchow who is appointed to investigate, not Wayne Brazeau. We infer that, between May 31st and June 10th, V-P Woods realized that these charges were tied into the grievances and so decided to assign Mr. Warchow to handle everything. However, in the process, it appears that Mr. Dombrosky and Mr. Dezentje's effort to charge Mr. Fradette (which had never been accepted anyway) got lost in the shuffle.

221 Notwithstanding V-P Woods' letter, Mr. Roy wrote to the Local on June 25th telling the Recording Secretary he had laid charges with V-P Woods directly.

222 Mr. Fradette says he became aware of the charges filed against him with Vice-President Woods sometime in 1991, and knew that either Wayne Brazeau or Bill Warchow had been appointed to investigate. He says he met with Bill Warchow out at the site one day about this, and perhaps had another meeting with him in town, but cannot say when. He was unsure if the meeting was about this grievance, or the conflict of interest issue, or the Union charges, and says he has no more specific recollection of the meeting. Mr. Fradette was generally quite vague in his recollections.

223 The Local Trial Board hearings against the other three went ahead on June 14, 1991 for

Sgambaro (Exhibit 12, Tab 20), July 5, 1991 for St. Louis (Exhibit 12, Tab 28), and July 14, 1991 for Rolseth (Exhibit 12, Tab 5A). The Trial Boards found the three "guilty" or "partially guilty", upholding some of Mr. Roy's complaint that the three had harmed him economically (Exhibit 12 - Tabs 30, 31 and 1(a)). All three decisions are dated July 10, 1991, although they had apparently been announced informally before then. The formal results were read out at a Local Union meeting on July 24, 1991. These dates are significant because of their proximity to Mr. Warchow's meeting with the three grievors in Fort McMurray on July 10, 1991, and with others, including the respondents on these charges, on July 11, 1991.

224 On August 3, Mr. Roy wrote to V-P Woods and asked him to get the transcripts of the Trial Boards "to make the big picture clearer and to show what's going on at Catalytic at the Syncrude site" (Exhibit 1, Tab 54).

225 On August 30, 1991, Mr. Warchow sent V-P Woods a report on Mr. Roy's charges against Mr. Fradette. We review that letter in detail below. The letter praises Mr. Fradette and disparages Mr. Roy. Mr. Warchow points out to V-P Woods that Mr. Roy laid his charges under Article 27, Sections 2, 5, 6 and 7. These are procedural sections, not matters on which charges can be founded. While Mr. Roy misnamed the sections, it was patently obvious from his correspondence that he was referring to Article 27, Section 1, Subsections 2, 5, 6 and 7. Indeed, this irregularity had been explained and dealt with at the Trial Board proceedings. Without pointing that out, Mr. Warchow gave V-P Woods his opinion that "no violations have occurred and none listed under the named sections of the Constitution." He recommended dismissing Mr. Roy's charges against Mr. Fradette.

226 On September 6, 1991, V-P Woods wrote to Mr. Roy about his Fradette charges, saying that:

- despite the policy on not accepting charges for grievable incidents involving a member acting in a supervisory capacity, he had appointed Mr. Warchow to investigate.
- Mr. Warchow had now reported to him on his investigation, and
- In view of the fact this matter should have been dealt with through the grievance procedure in the collective agreement, and the fact that your charges were improperly filed, your charges against Brother Fradette ... are improperly before me and will not be pursued any further by the writer.

227 Mr. Roy then wrote to Ron Kazakoff, the Local 424 Recording Secretary, citing Mr. Woods' position as a reason why the Local Executive Board needed to reconsider its policy and ask any member taking a supervisory position to take "a withdrawal card due to conflict of interest" (Exhibit 1, Tab 57).

228 In that same letter Mr. Roy set out his views on the use of the Union Constitution versus the grievance procedure. This gives some insight into why the grievors wanted Mr. Bendfeld and Mr. Warchow to keep "inner Union politics" out of the grievance processes, as described below in relation to duty of fair representation:

> [I] cannot prefer charges against another Brother because charges are normally not accepted when filed against a member of a Local when he is acting in a Supervisory capacity which should and could be handled through the Grievance Procedure. With all due respect I find that un-reasonable and to say the least un-acceptable for the simple reason that a member in a Senior General Foremen, and General Foremen position are held accountable for their actions under our I.B.E.W. Constitution and could be liable for charges but not a Brother of a Local when he is acting in a Supervisory capacity????
>
> Also filing charges under our I.B.E.W. Constitution and filing a grievance are two separate mechanism that are to be used when a Brother feels he has been wrong done by.
>
> Filing charges are considered when one feels he has been unfairly treated by an other Brother under our constitution and filing a grievance are considered when one feels he has been unfairly treated by the employer, they are two separate mechanism.

229 Mr. Roy also notes in this letter, the position adopted by the Union Local as a result of the complainants' earlier activity on this issue.

> I'm well aware of the correspondence (May 23, 1990) from the International President Brother Ken Woods leaving the decision to the Local Union to decide whether the member in question should take out a withdrawal card due to conflict of interest. At the Executive Board meeting on 424 on July 13, 1990 they could not see a conflict of interest at the time and decided to allow Brother John Fradette to hold his dual position as Temporary Supervisor at Catalytic Maintenance Syncrude Site and Executive Officer of Unit III.

230 On September 25, 1991, Mr. Roy appealed V-P Wood's refusal to act on the Fradette case to International President Barry (Exhibit 1, Tab 58A). On November 5, 1991, this appeal was denied (Exhibit 1-61a).

231 In the meantime, the three found guilty by the Trial Boards had appealed to V-P Woods. On October 22, 1991, V-P Woods allowed the appeals and set aside the charges because no evidence had been called under Article XXVII, Section 7, saying "the charges are obviously misfiled and the writer had no alternative but to dismiss the charges and the penalties resulting therefrom (Exhibit 1-59)." It appears that in dismissing this appeal, V-P Woods was drawing on the advice he received from Mr. Warchow who raised the issue of the wrongly cited sections.

232 On November 1, 1991, Mr. Dezentje and Mr. Dombrosky wrote to V-P Woods asking what

happened to their complaint letter and wanting to push forward with the charges against Mr. Fradette. They said, in this letter:

> Please be also advised that we will pursue this matter to the limit of our resources within the framework of the Canadian Law and the I.B.E.W. Constitution.
>
> The reason of our determination are the potent logic facts that we assume:
>
> 1. That any member or officer may be penalized for committing one or more offense(s) against a brother in whatever function he performs and in whatever occupation he possesses.
> 2. That any I.B.E.W. member or officer has to comply with our Constitution and thus is committed and is obliged to the Constitution and the laws of the I.B.E.W. in whatever function (dual or not) he holds.
> 3. That NOBODY can "serve two masters" and be fully efficient, proficient and loyal to both, since two different institutions each with their different objectives - Union and Cooperation - make it impossible for anyone to hold a dual position. It is clear that a person holding such a position, in certain circumstances leaves himself exposed to charges of conflict of interest.
> 4. That the integrity of the fundamental social justice of the I.B.E.W. as a respectable organization should surpass any self-interest or personal ambition, of any individual member/officer in whatever function, and occupation he acquires.

233 On November 12, 1991, V-P Woods wrote to Mr. Dezentje about his grievance and his charges. On the question of charges he advised that Wayne Brazeau had been replaced sometime before by Bill Warchow as the person assigned to investigate the charges. This was done once it became clear the charges related to the grievance Warchow was already involved in. He then said:

> Insofar as your charges against are concerned it is obvious that Brother Fradette was acting in a supervisory capacity (Foreman) at the time of the alleged violations of the IBEW Constitution.
>
> The IBEW takes the position that when a member is acting on behalf of an employer and takes an action that may be construed as a violation of the labour agreement that member is considered an agent of the employer, and the employer should be cited under the grievance procedure in the agreement; the member cannot be cited for violating the IBEW Constitution for taking such action.

234 On November 4, 1991, Mr. Roy wrote to V-P Woods asking him to reconsider his decision on the three appeals based on "new and important evidence" to the effect that this error had been raised and corrected at each Trial Board (Exhibit 1-60). V-P Woods refused to reopen the cases as only a member penalized may appeal (Exhibit 1, Tab 62). On November 20, 1991, Mr. Roy wrote to International President Barry (Exhibit 1, Tab 63) asking for an interpretation of the word "parties" in the appeal process. Correspondence over this issue continued into 1993.

235 The four collateral matters just covered provide the personal context in which the lay-off took place. The next topic relates to the collective bargaining context, since negotiations had just concluded when the lay-off took place.

3. Negotiations over the L.O.A. policy and the base crew

236 The grievors each allege that they were laid off when they were entitled to receive a temporary leave of absence instead. The grievors believed then, and maintained before the Board, that this was a collective agreement right negotiated during the 1991 bargaining.

237 The reason they took this position related to a document (Exhibit 6) they picked up, or were given, at the end of the GPC negotiations in February, 1991. That document described, in part, a change to Catalytic's policy on granting leaves of absence. The negotiations over this topic are important because it was the central point being raised in all three grievances. Catalytic and the Union have maintained throughout that this always was and always remained a matter of Employer policy, deliberately excluded from the collective agreement. This question goes to the substance of the grievance.

238 Employees under this collective agreement (before and after negotiations) are treated much like construction employees. They can be laid off on short notice without regard for seniority, which has never been a part of this agreement. Seniority concepts conflict with the hiring hall system for dividing all available work between all the Union members working in the construction field.

239 The pre-1992 Catalytic leave of absence policy is set out in a memorandum dated September 14, 1989, headed "Field Guidelines on C.M.I. Leave of Absence Policy" (Exhibit 2). This policy provides for a Leave of Absence form to be used for the various types of leave. The Area Supervisor is responsible to have the form completed and sent to the Field Superintendent's office. The categories of leave are set out as follows:

Shortage of Work

- initiated by supervisor on mutual consent of both employee and employer.
- employee will be kept on S.O.W. for 60 days.
- employee must have a minimum of one year's continual employment to qualify.

- U.I.C. separation slip will be issued.
- program is administered by Labour Relations, and employee may be dispatched to any area.
- employee will automatically be laid off after 60 days on S.O.W.

[there are then several categories of leave - Annual vacations, WCB, School, Medical/Sick]

Rotation

- initiated by supervisor on mutual consent of both the employee and employer
- used to record any absence where the reason is:

    - lack of material
    - lack of J.E.A.
    - time off because of 24 day limitation
    - winter restraints
    - any other reason where work is available but must be rescheduled for a few days because of other restraints

- supervisor is responsible to administer these individuals and recall them as required. They will not be dispatched to another area.
- no U.I.C. separation slip will be issued.

Absence with Cause

- initiated by employee with brief description of what absence involves and the time duration.
- normally used when employee needs one or two days off to attend to personal business.
- supervisor must approve the leave of absence.

240 The shortage of work aspect of this policy had worked as follows. When Syncrude told Catalytic it had no more work (which it could do on short notice), Catalytic had to lay-off employees. Laid-off employees would customarily go back to the Union hiring hall and register for

work, drawing Employment Insurance in the meantime. They would be dispatched, in order of their sign-up, to the next available job (whether with Catalytic or elsewhere). To avoid this happening, and to provide continuity wherever possible, Catalytic could agree to give employees a temporary leave of absence rather than lay them off. This leave of absence allowed the employees to stay as Catalytic employees for up to 60 days, in the hope that Syncrude gave Catalytic more work during that time, in which event they would be called back to work. This way Catalytic kept experienced employees and the employees avoided having to go back to the Union hiring hall list.

241 Shortage of work leaves of absence and rotations are similar concepts and in practice, seem to have overlapped. Rotation was used where there was work, but a temporary interruption in the ability to do that work which could be expected to resume shortly. Employees off on rotation would just be called back to the same job they left. Shortage of work leaves could be granted where there was no immediate expectation of work, but a hope of new work within 60 days. The 60-day figure appears to have been picked because of beliefs about employment standards or employment insurance provisions. Employees on this type of leave could be called back to any new work that came along. Their call back from leave would eliminate the need for Catalytic to make a call to the hiring hall.

242 This leave of absence arrangement was controversial within the building trade unions. In July or August of 1990, there had been a shutdown at Suncor. A group of insulators were held out of service for five working days rather than being laid-off. The employees grieved since they wanted lay-off slips. The matter was taken to Step IV under the grievance procedure and it was held that this had not involved a breach of the collective agreement. As a result of this decision a Union subcommittee was struck to consider the point, and it recommended that a three-day maximum should be used for hold-overs like that without a lay-off (see Exhibit 38). In this situation, the Employer was forcing employees to take short-term leaves of absence which they did not want to take.

243 Equally controversial was an Employer initiated proposal to introduce, for Syncrude, a concept it was already using at Suncor; that of having a base crew. The base crew concept would have provided for a set number of employees who would be given secure year round employment by Catalytic which, in turn, would be guaranteed by Syncrude.

244 By using a leave of absence, the employees could stay on the Employer's books rather than being laid-off and going back on the Union's hiring hall list. All the building trade unions had expressed opposition to such a two-tier arrangement. Business Manager Bob Lynn had encouraged all Catalytic employees to refuse to participate in any such arrangement.

245 These two issues were hot topics prior to negotiations in early 1991. The IBEW had forwarded a bargaining proposal to the GPC which included the following (Exhibit 40):

> 4. Temporary Layoffs

There should be no temporary layoffs because of a shortage of work. The Union Hiring Hall is the Labour Pool, not a group of employees on leave.

Too many people get jerked around when the Company uses temporary layoffs.

246 The Union wanted to build protection into the collective agreement to prevent forced short term leaves. In the past, the leave of absence question had been outside of the collective agreement, dealt with only by company policy. Mr. Smillie testified that this policy had never been in the collective agreement through his 20 years of experience.

247 Mr. Burton's minutes of the March 5, 1991, negotiating meetings refer to the Base crew and Leave of Absence issues. The initial discussion shows the advantages the Employer saw to having a base crew and a leave of absence policy:

BASECREW

The Committee highlighted the Building Trades objection to basecrew and wanted to be assured that there would be no discrimination regarding members on the basecrew.

It was agreed to provide the Committee with a copy of the letter issued by Roly LaBossiere which confirms no favoritism for basecrew employees.

It was also agreed that the steward would receive protection when layoffs occurred that may affect basecrew.

(a) Our clients are very supportive and involved in the basecrew concept. They want to see it continue.
(b) It is felt that the basecrew helps reduce turnover and contributes towards increased stability of the workforce. These are matters which are extremely important to Syncrude and Suncor.
(c) Helps reduce the client's camp costs and thereby economically advantageous to our clients. This provides additional incentive for Suncor and Syncrude to continue to maintain a Building Trades presence.
(d) Provides increased job security for basecrew employees and provides longevity of employment.
(e) Provides a greater incentive for an employee to move his family to Fort McMurray.

(f) Provides CMI and the client with more people in town during the weekend in case of emergency overtime callouts. This gives reassurance to our clients that their needs will be promptly serviced.
(g) As you are aware, the basecrew policy is a policy which has been clearly communicated to the Building Trades and a management program which is not subject to inclusion into the collective agreement. In essence, we have been very forthright with the Building Trades over this matter and are not in a position to change this approach which is so vital to our employees and our clients.

LEAVE OF ABSENCE

There was much discussion over the L.O.A. policy and the company's right to maintain this practice.

(a) Provides much needed stability for our clients and a point which is extremely important to both our clients and our employees.
(b) Keeps well-rounded, site knowledgeable employees.
(c) Applies only to employees who have been with CMI for over one (1) year.
(d) It is voluntary.
(e) It is felt CMI and our clients have to be compassionate, understanding and appreciative of long service employees. Surely this is a proper way to show such.
(f) This policy must be applied in a consistent, fair, objective manner and a management right which cannot become a part of the collective agreement language.

CMI is agreeable to a policy which addresses work not being available for short periods of time. This policy would allow CMI to put employees on three (3) working days L.O.A. because materials not available, job execution authorization, weather, etc. If more than three (3) working days of work not available, the employee would be given the option of a layoff. Also, L.O.A. under these circumstances would not be granted for over ten (10) working days.

248 This initial discussion shows that the Union was raising concerns about the Employer's practice of forcing people onto a leave of absence rather than laying them off. The Union's objection was that this practice prevented employees going on E.I. or returning to the hiring hall list, putting

them instead into a temporary limbo. Behind this is the concern that it protected employment for some employees. Without this protection, the employee next up on the hiring hall list would get the job, resulting in a more even distribution of available work amongst the overall union membership. Item (f) shows, at this point in negotiations at least, management was insisting that this policy "cannot become part of the collective agreement."

249 Later, the minutes record the following two entries on these same issues:

> 4. LEAVE OF ABSENCE POLICY
>
> CMI to write a revised L.O.A. policy which is inclusive of the L.O.A. - S.O.W. (60 days) as well as the L.O.A. for finite duration - work not available for ten (10) days or less.
>
> BASECREW
>
> Settled and the administration of such to be monitored on an ongoing basis.

250 This entry shows the Employer was talking about the short-term lay-off changes being in addition to the L.O.A. - S.O.W. provisions already part of the policy.

251 Just at the end of the minutes, the Unions replied with what ended up being the settlement on these questions:

> 4. GPC wants CMI to provide language regarding the leave of absence for three days or less. This information to be communicated to employees ASAP.
> 5. GPC accepts the principle of the basecrew even though it is very distasteful. Roly to reissue the non-discriminatory letter re basecrew and specify the job steward protection even though the steward may not be on the basecrew.

252 Mr. Smillie says that, in the cut and thrust of negotiations, they left the contract as it was, but that as a concession the Employer agreed to amend its policy (still outside of the collective agreement) to deal with the situation when work was not available within a finite period. Mr. Smillie is quite clear that, while the agreement to change the policy went into the memorandum of settlement, all understood it was to remain a matter of company policy alone. Indeed, he says this was one of the specific compromises made for other benefits.

253 Mr. Smillie said a number of items were dealt with by agreement but outside the contract.

His bargaining notes, reduced to a memorandum sent to the Employer on March 28, 1991 (Exhibit 37) confirms this fact.

> 4) The Leave of Absence policy in no work situations was changed by the Company as per the Memorandum. The Company committed to distribute their new policy as soon as possible.
> 5) There was much discussion about the base crew concept. The Committee highlighted the unpopularity of this program at all levels. The Company pointed out it is integral to their provision of a stable maintenance work force and is an important point in the differentiation of their services. The status quo remains.
>
> R. LaBossiere will re-issue his letter of January 21, 1991 on base crew "non-discrimination" and include the following thought: "Job Stewards who are not members of the base crew will be afforded the provisions of Article 10.000 when reductions in force occur."

254 The formal memorandum of settlement lists the various items agreed to in negotiations, including the topic of Leave of Absence, which reads:

> Item #2 - Leave of Absence Policy
>
> It is agreed that the present Catalytic Maintenance Inc., Leave of Absence shortage of Work Policy be amended to include "work not available for finite periods". The following represents the manner in which Catalytic Maintenance Inc. will implement the L.O.A. due to work not available for finite periods.
>
> (a) If work is not available for three (3) consecutive work days or less, an employee will be informed that work is not available and advised to take the required day(s) off.
> (b) If work is not available for more than three (3) consecutive work days but less than or equal to ten (10) consecutive work days, the employee will be given the option of a leave of absence for not greater than ten (10) consecutive work days or a layoff.
> (c) Leave of Absence for greater than ten (10) consecutive work days will not be extended to employees with less than one (1) year of service.

255 Unlike every other item in the memorandum of settlement, this item makes no reference to any clause in the collective agreement. Instead it speaks only to the Catalytic policy.

256 The only change in the policy discussed during the negotiations related to the forcing of employees to take short-term leaves when there was a brief shortage of work not covered by the rotation arrangement. This was principally an issue of concern to, and raised by, short-term employees, who did not want to be left hanging without hours to work but also without a lay-off slip.

257 Catalytic eventually re-issued its L.O.A. policy in the fall of 1991, by attaching the old policy to a memorandum (Exhibit 3) containing the following sections:

> 4. L.O.A. Policy
>
> Within the past year there have been various changes to the L.O.A. policy. These changes were brought about through both negotiations and an on site effort to maintain a fair and consistent application of the policy site wide.
>
> Attached is the L.O.A. policy in force. Listed are the different sections of the L.O.A. policy and changes to their application have been identified as required.
>
> (a) SHORTAGES OF WORK: i) will be offered to all employees with one (1) year or more of service unless their personal record of employment shows reason not to.
>
> ...
>
> (f) Rotation: Employee must phone site to verify availability of employment prior to returning.

258 This was issued well after the three complainants were laid off, and well after these grievances were filed. We note that the changes are said to come not just from the negotiations but also from "an on-site effort."

259 Mr. Dezentje bases his views on Catalytic's leave of absence policy, and his view that this was part of the collective agreement, on a copy of Exhibit 6 he had picked up in the lunchroom at the plant sometime before he was laid-off. This document is clearly not a collective agreement, nor is it a memorandum of settlement. It is titled "1991 Renewal Summary." It is clearly a descriptive document not purporting to be any kind of agreement itself, although it may have had appended to it, the section from the formal memorandum of settlement concerning the change to the policy. When the document speaks of leaves of absence it refers to it as a Company policy. Nothing

suggests directly that the policy or the amendments will form part of the collective agreement.

260 We find that this document is in fact the summary of negotiations prepared by Mr. Smillie that was circulated for the business agents and international representatives when explaining to their members the changes discussed and agreed to during the March, 1991 negotiations. Based on the evidence of what took place during negotiations, and the documentary record, we find it was never agreed that the leave of absence policy would become part of the collective agreement. It was understood by all that it would continue as a matter of Catalytic's policy.

261 The only change agreed to was in respect of the short-term leave of absences. This was to get the Employer to stop forcing unwilling employees to go on leave when they would rather have been laid off. The negotiations did not address the shortage of work policy that allowed up to 60-day leaves of absence on the basis of mutual consent where the employee had over one year's current service.

262 If any other change to that policy came about, it was only in the fall of 1991 when Catalytic issued its re-drafted policies (Exhibit 3, date 1991-10-07). That document, for the first time, casts the leave in a positive form - "SHORTAGE OF WORK: 1) Will be offered to all employees with one year or more of service unless their personal record of employment shows reason not to."

263 There is nothing to suggest the recasting of this aspect of the policy was a result of the negotiations earlier in the year, or that it was in place at the time of the complainants' lay-off.

264 There are some more general points to be drawn from this review of the negotiations over the leave of absence and base crew issues.

265 Management's active pursuit of the concept of establishing a base crew would institutionalize the practice of having a long-term maintenance crew for whom Syncrude would guarantee Catalytic work and to which company designated electricians would be named. While the Union, including the complainants, opposed this idea there appears to have been nervousness in the air about who would be given positions on the base crew if it were implemented.

266 Mr. Dezentje had written to Mr. Bendfeld on January 26, 1991, on these issues (Exhibit 30). His letter is significant because it shows that, well before his lay-off, he was already anticipating problems. His letter read:

> 1) Lay-off or temporary lay-off and call-back to work should be handled by the job steward. His decisions should be made based on a senior list and not by a Foreman's or supervisors "pick" or choice. This will prevent the establishment of a "clan" or a hand-picked crew and will keep harmony between the union members.
> 2) For each six (6) journeymen employed by the employer, one (1) journeyman shall be over the age of fifty (50) years. This therefore

prevents age discrimination.

267 Mr. Roy too had some anxiety arising from the fact he had not been invited to become a member of the base crew. The negotiations are thus significant in themselves because their focus on the leave of absence and base crew issues brought to the fore concerns the complainants already had about their employment situation and tenure. They also show that Catalytic management was thinking about who it would invite to stay as part of the base crew.

268 A second but related aspect, is the question of acting in a managerial capacity. The advantage for the employer and for Syncrude in having a long-term crew, related to the nature of maintenance and particularly shut down work. They needed people with experience at the plant to supervise the huge workforce involved in the shutdowns, but only required a small, but even then fluctuating, workforce the rest of the time. This meant a higher proportion of bargaining unit employees would move up to managerial positions than would ever be the case in a normal industrial plant. But it was management that picked the people who received these assignments. This linked the complainants' fears about their tenure to the acting in a managerial capacity issue they were already complaining about.

269 We infer from the evidence that the failure of management to pick some people for these positions created sensitivities within the bargaining unit and anxieties about what any base crew might look like. Catalytic's raising this issue over the bargaining period, from late 1990 through March 1991, heightened the importance of these concerns just prior to these layoffs.

270 Thus, in summary, at the point of the April 23rd layoff:

- Mr. Dombrosky and Mr. Dezentje were still trying to pursue their belief that Mr. Fradette had defamed them during the bucket wheel incident. On this matter:

    - Their lawyer had written the employer threatening to sue
    - They had alluded to filing charges under the Union constitution
    - They believed their grievance should proceed, but that Mr. Warchow was refusing to do anything for them.

- Mr. Roy was still thinking he should pursue his complaints over his incident. On this matter:

    - He felt his grievance should proceed, to deal with his allegation that he lost 30 hours pay due to lost overtime
    - He had delivered charges in Edmonton on April 22nd against three

union members who were involved in the incident and who at times acted in a managerial capacity

- All three were actively pushing the issue that Union Members should withdraw from the Union, or at least Union office, when they moved over to act temporarily in a managerial position. This was despite the fact they knew the Union had said it was an issue to be decided by the Local and despite the fact the Local had dealt with the issue contrary to their views by a substantial margin.
- Management was asking to designate a base crew of employees, partly to give it supervisory bench strength during shutdowns. This generated anxiety that some employees might not be selected.

271 With these contextual issues now described, we move on to the grievances and the way they were handled.

4. The grievance procedure

272 The Collective Agreement's grievance procedure provides for a five step process set out as follows:

> Article 7.000 - Grievance Procedure
>
> 7.1000 It is agreed that it is the spirit and intent of this Agreement to adjust grievances promptly. All grievances, including discharge for just cause, but not those pertaining to jurisdictional disputes, that may arise on any work covered by this Agreement must be initiated within fifteen (15) working days of the incident by either the employee in Step 1 or the Local Union in Step II and shall be handled in the following manner:
>
> 7.101 Step 1: Between the aggrieved employee and/or the Craft Steward and the Company supervisor.
>
> 7.102 Step II: Between the aggrieved employee, the Craft Steward and/or Local Union Business Representative and the Craft Foreman, the Supervisor and the Project Manager. If settlement is not achieved at this step, the grievance must be presented in writing to the company and to the International Representative of the Union involved.
>
> 7.103 Step III: Between the International Union Representative and the Labour

> Relations Manager or the highest official of the company.
>
> 7.104 Step IV: By negotiation between a committee of the Unions signatory to this Agreement and senior officials of the company at a meeting to be held at the place of work or a mutually agreeable location.
>
> 7.105 Step V: If any dispute or grievance concerning the interpretation, application or violation of this Agreement cannot be settled through the procedure described above within ten (10) working days, the matter may be submitted by a Signatory Union to this Agreement or the Company, to a Board of Arbitration for adjudication. [The contract goes on to define such boards]

(a) The division of responsibilities

273 An employee can initiate grievances directly with the company's supervisor. However, Step I is not necessary since article 7.1000 allows the Local Union to raise the matter initially at Step II. Step II is handled at the steward or Local Union business representative's level. In this case, Mr. Bendfeld was the person involved. Mr. Bendfeld worked throughout for Local 424.

274 Mr. Dezentje alleges that Mr. Bendfeld failed in his duty by not appointing a shop steward to be on duty when he and Mr. Dombrosky were laid off, saying they lost the advantages of the Step 1 grievance procedure. We reject this argument as without merit. Nothing was lost by the absence of a steward. The complainants could themselves have raised their complaints with the Employer directly. Instead they chose to wait and contact Mr. Bendfeld, who responded immediately.

275 Step III grievances are dealt with by the International Representative, in this case Mr. Bill Warchow, an employee of the IBEW. Step IV is somewhat unusual in that it involves negotiations between what is, in fact, a GPC Committee and the Employer. The obvious purpose of this, given the GPC multi-union approach, is to try to arrive at uniform applications and interpretations of the various trade agreements. In practice, the GPC Committee acts rather like a fact finder or mediator between the two sides - the International Union involved and the Employer, issuing a ruling the parties can either reject by exercising the option to proceed to arbitration, or accept.

276 Step V is standard labour arbitration of the type customarily used under the Labour Relations Code. We find it significant, in looking at the GPC's role under Step IV, that it is the signatory union, not the GPC, that has the right to send the matter on for arbitration. This reinforces our view, derived from the practice, that the GPC's role at Step IV is more adjudicative than representational. We find that under this grievance procedure, the International Union representative has carriage of the grievance from Steps III to V. The corollary to this is that the Local Union's role, and that of its representative, is essentially over (except in a supporting function) after Step II.

(b) Presence at Step II

277 Much time and energy was spent between the three complainants, the Local Union, Mr. Warchow and the Employer, debating the meaning of 7.102 - the Step II process. The complainants' position, adamantly asserted, was and remains that this article gave them an absolute right to be present at a face-to-face meeting with the company. Basically, they believe that this step guarantees them a right of confrontation with the Employer's representatives.

278 Mr. Bendfeld told the grievors that if it was mandatory they be present at this step, then he would arrange it. In the meantime, he contacted Mr. Steve Smillie, the Executive Director of the GPC, for his interpretation of the Step II procedure. Mr. Smillie gave Mr. Bendfeld his advice over the phone and then put it in writing saying:

> The clause simply requires that the issue be discussed and dealt with on site before being referred to the International Representative. The clause provides a variety of ways for this to be accomplished. There is no obligation for all those named in the clause to meet together in order to satisfy the provisions of the clause. As a practical matter, in virtually all cases, the area representative of the Union has discussed the case with the senior company representative or site labour relations representative and come to no resolution before referring it on.

279 Mr. Warchow gave the same advice when he returned from hospital later in March. He told the grievors the same thing when he met with them in person on July 10th. Nevertheless, the grievors, citing experts (who they refused at the time to identify), have maintained throughout that they have a right of confrontation at Step II. They cite Mr. Bendfeld's failure to allow or insist on this as an element of his failure to represent them.

280 We agree with Mr. Smillie's interpretation. Nothing in this article requires any face-to-face meetings at this step. The clause only says it is to be "handled ... between ... the aggrieved employee, the Craft Steward and/or local Business Representatives and the Craft Foreman, the Supervisor and the Project Manager." Handled and meet are not the same thing; grievances are routinely handled at the early stages informally, and without any direct, formal meetings.

281 The complainants appear to base their views on the wording of the sentence containing the inevitably ambiguous "and/or"

282 Fowler, Modern English Usage, says of and/or:

> and/or. The ugly device of writing x and/or y to save the trouble of writing x or y or both of them is common and convenient in some kinds of official, legal, and business documents, but should not be allowed outside them.

283 We would add collective agreements to the list of places from which this device should be

banished. The opening clause could be a list clause, meaning any one or more of the aggrieved employee, his steward or his local union business representatives. It could also be, as the complainants insist, that the parties intended the aggrieved employee must be included along with either the Craft Steward, or with the local Business Representative, or both of them. If so, the use of the and/or device, as usual, adds no clarity to the provision. However, even if that were so, and we think the better interpretation was that it is not, a meeting is not mandatory and the remedy for any lapse is simply to advance the process to Step III.

284 We dismiss any suggestion that Mr. Bendfeld or Mr. Warchow failed the grievors by failing to force a meeting at Step II. In our view, the grievors made far too much of this issue. They refused to take the reasonable advice offered, appearing intent instead on exploiting the issue as an illustration of broader injustices. They were still pursuing the issue with the GPC in July 1991, and the International Union even later.

285 We also find that the refusal to meet was in any event due to the Employer's position. We accept Mr. Bendfeld's evidence that he asked for a meeting (as requested by the grievors) and was told the Employer would not agree. We infer that the Employer's position was based in large part on the grievors' earlier threats, directly and through their lawyer Mr. Blakely, to sue managers and other employees who they felt had maligned them, or to lay union charges. Given the grievors' prior conduct in this vein the Employer's refusal was hardly surprising and they were, in this respect, the authors of their own difficulties.

5. Laying off the three grievors

286 All three complainants are journeymen electricians and members of IBEW Local 424. Mr. Gordon Dombrosky is now 49 years old. He began work at Syncrude for Catalytic in 1981 and worked for them until 1991, with two breaks of about a year each in 1982 and 1988. He is married and maintains his house in Fort McMurray. At the time of the layoff or termination he had been with Catalytic for over a year.

287 Mr. Jan Dezentje worked continuously for Catalytic at Syncrude for eight years until April 1991. He too is married, somewhat older than the other two, and maintains his residence in Fort McMurray. He has had regular leaves of absence at Christmas time and a couple of other leaves as well during his eight years.

288 Mr. Denis J. Roy is now 51. He began working as an electrician in Fort McMurray in 1976. He worked steadily for Catalytic from June, 1979 until he was laid off on April 24, 1991. His ten years of service with Catalytic entitled him to an extra 2% vacation pay, (1% for five years and 1% for 10 years). During this period he went on a couple of leave of absences due to lack of work but returned fairly quickly.

289 Mr. Dezentje and Mr. Dombrosky described the April, 1991 shutdown as being like others that had gone before. The normal routine was to stop doing the regular maintenance work and

assign the crews to pre-shut down preparation. For the shutdown itself, Catalytic would hire employees from the Union hall. Long-term employees would work, some on days and some on nights, to provide people who knew the plant to work along side those newly hired for the shutdown.

290 Mr. Dombrosky and Mr. Dezentje worked on John Chris' crew and were assigned to supply temporary power for the shutdown work. Denis Roy transferred to the same night shift from his work in extraction. Mr. Chris only stayed as foreman until April 19th or so when he took a week's vacation.

291 Mr. Roy learnt that his father was ill. He had Mr. Chris fill out an application for compassionate leave. This application was left on the supervisor's desk, but apparently never processed. On discovering this, Mr. Roy and Mr. Chris filled out a new form which Mr. Chris took to the appropriate authorities. The approved form shows that Mr. Roy was to be gone on compassionate leave of absence from April 20, 1991 to May 13, 1991.

292 As discussed above, Mr. Roy had been through a grievance in March and because of this grievance, he had decided to lay charges under the Union Constitution against Mr. St. Louis, Mr. Sgambaro and Mr. Rolseth. Mr. Roy left for his father's home in Ontario on April 22, 1991, and stopped in Edmonton that day to drop off his charges at the Local 424 office.

293 At the end of this shift on Tuesday, April 23rd Mr. Dezentje and Mr. Dombrosky approached the time card station and were told they were laid-off and should see Mr. Fradette in the lunchroom. There were others on the crew there as well. The whole crew went to Mr. Fradette's office where he told them they were all laid off due to a shortage of work. Mr. Dezentje says Mr. Fradette told them Ivan Westby had said there was no work. Mr. Dezentje protested that he must mean leave of absence and Mr. Fradette said "no - you're laid off". Mr. Fradette had cheques for them all and asked them to sign lay-off forms, which Mr. Dombrosky and Mr. Dezentje refused to do. They were the only ones on the crew who had more than one year's service. The Catalytic layoff form lists five employees for layoff that day and is signed by Tony Fullwood and Rolly LaBossiere (Exhibit 24).

294 Mr. Dombrosky and Mr. Dezentje each say this is the first time they have ever been involuntarily laid-off without being given the option of a leave of absence. For long-term employees like themselves they always got a leave of absence offered for up to 60 days until work was available.

295 Mr. Fradette says on the day of the layoff he came in at 5:30 and met with Tony Fullwood who was working the other shift. He says Fullwood told him the crew was going to be laid off that night. Mr. Fradette says the information came from Ivan Westby via Fullwood, but that he never met personally with Westby. He says he cannot recall meeting with Mr. Dombrosky or Mr. Dezentje that night, but he may have talked to them before they left. Mr. Fradette says he had asked about Mr. Roy, but had been told that Labour Relations would look after getting in touch with him.

296 Mr. Dezentje says they did not ask for a job steward at the time, nor did they try to call Mr. Bendfeld, although it was 7:30 at night. They just packed up their tools and went home.

297 Mr. Dezentje says the next day he put his name in at the Union hiring hall and went on the job list. He learned of calls for work by Catalytic on May 5th and May 16th, but did not respond on either call. His explanation was that, if sent back to Catalytic it would probably just be for a short stretch until he was laid off again. He suggested this was because the same "mine clique" was still in place, referring to Mr. Fradette, Mr. Sgambaro, Mr. Rolseth and others with whom the three complainants felt themselves in conflict.

298 Mr. Roy arrived in Ontario on the night of April 24th and decided to phone Mr. Ian McColm who was looking after his house for him in Fort McMurray. Mr. McColm told him that he had been laid off and that Mr. McColm had his separation slip.

299 Mr. Dezentje and Mr. Dombrosky contacted Mr. Bendfeld to file a grievance the day after their layoff. Mr. Roy waited until he got back to Fort McMurray to try to sort things out.

300 On May 13th after he arrived back, Mr. Roy spoke with Ivan Westby about his being laid off rather than being given a leave of absence. He says Mr. Westby said "too bad - you were working on a shutdown and at the end of the job we laid you off." He said this was a right they [Catalytic] could exercise under the leave of absence policy because "we didn't know then that we would need additional staff." Mr. Roy said to Mr. Westby that if they would consider rehiring him he "would change his ways." Mr. Roy says he felt kind of lost because he had never experienced a lay-off before. He says he said to Mr. Westby "you win the battle but you lose the war" to which he says Mr. Westby replied something like "yes, you're right on that". By way of explanation, Mr. Roy said that they had many discussions about labour fairness on the job site. He gave as an example a complaint he had about waiting too long for the bus because of Mr. Rolseth's hours of work, as a result of which Mr. Roy had demanded a cab service. This created a sore spot which the Union Business Manager and Business Agent had to resolve. Mr. Roy expressed the view that employees who stand on principle in such circumstances get branded as problem employees.

6. Mr. Bendfeld's handling of the grievances

301 As the local business agent for Local 424, Mr. Bendfeld was the person responsible for handling grievances under the GPC agreement at the initial level. It was to Mr. Bendfeld that the grievors turned to file their grievances. This occurred on April 25, 1991, in the case of Mr. Dezentje and Mr. Dombrosky, and on May 13th in the case of Mr. Roy.

302 Mr. Bendfeld kept records of his involvement and succeeded in staying focussed on the issues in dispute in these three grievances. He produced a chronology of events from his files, recorded in the officer's report, which we accept as accurate.

303 Mr. Dezentje says he called Mr. Bendfeld and arranged to meet him at 9:30 on April 25,

1991. Mr. Dombrosky says he and Mr. Dezentje went in to see Mr. Bendfeld and explained their situation to him. They told Mr. Bendfeld that, two hours after they left the site, two other electricians were assigned to finish the work they were on. Mr. Dezentje says he did not tell Mr. Bendfeld that Mr. Fradette had told them Mr. Westby had said there was no more work.

304 Mr. Bendfeld said he would go to the site to check things out and volunteered to write out a grievance for the two of them. Mr. Dombrosky told Mr. Bendfeld that they would write out the grievance themselves - just to give them the form and they would fill it in.

305 Mr. Bendfeld took notes of this first meeting (Exhibit 12, Tab 12) which show that he had a thorough discussion with them and took down their concerns.

306 He says they were alleging that their layoff was discriminatory and that everyone with more than one year of service was entitled to a leave of absence. They said electricians and other trades had this entitlement. Also, electricians with less than one year's service had been kept on Catalytic's payroll. He says they raised three points:

- They were discriminated against because they had filed a grievance in 1990 and Catalytic was getting back at them by a layoff.
- Article 11:500 did not allow transfers and, after their layoff, electricians from a different area of the plant were transferred to the area they were in.
- Their supervisor, John Fradette "had it in for them."

307 Mr. Dezentje says that at the end of the meeting Mr. Bendfeld said he would investigate and get back to them. Despite this, the next day, April 26, 1991, Mr. Dezentje and Mr. Dombrosky wrote directly to Mr. Bob Lynn, the Union Business Manager, bypassing Mr. Bendfeld, enclosing a draft grievance they had written themselves.

308 In that letter (Exhibit 1, Tab 9), they raise three points:

- The layoff was discriminatory because other electricians, including Nolan and Amyot, were offered leaves of absence while they were denied that option, contrary to the GPC agreement.
- The layoff was contrary to section 11:500 because two other electricians had been transferred in to do their work: Brad Clearwater and Paul Skrlj.
- Therefore, they conclude, the layoffs were a retaliation from Catalytic because of their filing their (partly settled) October 19, 1990 grievances.

309 What is significantly absent from this document is any suggestion that their dispute with Mr. Fradette or others in the Union had influenced their layoff.

310 Also on April 26, 1991, Mr. Bendfeld went to the Syncrude site and met with Rolly LaBossiere - Site Labour Relations Manager, Pat Synnott - Site Manager, Ivan Westby - Field

Superintendent, and Doug Till - Job Steward.

311 Mr. Bendfeld says he also met that same day with Mr. Fredette in his role as a Supervisor for Catalytic, not as Unit 3 Chair. He asked Mr. Fradette if he was the one who decided to lay-off Mr. Dezentje and Mr. Dombrosky. Mr. Fradette said no, that it had come from the main office where Messrs. Synnott and Westby worked. Mr. Bendfeld asked Mr. Fradette whether he had asked Mr. Dombrosky and Mr. Dezentje to sign a layoff form. Mr. Fradette replied that he recalled nothing about a form. While he cannot recall saying it was a grievance, Mr. Bendfeld says he was dealing with it as such. Mr. Bendfeld says that responsibility for grievances lies with the business agents and business manager, and does not concern the Unit officers. Mr. Bendfeld cannot recall if he spoke about Mr. Roy's layoff, or that of other employees such as Amyot or Nolan.

312 Mr. Dezentje and Mr. Dombrosky met with Mr. Bendfeld on April 29, 1991, when he told them of the reply he had received from the Employer. Mr. Bendfeld's notes and recollection show that by April 29 the Employer had given him a specific and detailed reply to the grievors' issues (Exhibit 12, Tab 13). Their reply was:

- Article 11:500 only applied site to site.
- The changes to the leave of absence policy did not involve any change to the requirement of mutual consent.
- There was no discrimination due to the 1990 grievance; the lay-off was due only to a shortage of work, with none anticipated within the next 60 days.
- Any rotation or leave of absence is initiated by the Supervisor; it is the Employer's option whether to consider any employee for leave and management's rights to determine who is selected for a lay-off.

313 Mr. Bendfeld's notes indicate also that Catalytic was saying there were others with more than one year of service who were laid off rather than offered leave of absence (including other trades).

314 Neither complainant accepted the Employer's reply, and they both wished to file grievances. They chose to compose the grievances themselves, which reflected the same points set out in their letter to Mr. Lynn. Mr. Dezentje says he wrote out the grievance, then discussed it with Mr. Bendfeld asking if it was good enough. Mr. Dezentje says Mr. Bendfeld said it was ok.

315 These grievances each read:

> I was unjustly laid-off on April 23, 1991 on the following grounds:
>
> 1. I was displaced from employment contrary to Article 11:500.
> 2. I was unlawfully discriminated against when the employer selected me for lay-off for the following reasons:

- I had filed a grievance in the past (October 1990)
- I was not given the same rights as all other employees under the employer's Leave of Absence Policy

I request reinstatement with full redress.

316 Mr. Dombrosky was cross-examined on the wording of the grievance and as to the points he and Mr. Dezentje were raising. The two aspects they were raising were:

1. That clause 11.500 of the collective agreement had been breached.
2. That they should have been given a leave of absence under the Catalytic leave of absence policy, which they viewed as part of the collective agreement.

317 The remedy they were seeking was to be given a leave of absence and to be paid the hours given to the two employees who replaced them. Mr. Bendfeld sent the grievances to the Employer.

318 We find that Mr. Dombrosky and Mr. Dezentje deliberately decided to write up the grievance themselves and rejected Mr. Bendfeld's offer to write up the grievance for them. They simply preferred to go it alone. They also chose for themselves which points to include and which points to exclude from the grievance form. We find that they knew of other points they might argue. They had raised additional points with Mr. Bendfeld in their first meeting with him, and subsequently described them in detail in correspondence to others. Nonetheless, acting on their own and notwithstanding the availability of Union advice, they limited their grievance to the items set out in the document. Of particular significance is the omission of any reference to Mr. Fradette being involved in the decision to layoff.

319 Their filing the grievances prompted internal inquiries within Catalytic. On April 30th, Mr. Westby, the Field Superintendent, wrote a memo to Rolly LaBossiere setting out Catalytic's position on the lay-offs. This internal memo reads:

> As we are all aware of, the workload will be taking a significant downturn over the next several months. I have taken a look at the workload over the next three (3) months and if we feel we cannot place our employees in this time frame we are laying them off in fairness to them. Unemployment insurance regulations state, that a temporary lay-off is a maximum of 60 days.
>
> One of the jobs we were preparing for Shutdown was Plant 7-2 reliability program which is now complete as far as we can go until the next Shutdown in 1992. This is the job the two above mentioned employees had been assigned to

since October 1990.

Kevin Nolan and Rene Amyott were given a leave of absence, as the jobs they were working on will be resurrected when Shutdown is complete.

In regards to other employees taking their place, Article 11:500 does not apply as this article applies to different worksites and the S.C.L. site hires as one site.

Brad Clearwater and Paul Skrlj were sent from other areas of the plant to cover work in 8-2 shutdown for one shift; as there was a breakdown in communication by the dayshift Superintendent who thought John Chris and Ron Neufeld were due to return and in fact did not return until the following night from days off.

It may be worth noting that we laid off over 600 employees in the last two (2) weeks.

320 On May 1st, without asking or telling Mr. Bendfeld, Mr. Dezentje and Mr. Dombrosky wrote to the Employment Standards Branch of Alberta Labour and the Alberta Human Rights Commission, in each case complaining of a discriminatory lay-off. (Exhibit 1-11 and 1-12)

321 Mr. Bendfeld says he spoke to Mr. Dezentje and Mr. Dombrosky on May 3, 1991. They insisted that a meeting be held at Step II of the grievance procedure and that they be present. Mr. Dezentje told Mr. Bendfeld he had an expert's opinion that the grievors had been discriminated against, but refused to divulge who the expert was, saying "it would come out in Court."

322 Mr. Bendfeld explored the Step II meeting issue as described above. That same day Mr. Dombrosky and Mr. Dezentje wrote to the Local in Edmonton complaining that the failure to have a job steward on the night shift when they were laid off lost them the opportunity to have a Step I meeting.

323 On May 5, 1991, Mr.Dombrosky and Mr. Dezentje wrote to Mr. Blakely, the lawyer they had consulted the previous fall, saying their lay-off made it urgent to identify the two front-line supervisors they say defamed them. This letter blames Mr. Fradette for their layoff. It asks Mr. Blakely to sue Russell Hillier to get disclosure of the two supervisors involved (one of whom they say is Mr. Fradette) and to recover their lost wages, costs and damages for mental stress. This letter shows:

- They were still taking legal advice independent of and undisclosed to Mr. Bendfeld.

- They were thinking at the time they would proceed against Mr. Fradette and others by lawsuit since they had been unable to pursue their complaints of slander under the collective agreement.
- It was still their intention to sue Mr. Hillier, an employee of Catalytic.

324 On May 6th, again without going through Mr. Bendfeld, Mr. Dombrosky and Mr. Dezentje wrote to IBEW International Vice-President Ken Woods complaining about the lack of face-to-face meetings at Steps I and II of the grievance procedure. They also copied the letter to the President and Recording Secretary of Local 424 in Edmonton. At the same time they wrote to the Local Union office asking for copies of all motions within the local dealing with John Fradette's dual function.

325 Mr. Bendfeld says Mr. Dezentje called him on May 6, 1991, saying he had talked to a lawyer and a politician (apparently local MLA Norm Weiss) and they had both told him there was discrimination.

326 On May 9, 1991, Mr. Bendfeld met further with Mr. Rolly LaBossiere about the grievances. Mr. Bendfeld argued that management had a duty to apply the leave of absence provision fairly and to respect the grievors' length of service. He put forward the request for a meeting and was told that Catalytic was not prepared to have a face-to-face meeting with the grievors. Mr. Bendfeld communicated this to the grievors. He must have told them by this point that the next step would involve Mr. Warchow. They say as much in a letter to him dated May 21, 1991, when they sent Mr. Warchow copies of their complaints to Alberta Labour and the Alberta Human Rights Commission.

327 On May 10th, Mr. Dezentje and Mr. Dombrosky took their grievances up with their Local MLA, sending him copies of their correspondence a few days later.

328 On May 13, 1991, Mr. Roy called Mr. Bendfeld. He told him he had returned from a compassionate leave, had gone out to work and found out he had been laid off. At the same time he found out Catalytic was indoctrinating ten new hires. Mr. Bendfeld says Mr. Roy told him that Mr. LaBossiere had said if Tony Fulwood would rescind the layoff, they would take Mr. Roy back. Mr. Roy said Mr. Fulwood could not be found, but that Mr. Ivan Westby had said that the layoff stands. The next day Mr. Roy attended at Mr. Bendfeld's office.

329 On May 16, 1991, Mr. Bendfeld took up Mr. Roy's grievance with Pat Synnott and Willard Wolansky at the site. He says their response was the same as for the other two grievors. Again, they refused to have a face-to-face meeting. That same day Mr. Warchow faxed Mr. Bendfeld. He had been asked by V-P Ken Woods to get information so Woods could reply to the complainants' inquiry about the Step I and Step II meetings.

330 On May 17, 1991, Mr. Bendfeld called Mr. Warchow and they discussed the Step II issue. Mr. Warchow gave the same advice as Mr. Smillie had given. Later that day Mr. Roy came into Mr. Bendfeld's office to file the formal grievance. Mr. Roy said he wanted to type the grievance himself,

so he left with the handwritten draft Mr. Bendfeld had prepared. He returned two hours later, having revised Mr. Bendfeld's draft to refer to the project agreement rather than the leave of absence policy, along with some other minor changes. Mr. Bendfeld's view was that Catalytic did not, in any event, stand on technical issues, so he sent Mr.Roy's typed grievance on to Catalytic with a copy to Mr. Warchow. The grievance read as follows (Exhibit 1, Tab 46):

> I was unjustly laid off on April 24, 1991. I was unlawfully discriminated against when the employer selected for lay-offs for the following reasons:
>
> I was on an approved compassionate leave of absence at the time.
>
> I was not given the same rights as all other employees under the G.P.C. and the company's leave of absence project agreement.
>
> I was not dealt with fairly.
>
> I request reinstatement with full redress.

331 As with Mr. Dombrosky and Mr. Dezentje, we find Mr. Roy preferred to finalize the document himself rather than rely upon Mr. Bendfeld's advice.

332 Over the next few days Mr. Roy also wrote extensive letters to Mr. Warchow (May 21, 23 and 30). In those letters he set out a long history of workplace difficulties involving the Employer and many of his colleagues, including people like Mr. Fradette who acted on occasion in a supervisory capacity.

333 One item Mr. Roy raises in this correspondence that we find significant relates to the base crew. Mr. Roy says:

> After being with the company for 12 years I was not sent a letter giving me the opportunity to join base crew. As my seniority number is 06-01 I know the labour relations explained that the people that will be asked will not be based on seniority but there is nothing on my file or past record that would indicate to me why I would not be the first one asked as an electrician. For information all electricians turn down base crew but that is beside the point.

334 The Employer's formal reply to the grievances filed by Mr. Dezentje and Mr. Dombrosky is contained in a letter from Mr. LaBossiere dated May 28, 1991, directed to Mr. Bendfeld. It was received on June 3rd and reads (Exhibit 1, Tab 18):

> In reply to the grievance filed by Mr. Jan Dezentje and Mr. G. Dombrosky, please note.
>
> (1) Article 11.500 refers specifically to transfer of employees from project to project i.e. Suncor to Syncrude, or Dow Chemical to Suncor, and does not apply to this situation.
> (2) The Leave of Absence Policy is applied when:
>
> (a) the company feels there will be work available (within the 60 day period) to bring the laid-off employees back to and;
> (b) if this is the situation then only by mutual consent of both parties.
>
> At the same time of lay-off there was no forecast of work available within the sixty (60) day period.
>
> It is our belief that the actions taken in the lay-off of Mr. Dezentje and Mr. Dombrosky were justified and the grievance is denied.
>
> If we do not hear back from you by June 14, 1991 we will consider the matter concluded.

335 Mr. Bendfeld sent this on to Mr. Warchow, who was already pursuing the issue at the next level.

336 On June 10th, the Union received a similar formal reply to Mr. Roy's grievance dated June 3, 1991 saying, in part (Exhibit 1, Tab 48):

> Mr. Roy was laid-off during reduction in work force.
>
> That Mr. Roy was on an approved leave of absence did not guarantee employment but rather that if there were not reductions in work force during his leave he would be able to return to site.
>
> The leave of absence policy states that a shortage of work leave of absence is available by MUTUAL consent. As we did not foresee work being available over the next sixty days, it was in the employee's best interest to allow him to seek

> work elsewhere. We believe we dealt with Mr. Roy in a fair and impartial manner and therefore the grievance is denied.
>
> Should we not hear from you by June 19, 1991 we will consider the matter concluded.

337 Mr. Bendfeld forwarded this reply to Mr. Warchow. He did not worry about the deadline dates in either letter since Mr. Warchow was already dealing with the matter at the next level. He says he also met with Mr. Roy telling him of the reply and that it was to go forward to Mr. Warchow.

338 On June 6, 1991, Mr. Bendfeld sent Mr. Warchow a letter formally conveying the Dombrosky and Dezentje grievances to him for processing at Step III. This letter provides, in part:

> We see in favour of the grievance the following:
>
> The grievors length of service, clean record of employment, the employer's past practice of offering a leave of absence to the grievors, the employers obligation to conduct themselves in a fair manner when exercising management's rights under the Collective Agreements, within two hours of the layoff the work the grievors were performing was assigned to other employees from another part of the plant.
>
> The grievors allege that due to the grievance they filed in October 1990, Catalytic is retaliating by way of this layoff. They further allege that John Fradette as a supervisor for Catalytic influenced the layoff because of inner Union politics. Catalytic denies this saying a shortage of work is the only reason and the decision to layoff the grievors and the other five employees on the temporary power crew was made by Ivan Westby. In questioning John Fradette, he stated the decision to layoff the temporary power crew came down from the main office and he then informed the crew.
>
> Regarding the Leave of Absence issue, Catalytic says no electrician was offered same during this time period. The grievors allege if John Fradette would not have been in the area they would have been offered an LOA as they had been in the past by other supervisors. As stated above Ivan Westby claims full responsibility for the layoff decision.

> Catalytic argues they have the unfettered right to select employees for layoff or Leave of Absence. Under arbitration jurisprudence there is good argument using the Doctrine of Fairness to say the employer must exercise their rights in a fair manner. Considering the grievors length of service, clean record and the past practice of offering a LOA, the employer in this case did not act in fairness. If there had been at issue only a shortage of work there would not have been a continuation of the temporary work within hours of the layoff.

339 Mr. Bendfeld included with this letter a series of arbitration decisions in support of his argument that the Employer owed the employees a duty of reasonableness in its application of the leave of absence policy. He enclosed the grievances, the reply, a leave of absence policy and Mr. Dombrosky and Dezentje's letter of April 26, 1991 to Business Manager Bob Lynn. Mr. Bendfeld gave Mr. Dombrosky and Mr. Dezentje a copy of this letter on June 10th.

340 Mr. Bendfeld copied Mr. Pheasey and Mr. LaBossiere of Catalytic with his letter to Warchow. This is significant in that it indicated an advance to Step III within the specified time limits.

341 On June 12, 1991, Mr. Bendfeld wrote to Mr. Dezentje telling him he had received a written reply from Catalytic denying the grievance (Exhibit 1 Tab 26). The same letter repeats the advice that the matter has gone to Bill Warchow for further resolution. Mr. Dezentje says he never received the Employer's reply. However, he was clearly notified by this letter that it had been received.

342 On June 15, 1991, Mr. Dezentje and Mr. Dombrosky wrote to Mr. Warchow complaining that they had no reply about their grievance, asking him to proceed to Step III on their behalf. In the same letter they complained about not being present at Step II, and sent copies of their letter to Alberta Labour, Alberta Human Rights and International Vice-President Ken Woods.

343 Mr. Dombrosky was not aware on June 15, 1991 that Mr. Warchow was already meeting with Catalytic officials. He did know from Mr. Bendfeld, however, that it had been turned over to Mr. Warchow, from which he concluded that it had been advanced to Step III.

344 On June 17, 1991, Mr. Bendfeld wrote a letter to Mr. Warchow formally transmitting Mr. Roy's grievance. The letter is similar in form to the one concerning Mr. Dombrosky and Mr. Dezentje. It was also copied to the Employer's representative. It encloses another arbitration decision in support of the reasonableness argument and raises the issue of Mr. Roy having been on compassionate leave.

345 Up until at least June 6, 1991, Mr. Bendfeld was not aware of the variety of letters Mr. Dombrosky and Mr. Dezentje had sent out to various government officials, to Bill Warchow, to Wayne Brazeau, V-P Woods and to the President of Catalytic. Mr. Dezentje says that we "were going down every avenue we could find."

346 Mr. Roy went further and described how the three complainants had met at Mr. Dezentje's house and agreed at Mr. Dezentje's suggestion, that they would conduct a letter writing campaign "to let Jim know we were serious about this ... to put pressure on the Union" and "to keep everyone honest." We find this campaign, like most of the correspondence concerning these matters, was done by the three complainants acting in concert, on the basis of a shared strategy.

347 Within six weeks of April 23rd, one or more of the grievors had written or complained to:

1. Alberta Employment Standards asking for an investigation into Catalytic Maintenance Inc., citing breaches of humanitarian rights and enclosing the October defamation grievances as well as the April grievances (Exhibit 1, Tab 11).
2. The Alberta Human Rights Commission alleging a breach of human rights (unspecified) again asking for an investigation and enclosing the October and April grievances (Exhibit 1, Tab 12).
3. Local 424 of IBEW complaining of the lack of a job steward on April 23rd and complaining about persons acting as stewards without attending a course. A copy of this complaint was also sent to IBEW International Representative Wayne Brazeau (Exhibit 1, Tab 13).
4. IBEW International Vice-President Ken Woods, again with a copy to Wayne Brazeau, complaining about Step 1 and II of the grievance process and bringing in references to the intra-Union charges against Mr. Fradette (Exhibit 1, Tab 14).
5. MLA and Minister of Career Development and Employment Norm Weiss enclosing the Employment Standards complaint (Exhibit 1, Tab 16).
6. Minister of Economic Development Peter Elzinga asking him to "use [his] political influence of [his] elected public office to look into Catalytic's discriminatory lay-off procedures" (Exhibit 1, Tab 19 for Dezentje and Dombrosky and Exhibit 1, Tab 48 for Roy).
7. Mr. W. Coady, the President of Catalytic, complaining of a neglect of equal human rights and raising a series of apparently extraneous complaints and asking to meet with him in person with members of Catalytic's management in Fort McMurray (Exhibit 1, Tab 20).
8. International Vice-President Ken Woods of IBEW laying charges under the IBEW Constitution against John Fradette, again with copies to Wayne Brazeau and enclosing the grievances (Exhibit 1, Tab 21).
9. Alberta's Occupational Health and Safety office, alleging (on behalf of all three complainants) that their lay-offs were due to the fact that over the past year they had reported safety violations (Exhibit 1, Tab 27).
10. The Minister of Labour Elaine McCoy via Minister Elzinga (Exhibit 1, Tab 32).

348 We do not intend to explore all this in depth. However, this correspondence is significant because:

1. The various complaints tended to restate, and in the process sometimes confuse, just what it was they were complaining about. Partly this is because some letters were crafted to trigger each agency's mandate and partly it is because they continually alluded to past events.
2. These letters were often copied to a variety of people, making it unclear exactly who should be doing what.
3. It gave the impression that, far from relying solely on the Union, Mr. Dezentje, Mr. Dombrosky and Mr. Roy were planning and executing their own strategy.

7. Mr. Warchow's dealing with the grievances

349 Mr. Bill Warchow took over the grievances once they reached Step III of the grievance procedure. Mr. Bendfeld sent Mr. Warchow written information, but had earlier telephoned him to let him know the grievances were coming up to his level.

(a) Initial information

350 It appears that Mr. Warchow's involvement began as a result of Mr. Dezentje's and Mr. Dombrosky's May 6, 1991 letter to IBEW Vice-President Ken Woods (Exhibit 1-14) complaining about not being present at Step II. Vice-President Woods sent this on to Mr. Warchow asking for information so he could reply.

351 Mr. Warchow was in hospital until May 15th. The next day he faxed Jim Bendfeld, asking for a call to tell him about Dombrosky's and Dezentje's grievances. He told Bendfeld the two had written to Vice-President Woods asking for an interpretation of the grievance procedure. Mr. Warchow and Mr. Bendfeld then spoke on the phone and Mr. Bendfeld updated Mr. Warchow on the grievances. Mr. Warchow believes he also spoke to Mr. Smillie about the issue and the correspondence concerning an individual's right to be present at Step II.

352 Mr. Warchow received a letter dated May 21 from Mr. Dezentje and Mr. Dombrosky enclosing their grievance, their Employment Standards Complaints and their Alberta Human Rights Complaints. He says he did not reply directly, preferring instead to deal with the Local Union. However, on May 27, 1991, he did send a reporting letter to Vice-President Woods (Exhibit 12, Tab 18) in answer to his earlier inquiry.

353 In that letter he told Vice-President Woods:

- Jim Bendfeld was still awaiting the formal step II reply from the Employer.

- Because Warchow was in hospital when Dezentje and Dombrosky wrote challenging their right to be present, Bendfeld called Smillie to get his interpretation.
- He [Warchow] will decide whether to proceed once the Company's reply is received.

354 Within this letter Mr. Warchow made a few observations that touch on his reaction to these grievances. Of note are the following extracts:

> About any right to be present at Step II:
>
> Many grievances proceed without the grievors presence due to various circumstances and the opportunity for the foremen, who are generally members of the respective unions to be quite frank about details. Often if the grievor is present we find the foreman is not totally upfront for fear the grievor may file changes against him within their structure.

355 This comment suggests that Mr. Warchow was by this point aware, either from Mr. Bendfeld, or the Employer, or both, of concerns from the Employer or the foreman about using Union charges against persons acting in a managerial capacity.

> About the letters to outside agencies
>
> Brothers Dezentje and Dombrosky are not really relying on the grievance procedure under the agreement. Today I received a letter from them enclosing copies of correspondence they forwarded to the Alberta Human Rights Commission and the Alberta Employment Standards. These are dated May 1, 1991 indicating they are taking a shotgun approach with their problems even before the process provided for in the agreement could be completed.
>
> I can only suggest you advise them we have a system in place that has worked for 38 years and it must be adhered under the terms of the agreement. If these Brothers do not have the confidence of this system then they may seek outside assistance after all steps have been complied with.

356 While these comments are clearly critical they are not undeserved. The complainants admit they were using a letter writing campaign to put pressure on the Union and others to meet their demands. By doing so they were making it harder for the Union to deal with the merits of their grievances due to the sheer volume of (often conflicting) side issues.

357 Sometime between May 31st and July 10th, Vice-President Woods appointed another International Representative, Wayne Brazeau, to investigate Mr. Dezentje's and Mr. Dombrosky's complaints about John Fradette. The two apparently met with Mr. Brazeau sometime in June. However, soon after and probably in response to the continuing correspondence, V-P Woods also asked Mr. Warchow to look into the internal union charges, but without telling him that Wayne Brazeau had already been assigned.

358 Mr. Warchow says he received Mr. Bendfeld's letter of June 6, 1991 (Exhibit 1, Tab 25) setting out points and cases in support of the grievors' position. Mr. Warchow also received a copy of Catalytic's reply to Step II, (Exhibit 1, Tab 18) although he cannot recall the date exactly. He believes it was after he returned to Ottawa from Yellowknife on June 23rd. He cannot recall learning of the Employer's June 14th deadline for replies before then. However, this is academic since he had already arranged to meet with the Employer at the Westin Hotel in Edmonton on June 14. On June 9, 1991, Mr. Warchow faxed Mr. Terry Burton (Exhibit 27) confirming an arrangement to meet over the "termination of Dezentje and Dombrosky on April 23, 1991" and the "layoff of Denis J. Roy while on a Compassionate Leave of Absence."

(b) Meeting the Employer on June 14, 1991

359 Mr. Warchow says he met with Mr. Burton and perhaps Mr.Willard Wolanski in his room at the Edmonton Westin on June 14th. They discussed these cases for over an hour. Mr. Warchow says he started out saying these three long-term employees had each filed past grievances and had then been laid off without being offered a leave of absence. He asked if there wasn't something they could do to investigate and get the three of them back to work. He emphasized that Mr. Roy was a 12 year employee who had been on a compassionate leave of absence. Mr. Warchow says Mr. Burton replied that they had a major layoff of 750 men including 150 electricians. Mr. Burton, stationed in Calgary, was not knowledgeable about everything at the site and said he would need to check things. Mr. Warchow says the company brought up the fact that the past track records of the three employees were not good, to which Mr. Warchow says he replied, "he would like to see it in writing". Mr. Warchow asked specifically about Mr. Roy and was told that he should leave Mr. Roy's situation with them because they were going to talk to the on-site supervisors.

360 Mr. Burton, in preparation for the meeting on June 14th with Mr. Warchow, had written a memo to Rolland LaBossiere on June 12, 1991 (Exhibit 12, Tab 19). In that memo he asked a series of questions of Mr. LaBossiere. He does not recall getting a written response. In the memo he asked (among other things) about the circumstances of the layoff, whether there were any disciplinary problems with any of the three, and whether Mr. LaBossiere would be willing to rehire them if work was available, assuming the Union agreed. Mr. Burton's memo makes no mention of the individuals' prior grievances, nor of any concerns about their filing Union charges against other employees. This is an internal Employer memo. This suggests to us that at the point of asking his question, Mr. Burton was not aware of these issues either from within the Company or from Union sources.

361 Mr. Burton gave evidence of the Westin Hotel meeting with Mr. Warchow. He says they discussed the layoff of Mr. Dezentje and Mr. Dombrosky, which, he says, was not a termination since both were eligible for rehire. He recalled the discussion over Mr. Roy, and particularly that he had been laid-off while on compassionate leave. He says Mr. Warchow asked him to show some compassion and convinced him that there was good reason to treat Denis Roy in a different fashion to the other two. Mr. Burton agreed to look at Mr. Roy's position again, although Catalytic had a shortage of work at the time.

362 Mr. Burton does not recall any discussion from any source at the June 14 meeting of Mr. Roy being unlawfully discriminated against because he had filed a grievance.

363 Mr. Burton says he would have had Mr. Dezentje and Mr. Dombrosky's grievances before the June 14 meeting, along with Mr. LaBossiere's reply to Step II (Exhibit 18). That reply was apparently based on Mr. Westby's memo to Mr. LaBossiere of April 30, 1991, quoted above, which was copied to Mr. Burton (Exhibit 12, Tab 14).

364 Mr. Burton says he has known Mr. Westby for years and had no reason to doubt the authenticity of this memo. Mr. Burton says, on June 14th, in respect of Mr. Dezentje and Mr. Dombrosky, he took the position that they were going through a normal layoff, there were no seniority provisions in the agreement, they had been fairly laid off and they could be redispatched by the Union at any time. On the question of Article 11:500, Mr. Burton says this was discussed but that he and Mr. Warchow both knew and agreed that this dealt with transfers between different sites and that it made no sense to say you couldn't transfer a person within a site.

365 Mr. Burton said he could find nowhere in their organization's evidence that the grievors had been discriminated against. He says that on June 14th they had a discussion about the Employer selecting people for layoff, but this was something that happened all the time. His evidence is that such decisions were not made by foremen, but by the Supervisors, probably with the Project Manager being involved.

366 Mr. Burton could not recall whether Mr. Warchow raised with him, on June 14th, the fact that Mr. Dezentje and Mr. Dombrosky had filed a grievance in October, 1990. He could not recall, either, whether it came up as a result of his inquiries of Mr. LaBossiere.

367 He does recall the question being discussed about whether the two were denied leaves of absence. He had looked into the background on this point. It was his position that L.O.A.s were not automatic and were not offered unless there was an expectation of work. He could not recall any specific discussion of the four individuals mentioned in Mr. Westby's memo to Mr. LaBossiere. Mr. Burton's expectation for the Dezentje and Dombrosky grievances, following the June 14th meeting, was that Mr. Warchow would be proceeding with the grievances before the GPC Western grievance subcommittee.

368 Not knowing what Mr. Warchow was doing, Mr. Dezentje and Mr. Dombrosky sent him a

letter dated June 15, 1991, telling him to proceed to Step III and enclosing the grievances and their letters to Alberta Labour and the Human Rights Commission (Exhibit 1 - 28).

369 On June 20th, Mr. LaBossiere of Catalytic sent Mr. Warchow the following letter with enclosed documents (Exhibit 12-22)

> Please find enclosed the following information.
>
> (a) Concerns with Denis Roy from an Electrical Quality Control point of view.
> (b) Work Performance & Workmanship of Denis Roy & Jan Dezentje
> (c) Correspondence to Mr. Ray St. Germain of O.H. & S.
> (d) Rebuttal from Mr. Rick Rankin re: letter to Mr. Ray St. Germain
> (e) Charge against Mr. Sgambaro, Mr. M. St. Louis & Mr. G. Rolseth. Re: Issuing a warning as per the Catalytic Disciplinary Policy.
> (f) Mr. Rolseth's rebuttal to the charges.
>
> NOTE: Mr. Sgambaro, Mr. M. St. Louis and Mr. Rolseth were informed verbally that they were found guilty and are awaiting written confirmation.
>
> In essence the tribunal body is stating that it is not the right of supervision to discipline without fear of unwarranted reprisal through their local union. We are very distressed at this insinuation. It may mean that it would be impractical to have Local 424 electrical supervisors over their fellow member electricians.

370 This letter was obviously written just after the Local Union Trial Board hearings into the complaints brought by Mr. Roy. Therefore, it may well be that the last point had not been brought up at the June 14th meeting. This letter shows quite clearly that the Employer was annoyed at the complainants over their Union charges. They were also expressing concerns about each employee's performance, suggesting that something other than just a lack of work was behind the decision to lay-off the grievors, and to refuse them a leave of absence.

371 Mr. Warchow received this material at his hotel. He does not believe he shared it with Mr. Bendfeld, nor did he send it to the grievors for review.

372 The attached letters were:

(a) A memo from Rick Rankin - Electrical Quality Control Inspector - listing three complaints which overlap with the matters raised by Mr. Rolseth in his memo which was the subject of Mr. Roy's March grievance.
(b) A memo from Catalytics Quality Control Department listing, for Mr. Roy,

the same three items as Mr. Rankin. It also listed three complaints about Mr. Dezentje's work.

(c) A letter that Catalytic wrote to the Occupational Health and Safety Department in reply to a complaint Mr. Dezentje had sent in on June 12, 1991, concerning a hy-potting procedure. In that reply the company said that Mr. Dezentje and Mr. Roy had raised their concerns within the company and they had been resolved satisfactorily in March. Obviously the company felt this complaint unfair given the earlier resolution. The complaint was part of the three complainants' letter writing campaign.

(d) Mr. Rankin's description of the hy-potting issue to which Mr. Dezentje's OH & S complaint related, denying many of the alleged facts.

(e) A copy of the charge Mr. Roy brought under the Union Constitution against Messrs. Sgambaro, St. Louis and Rolseth (this is not actually in the exhibit although referred to in the letter. However, the exhibit does contain other documentation related to Mr. Roy's union charge, in particular, the warning memo Mr. Rolseth wrote out which was withdrawn through the grievance procedure, and documents related to that grievance procedure).

(f) Mr. Rolseth's reply to Mr. Roy's charges as sent to the Union.

373 Initially, it might be thought that the Employer was violating its settlement with Mr. Roy over the March grievance by bringing forward the Rolseth warning which gave rise to the (then settled) grievance. However, while there is some force to this argument, it is diminished by two factors. First, the Employer compiled this information after the layoff decision was made and in response to Mr. Warchow's specific request to give him something in writing to justify the allegation that the employees' job performance was questionable. This material was not put forward to support a just cause termination, just to show why the Employer was not prepared to rescind the layoffs. Second, the materials on this point appear to have come primarily from the documents related to Mr. Roy's charges under the Union Constitution and from the Trial Boards that followed. Having succeeded in having these documents purged from his file, Mr. Roy himself ensured their further use and circulation by making them the subject of these charges. He is at least partially responsible for this resurrection of Mr. Rolseth's complaints.

374 Mr. Burton says that after the June 14 meeting, he put a letter together about Mr. Roy which he faxed off to Mr. Warchow in Montreal. That letter read:

> During our meeting on Friday, June 14, 1991, you indicated that Mr. Roy should be considered for a "leave of absence - shortage of work" rather than a lay-off. Also, as you pointed out, Mr. Roy was on a leave of absence when he was laid-off and should be given consideration relative to a "leave of absence - shortage of work."

> Naturally, it is our company's position that fairness be shown to Mr. Roy and concur with your request that he be given a "leave of absence - shortage of work" conditional upon the following:
>
> (a) Mr. Roy will be brought back to work as soon as a position is available.
> (b) Throughout the following year, there will be quarterly performance reviews with Mr. Roy.
> (c) The grievance which Mr. Roy filed is withdrawn.
>
> Please advise as to the manner in which we should now proceed.

375 Mr. Burton says this letter was faxed to Mr. Warchow in Montreal at 514-328-1618 on June 26, 1991. He produced two similar cover sheets, one stamped "faxed" with the date. We find that this fax was sent from Mr. Burton's office to Mr. Warchow at that number. Mr. Warchow denies receiving the document.

376 Mr. Burton says that he never received any reply to this letter and, despite being in regular touch with Mr. Warchow on other matters, cannot recall any further mention of Mr. Roy. Mr. Burton says the intent of this offer was that, if the proposal was accepted, Mr. Roy would be brought back as soon as possible, without any need to be dispatched by the Union. He thought the offer would settle the grievance.

377 Mr. Warchow's evidence is that he did not receive this fax from the Employer. In fact, he says, he first saw the document in the fall of 1994 or early 1995 during these proceedings. Despite this, Mr. Warchow also says he had several conversations with Mr. Burton about Mr. Roy's grievance following their June 14th meeting and following his July 10th meeting with Mr. Roy in Fort McMurray. Mr. Warchow has no notes of any such calls and ventures that they might have been from phone booths in airports and similar places on the run.

378 The Board has difficulty accepting the proposition that Mr. Warchow never received Mr. Burton's proposal in respect to Mr. Roy. It may be that this letter got misplaced or buried in the blizzard of paper being generated on these matters, much of it from the complainants. We can accept that Mr. Warchow may not have seen this proposal by the time of the July 10-11 meetings in Fort McMurray. However, as will be seen by the correspondence described below, by August 30th, Mr. Warchow wrote to V-P Woods saying he needed "to finalize details about his return". In that same letter he outlines terms of settlement that are clearly based on the concepts outlined in Mr. Burton's letter. He closes with the phrase "failing his rejection of this offer, ..."

379 This leads us to conclude that he must have had this proposal before August 30. It may be that he found it between July 11 and August 30, perhaps when preparing his reporting letter in

response to V-P Wood's inquiry, or perhaps right after his visit to Fort McMurray on July 11th.

380 We prefer Mr. Burton's account of events to that of Mr. Warchow. His evidence throughout was given in a clear straightforward manner and was consistent with the written record and the probabilities of the situation. In contrast, Mr. Warchow's evidence was vague, and failed to explain certain obvious inconsistencies. Even if Mr. Warchow had not received Mr. Burton's letter, what is clear is that, given the way the June 14th meeting left off, Mr. Warchow ought to have followed up on Mr. Burton's promise to give special consideration to Mr. Roy's situation. Mr. Warchow says he continued to negotiate with Mr. Burton. We accept Mr. Burton's evidence that this did not happen, and that no further contact occurred over Mr. Roy's grievance.

381 Mr. Dezentje and Mr. Dombrosky wrote to Mr. Warchow on June 22, 1991 about Mr. Bendfeld's grievance transmittal letter of June 6th (Exhibit 1 - 29). They say, in part:

> Although we agree with some of brother Bendfeld's statement, we deem it necessary to clarify and correct some of his stated interpretation regarding our grievance.
>
> We would like you to take note of the following:
>
> 1. According to brother Bendfeld: "They further allege that John Fradette as a supervisor for Catalytic influenced the lay-off because of inner Union politics."
>
> Our comments:
>
> It seems to us that in making this statement brother Bendfeld exceeded his legal authority in misinterpreting and inaccurately representing our submitted written grievance.
>
> We think we made the points clear in our grievance which we based on factual evidence as: past set precedents in Catalytic's lay-off procedures, and the GPC Agreement and from which we consequently drew our justified conclusion.
>
> NOWHERE did we mention in our grievance "... inner union politics" and we sincerely hope that brother Bendfeld did not base our grievance on these detestable, inaccurate allegations when he solely proceeded with step 2 (two) of

> the grievance procedure at which he denied our presence, although this step clearly specifies otherwise.

382 They then note that, despite the alleged shortage of work, Catalytic called 10 more electricians from the Union hiring hall on each of May 5th and 16th (these are the calls Mr. Dezentje knew of but decided not to apply for). They went on to question how Mr. Westby could single them out for lay-off when they were eligible for the "Leave of Absence Policy as agreed upon and specified in the GPC Agreement." They raise the fact they filed an OH & S complaint (see above) plus had difficulties through their October, 1990 grievance. They go on to say, rather obliquely, that Mr. Westby couldn't have singled them out without "additional persuasive guidance from the company rank overseeing the temporary power file in the shutdown work force." By this they meant Mr. Fradette and others.

383 They then talk about Mr. Fradette's position, suggesting he offered other tradespeople such as Messrs. Nolan and Amyot leaves of absence. They disparage Mr. Bendfeld's saying Mr. Fradette told him the lay-off came from the main office, saying:

> In our opinion it was useless for brother Jim Bendfeld to question brother John Fradette about the above unjust lay-off decision, since it would be plain foolish for the accused (see our filed charges) to admit wrongdoing that could result in a negative outcome on the pending investigation and/or hearing in his actions (of which he is aware).

384 They conclude by saying to Mr. Warchow:

> Please note, that brother Jim Bendfeld in his statement confuses "inner Union politics" partly with our grievance. Brother Bendfeld's alleged undefined "inner Union politics" may have caused the grievors' CHARGES, BUT HAVE DEFINITELY NO BEARING on the unfair discriminatorily lay-offs applied to us which were the main issue and basis of our GRIEVANCE.
>
> Trusting the fine, yet distinguishable line between grievance and charges has been sufficiently defined, ...

385 Mr. Dezentje was examined about what he meant by this letter. He confirmed that he was telling Mr. Warchow to keep the intra-union debate (the subject of the charges) away from the company, and was expressing some irritation at Mr. Bendfeld for bringing up those issues as part of the grievance process.

(c) Meeting with the grievors in Fort McMurray

386 Mr. Warchow arranged through Mr. Bendfeld to meet with the three grievors at the Sawridge

Hotel in Fort McMurray on July 10, 1991. His proposal was to meet with each of them separately. Mr. Warchow says he may have met with the Employer, presumably in Calgary or Edmonton, on his way up to Fort McMurray, but if so no other evidence on this was forthcoming to explain what took place.

387 Before the meeting, Mr. Dezentje and Mr. Dombrosky wrote to Vice-President Woods complaining about Mr. Warchow's proposal to meet with them separately. They argued that they needed to "organize a unanimous, unified strategy together in order to present this grave (to us) issue to Catalytic Maintenance Inc.'s Management and a strong unified union front therefore is of the utmost importance." They ask for an explanation for "this highly irregular approach of dealing with a joint grievance procedure." Mr. Roy apparently wrote a similar letter.

388 They sent these letters to Vice-President Woods, not to Mr. Warchow. They felt going through Mr. Warchow's superior would pressure him into action, whereas it appears only to have served to confuse communication and cause irritation. It shows that even before the meeting, the grievors were taking a confrontational stance vis-à-vis Mr. Warchow.

389 The files Mr. Warchow produced show that he made some preparatory notes for these meetings. Some of this information involved Union dispatch records, apparently obtained from the hiring hall. Other notes appear to be based on Mr. Roy's recent letter to V.P. Woods. These notes show that prior to the meeting Mr. Warchow felt:

- "If there is a valid grievance, there will be a hearing at Step III. If I am convinced the matter can be settled I will pursue it. If the case is weak in nature and substance a decision must be made whether to proceed. The G.P.C. will eventually make the decision and I must be assured I can win it there. If it is a weak case and we lose it, it will be a decision against us and establish jurisprudence for future cases."
- "L.O.A. etc. not in G.P.C. agreement and cannot be grieved as a violation of the agreement"
- Mr. Roy was raising many issues that could not be a subject of Union charges. "If a member is acting in a supervisory capacity and carrying out company duties such as discipline, transfers, layoffs, etc. the member cannot be charged under the constitution as he is performing his duties for the employer." ..."We prefer our members supervise us rather than other tradesmen or managerial types." ..."charges against foremen and supervisors should never be filed. If violations occurred they should [sic] processed through the grievance procedure."... "Members and officers of an L.U. may serve and are encouraged to act in various supervisory position. They cannot be charged under the constitution if they are carrying out employer duties."

390 The three grievors plus Mr. Warchow and Mr. Bendfeld testified about the meeting itself and there is little disagreement between them on the substance of what took place. Mr. Bendfeld took rough notes of the meeting's highlights (Exhibit 12-29). These conform in all material respects to the evidence of the other witnesses. Mr. Warchow also took notes, which he later summarized (Exhibit 12-2(a) for Roy and Exhibit 12 - 3(a) for Dombrosky and Dezentje)

391 The three complainants came to the hotel equipped with a typed "statement of understanding" which set out their demands and conditions about how the meeting was to be conducted. It was signed by all three and read in part:

> We, Gordon Dombrosky and Jan Dezentje are willing to comply with Brother Bill Warchow's request for a meeting, provided the following CONDITIONS are met:
>
> 1. If this meeting concerns STEP THREE of the G.P.C. Agreement grievance procedure, we request that only the following persons should be present:
>
> The person who represents the grievors in STEP THREE of the grievance procedure of said Agreement and the grievors.
>
> 2. If the meeting is to comply with Brother Ken Woods' request to investigate the interpretation of STEP TWO of the grievance procedure of said Agreement by brother Bill Warchow, then the following persons should be present:
>
> (a) The person who is appointed to do the investigation as ordered by Brother Ken Woods (see copy of letter May 28, 1991), Brother Bill Warchow;
> (b) The person who dealt with STEP TWO of the grievance procedure of the said Agreement, Brother Jim Bendfeld;
> (c) All three grievors who were denied their legitimate right to be present at STEP TWO (as specifically stated in the said Agreement) by Brother Jim Bendfeld.
>
> Brother Bill Warchow who is appointed to investigate the interpretation of STEP TWO of the said Agreement can give the exact definition of STEP TWO (See Article 7.102 of G.P.C. Agreements' Grievance Procedure) which all three grievors like to receive in writing.

> We furthermore would like to notify all parties present that this entire meeting will be recorded by each grievor for the sincerity of the records. Copies of the tape(s) will be sent to Brother Ken Woods and are available to all parties involved at retail price (+ GST) of the tape(s).

392 Given their objection to separate meetings, Mr. Warchow decided to meet first with Mr. Roy, and then with Mr. Dombrosky and Mr. Dezentje together.

393 At the outset of the first meeting, Mr. Roy presented this statement. Mr. Warchow refused to meet under such conditions. At the outset, it appears Mr. Roy was confrontational and angry. Mr. Roy eventually agreed to proceed anyway, without a tape recording. Mr. Warchow began by saying he was there to get details on Mr. Roy's grievance, and if there was a grievance under the collective agreement, then he would proceed with it to Step III. Mr. Warchow explained the General President's Agreement and the General President's Committee. They then discussed Mr. Roy's view that he should be present at Step II. Mr. Warchow disagreed with that view. Mr. Roy wanted to discuss his letter to the Human Rights Commission but Mr. Warchow wanted to stick with the grievance.

394 Mr. Roy raised his concern about being laid-off without an option to take a leave of absence. Mr. Warchow explained that there was nothing in the collective agreement about leaves of absence, which were governed by Employer policies. Mr. Roy replied that the agreement changes he had been handed by his job steward referred to a change in the leave of absence policy.

395 Mr. Warchow explained that it had been dealt with in negotiations but that the notes from Mr. Smillie had been distributed for information. Mr. Roy suggested the Employer had to give a leave of absence to everyone if they give it to one person or else it would be breaking the law, because it was discrimination. Mr. Warchow asked what part of the collective agreement had been violated and he replied it was a discriminatory lay-off given the company's practice to keep long-term employees.

396 They then discussed the performance grievance matter involving Mr. Roy. Mr. Roy maintained he was "set up" in extraction and eventually lost his job over it. Mr. Bendfeld expressed surprise because Mr. Roy had accepted the resolution to that earlier grievance. Mr. Warchow then went over with Mr. Roy the correspondence he had received from Mr. LaBossiere of Catalytic after the June 4th meeting, as described above. Mr. Roy denied the substance of the performance allegations made against him, and objected that the Employer was raising the facts behind the written warning and the warning itself, which had been withdrawn. Mr. Bendfeld says he agreed with Mr. Roy that the withdrawn complaints should not exist as far as the Employer was concerned, and said so to Mr. Warchow. Mr. Bendfeld says Mr. Roy asked to see the complaint documents, particularly those from Rick Rankin. Mr. Bendfeld said Mr. Roy asked for copies because he wanted to "charge the S.O.B. for making that statement." He says Mr. Warchow replied that if he

was going to use them for that purpose he wasn't going to give him copies. Mr. Bendfeld said he never actually saw this material either, except in this meeting.

397 All agree there was no mention at this meeting of any offer from the Employer to reinstate Mr. Roy subject to the conditions set out in Mr. Burton's letter of June 24th, 1991.

398 The meeting with Mr. Roy ended at 8:45 p.m. At 9:38 p.m. Mr. Warchow met with Mr. Dezentje and Mr. Dombrosky. Again, Mr. Bendfeld kept notes, although this time far briefer.

399 This meeting too began with a discussion about taping the meeting and their "statement of understanding". After agreeing to stay, they got into a discussion of a right to be present at a Step II meeting. They told Mr. Warchow MLA Norm Weiss and an English Professor disagreed with Mr. Warchow's interpretation of the agreement. They then went on to discuss preparing for the Step III meeting, the steps taken so far and the reasons the grievors felt they should have been given a leave of absence.

400 Mr. Dombrosky says he and Mr. Dezentje discussed the leave of absence policy and their position that the recently negotiated GPC agreement gave them a right to a leave of absence. They produced a document that they said was the agreement and which confirmed their position. Mr. Warchow told them the document they had was probably just Steve Smillie's stray computer notes. In fact, it appears it was the negotiation summary Mr. Smillie prepared for the use of Union business agents to explain what had happened in negotiations. It was clearly not the final agreement nor was it the revised Employer policy. Mr. Dombrosky says they were adamant on their right to a leave of absence. Mr. Dombrosky says Mr. Warchow said to them "I will not take a grievance to Step III unless I can win and I don't feel confident about this one." Mr. Dombrosky says Mr. Warchow did not raise any concern about time limits.

401 Mr. Dombrosky says he told Mr. Warchow that Mr. Brazeau was investigating their charges against Mr. Fradette, which he says quite startled Mr. Warchow. Presumably, this was because he had been assigned to investigate Mr. Roy's charges and had not been told of the earlier assignment of Mr. Dombrosky and Mr. Dezentje's charges to Mr. Brazeau.

402 Mr. Dombrosky says Mr. Warchow did not discuss with him the correspondence Mr. Warchow had received from Mr. LaBossiere at Catalytic, nor did he discuss any concern about his workmanship. Mr. Dezentje confirms the same thing. However, in August they wrote to V-P Woods complaining that while Mr. Warchow had told them of the letters, he had refused to give them copies. We find this later statement to be a more probable account of what actually happened.

403 At the conclusion for this meeting, Mr. Dombrosky believed that Mr. Warchow was going to proceed to Step III even though he thought the grievance lacked substance. The meeting ended at 11:52 p.m.

(d) The July 11th meetings in Fort McMurray

404 The next day, Mr. Warchow and Mr. Bendfeld went to the Syncrude site to investigate. Mr. Bendfeld and Mr. Warchow both say that it was Mr. Warchow who asked Mr. Bendfeld to arrange the meeting, and that Mr. Warchow decided who should be there. Mr. Bendfeld's recollection is that this meeting was to deal with the grievances and the Union charges. Mr. Warchow produced notes (Exhibit 12-4a), apparently digested from his actual notes taken during the meeting. They show a meeting at 9:20 a.m. with John Sgambaro (foreman), Gerry Rolseth, John Fradette (Supervisor) and Doug Till (Steward).

405 The notes show that each of the four individuals in attendance offered comments highly critical of all three grievors. The notes are obviously selective since they only run three pages and the meeting took two hours. Mr. Warchow's evidence is that people came in and out of this meeting.

406 The comments, in summary, suggest performance problems relating to all three employees. Mr. Roy was said to take the view that his long seniority made him immune from discipline. He was also said to have become erratic and unstable over the last few years. Mr. Till, the shop steward offered the view that when the three of them were together, "no common sense applied". He is reported as saying:

> Since those three are gone very few problems have occurred on site. Previously 80% of stewards time spent dealing with their problems and complaints.

407 The notes include comments attributed to Mr. Bendfeld. His evidence is that he did not make this remark himself, but that Mr. Rolseth and Mr. Fradette made the comments, which Mr. Warchow did not hear. He therefore repeated what was said, which apparently lead Mr. Warchow to attribute it to him personally. The comments were:

> Matched up Denis Roy with Jan Dezentje and Gordon Dombrosky for partnership and support. Also no one else wanted to work with them.

408 We accept Mr. Bendfeld's evidence on this point. First, he was called as a witness for the complainants and it was uncontradicted. Second, Mr. Bendfeld had no opportunity to match the three together, while the persons to whom Mr. Bendfeld attributes the comment did.

409 Mr. Warchow says he later met with other individuals at the site including Mr. LaBossiere and Mr. Westby. Mr. Bendfeld says Mr. Warchow met with company officials on his own, without his or Mr. Till's presence, but since he was not present he could provide no further information. This did include a meeting with Pat Synnott. Mr. Warchow has no notes or clear recollections of those meetings.

410 It is quite clear that the persons involved in the one meeting were not a representative sample of those who dealt with the grievors at the plant. The three "management persons" - Fradette, Sgambaro and Rolseth, had all figured in the earlier grievances and were all involved in the grievors' complaints about acting in a managerial capacity while continuing to hold Union office.

Most significantly, all were involved in the charges Denis Roy had laid under the Union constitution, which had recently been heard, resulting in their convictions. However, this is not to say it was illegitimate for Mr. Warchow, assisted by Mr. Bendfeld, to interview these people. By this time, Mr. Warchow had been assigned to look into the internal Union charges as well as the grievances. Even with respect to the grievances, Mr. Warchow needed to know what these people, as potential witnesses for either the Union, or more importantly, for the Employer, might say about the greivors and why they were laid off without being offered a leave of absence.

411 What is clear is that Mr. Warchow took no steps to interview persons who might be well disposed to the complainants and who might provide some support for the position they were taking that the criticism of their work performance was unfounded. Nor did he provide the complainants with any opportunity (then or later) to explain or rebutt what was said about them by others on July 11, 1991.

412 Sometime either during or after the meetings in Fort McMurray, Mr. Warchow asked Mr. Bendfeld to get more information on the number of electricians laid off and the numbers given leaves of absence. Mr. Bendfeld said he approached the Employer for additional information. This required a special computer run which took a little time. The Employer was entirely co-operative in providing this information.

413 On August 3, 1991, Mr. Roy wrote a letter to Vice-President Woods. Again, it is significant that he chose to write to V-P Woods, not Mr. Warchow directly. In that letter he addresses both his grievance and the changes he laid under the Union's constitution. He says the meeting with Mr. Warchow went well "except there are a few things that trouble me." He concludes by saying "so far I'm satisfied with the progress of all matters and I thank you for your time and effort." The respondents suggest this is an indication that he had no real complaint at that point. We do not accept that. First, he did not know of the Employer's June 24th offer or about much else of what had taken place. Second, the letter's seven pages contain a series of points about which he was clearly not satisfied. In particular, he raised the following issues:

1. He objects to the refusal to allow the July 10th meeting to be taped.
2. He objects to not being present at a Step II meeting.
3. He objects to Mr. Warchow's stated position that internal Union charges should not be laid against Union members for activities carried out while temporarily acting in a supervisory capacity.
4. He discussed and asked for copies of the letters the Employer had given to Mr. Warchow.
5. He repeats Mr. Warchow's advise that the Leave of Absence policy is not part of the collective agreement - "I will agree with Brother Warchow that the L.O.A. policy is not under an article in the G.P.C." However, he then goes on to assert that it is discriminatory to give leave to one employee and not to another.

6. He complained that Mr. Warchow had a negative attitude because he said "we have a weak case here", and that it would cost $15,000 to take to arbitration.
7. He brought up Mr. Dezentje and Mr. Dombrosky's October, 1990 grievances. He says the grievors insisted on an apology from the two front line supervisors to prevent them hiding behind Catalytic and the Area Supervisor "... they must be responsible individuals and accountable for their actions. Also, if any of the said Front Line Supervisors happen to be IBEW members they would have to be accountable under our Constitution if it could be proven that they have violated any of the rules ..."
8. He raised the charges against Mr. Fradette and his conflicting positions.

414 On August 5th, Mr. Dezentje and Mr. Dombrosky wrote directly to V-P Woods, also by-passing Mr. Warchow. They complained that Mr. Warchow would not give them a Step II meeting, would not let them tape the meeting, and took the position the Leave of Absence policy was not part of the collective agreement. They also said they had learned at the meeting with Mr. Warchow that management had sent him letters concerning their performance, but that Mr. Warchow had refused to give them copies.

415 On August 6, 1991, Mr. Bendfeld replied to Mr. Warchow's request for further information on the number of employees laid off (Exhibit 12, Tab 6(a)). Mr. Bendfeld had obtained a computer run of all employees who had over one year's service and were terminated since 1987. There were 204 laid off and 179 given shortage of work leave of absences (excluding Christmas leaves). Mr. Bendfeld then reviewed the 36 electricians from that list and found that many of them had volunteered for layoff. He found five electricians who were not offered leaves of absence. He canvassed the other trades and found at least two pipefitters had been laid off without being offered a leave of absence. He found the labourers had unsuccessfully appealed one refusal of a leave of absence to Catalytic. He provided workforce figures from the plant. He ended up expressing the view, apparently related to the reasonableness argument, that the Union would have to show the Employer had a consistent practice of offering a leave of absence to all employees, which was something they could not prove.

416 On August 13th, V-P Woods wrote to Mr. Warchow enclosing correspondence from the grievors. He asked for a written report immediately. The next day he wrote again, enclosing further material received from Denis Roy.

(e) Reporting to Vice-President Woods on August 30th.

417 On August 30, 1991, Mr. Warchow wrote a letter to International Vice-President Woods on his investigation into Mr. Roy's charges. In that letter he made a number of observations that portray quite clearly the view he took of the three grievors, their grievances and their other activities. The letter opened in the following way (Exhibit 12, Tab 9(a)).

> With great difficulty this investigation revealed many problems that surfaced, attempts to resolve same, charges filed against certain members and officers, grievances filed under the G.P.C. Project Maintenance Agreement, letters to anyone and everyone inside and outside the province of Alberta, misinterpretation or misunderstanding of the I.B.E.W. Constitution, G.P.C. agreement and above all, a lot of bad advice followed. On top of that, Brother Roy teamed up with two other members of L.U. 424, Gordon Dombrosky and a Jan. F. Dezentje resulting in each one encouraging the others to proceed on the road to self destruction in the name of fairness and brotherhood. The matter of Dombrosky and Dezentje, although referred to in this report will be the subject of a separate report.

418 Mr. Warchow then reported on the July 10th meeting in Fort McMurray. He summarized, with a fair measure of accuracy, the essence of Mr. Roy's grievance. He then reported on his investigation and negotiations. The following extracts are significant:

> Roy insists he was singled out for inclusion for the lay-off because he had filed a previous grievance. All persons interviewed including foremen, steward and company officials deny this.
>
> ...
>
> The G.P.C. is charged with the administration and interpretation of the agreement, however, I am advised Roy, Dombrosky and Dezentje have gone to outside sources for opinions.
>
> During the arduous hearing Denis Roy sought to bring up many extraneous issues going back long before this matter surfaced. It was most difficult to have him remain on the key problems we were investigating.
>
> When Denis Roy was being disciplined with a verbal warning by Mitch St. Louis over the improperly connected cords and female plugs, he became very abusive and used foul language to his foreman and told him if he had a complaint to put it down in writing. When this request was complied with it, it was placed in his file. (A verbal warning means nothing in an employee's file as no record exists, but a written warning is a recorded document). Thereafter, Roy grieved this written warning and succeeded in having it removed at a later date. However, he claims he was discriminated when he was not given an opportunity to work on some weekend overtime on March 1, 2, and 3. (Copy of a letter from Gerry

Rolseth to L.U. 424 Recording Secretary, Ron Kazakoff enclosed detailing Roy's abusive attitude).

Brother Roy was laid-off on April 24th, while on an approved leave of absence from the company. In late April, the shutdown was coming to an end. In a letter to me from Jim Bendfeld, dated June 17 (copy enclosed) he stated approximately 600 employees were being laid-off. Only after I interviewed most of the foremen and those above that rank and other company officials did I understand why he may have been included in the lay-offs. It seems that nobody wanted him on their crews.

I have obtained copies of reports of poor performances and questionable practices from company representatives of which I enclose for your perusal.

I do have some concern with an employee who has been employed with the same firm for the past 12 years being terminated in such a manner. When I advised the company there must be a breakdown in their communications, they concurred. Apparently Denis Roy was a reliable and conscientious employee. For whatever reason, especially in the past 5 years, he has become a very unstable individual. Other employees have also noticed it. After working in a certain area for a while, when one crew needed additional men, he was the first one that was offered, hoping he would not return. By failing to address the problem at that time they kept shuffling him off to another crew.

Brother Roy, although he did not perform to everyone's satisfaction and has established a poor trade record in recent times should not be penalized to the extent he was. I am currently negotiating with the company to have him return with certain conditions attached. These would include quarterly reviews of his activities, attitude, productivity, and most importantly, his psychological well-being.

I request you keep this last subject confidential, as I must still finalize details about his return, ensure he continues to receive 12% vacation pay (a bonus of 2% for ten year or more employees) and be assured he does not end displacing another employee which would create even greater problems for him on site.

His grievances would also have to be withdrawn, and although he was

> unemployed a short period of time, he went back to work for another firm. It must also be understood he must pay some penalty for his actions and that would have to be his lost time from employment.
>
> Failing his rejection of this offer, I would suggest it proceed to the G.P.C. for resolution, and I doubt there would be any satisfaction for him at that level.

419 On the same day, Mr. Warchow also sent V-P Woods a reporting letter on Mr. Roy's charges against Mr. Fradette. This letter too indicates Mr. Warchow's views on the matters that he was then handling. In that letter (Exhibit 35) he says, in part:

> I should initially state that Denis J. Roy, the charging party was laid off from employment from Catalytic Maintenance Inc. (C.M.I.) at the Syncrude Ltd. project in Fort McMurray, Alberta, on or about April 24, 1991. He has undertaken a major letter writing campaign to the local union, various Alberta government agencies and departments, filed grievances, charges against officers and members as well as challenging various aspects of the G.P.C. agreements, their interpretations and application.
>
> I have spent considerable time interviewing Mr. Roy, officials of Local Union 424, his immediate supervision, job steward and company representatives. Each one presented some insight on this individual.
>
> Brother John Fradette is the Chairman of the Fort McMurray unit of Local Union 424 and sits on the executive board of the local. He is a very strong and dedicated member and strongly believes in the I.B.E.W. Brother Fradette acts as a foreman on the project and during periods of shutdowns or other increased activity, is temporarily elevated to an acting or temporary superintendent. As the work nears completion and the work force is reduced, he returns to his previous capacity.
>
> ...
>
> First, I should indicate Brother Roy has made a shambles of his interpretation of the constitution of the I.B.E.W., misread the G.P.C. agreement relating to transfer of existing employees and has little or no knowledge or application of the constitution.

> He feels that anyone above the rank of journeyman is acting in an adversial position and cannot be acting in the best interests or have his loyalty in the I.B.E.W. We spend considerable time encouraging management to use our members to supervise our people. It is to all parties advantage to have someone from that trade that knows the people and the trade to direct them. After this fiasco surfaced, to prevent further dissention C.M.I. is now considering having other trades supervision over our people. They stated they will not risk putting our I.B.E.W. supervision on charges at the whim of a disgruntled member because they are carrying out company directions or policy.
>
> All issues relating to violations of the constitution I consider a totally incorrect interpretation by Mr. Roy. If these were the circumstances every time an employee was laid off for any reason the foreman or those above that rank could be subject to charges.
>
> ...
>
> I have encountered considerable difficulty with Mr. Roy as to the intent of certain portions of the I.B.E.W. constitution, G.P.C. Project Maintenance Agreement and applications of rules, policies, etc.
>
> The letter dealing with the charges and the wording context is totally different from all his other correspondence. He constantly makes reference to the plaintiff, a term normally used by a legal counsel. He only used this term in these charges and no reference to plaintiff was used prior to or after this letter. I cautiously mentioned this to him during our hearing on July 10th and informed him it looked like a lawyer attempted to put this letter together using the legalistic term of plaintiff, but references of violations of the respective sections of the constitution were totally incorrect and inaccurate. He seemed embarrassed and made no comment.

420 He then went on to recommend dismissing Mr. Roy's charges because of the section number technicality.

421 The next significant event was a hearing before the GPC Committee in November. None of the August 30 correspondence went to either Mr. Bendfeld or to the complainants all of whom continued to hear nothing. After the July 10, 1991, meeting they got no response whatsoever from Mr. Warchow, Mr. Brazeau or Mr. Bendfeld about their grievance until they got letters in May of 1992. They got no notice of the November, 1991 meeting, either before or after it happened.

422 Over this same period Messrs. Dezentje and Dombrosky wrote letters to:

- Mr. Smillie on July 28, 1991 (Exhibit 1, Tab 33) asking for the GPC agreement and raising again the Level II interpretation issue.
- IBEW Vice-President Woods on August 5, 1991 (Exhibit 1, Tab 34) complaining about the information Mr. Warchow gave them on July 10, 1991, and about what he had not given them, particularly the correspondence from Catalytic.
- IBEW Vice-President Woods on November 1, 1991, complaining about lack of progress on the international IBEW complaint which Mr. Dezentje says they believed Mr. Brazeau was still investigating.

(f) The GPC Grievance Committee Hearing into the Dezentje and Dombrosky grievances.

423 On November 12, 1991, Mr. Woods replied to this letter by registered mail (Exhibit 1, Tab 37) saying that:

1. Brazeau had been replaced by Warchow on the international investigation.
2. "Warchow's investigation into that grievance is ongoing and is hoped [sic] a resolve will be forthcoming in the near future."
3. The internal charges against Fradette arise from his acting in a supervisory capacity. "The IBEW takes the position that when a member is acting on behalf of an employer and takes an action that may be considered as a violation of the labour agreement that member is considered an agent of the employer; and the employer should be cited under the grievance procedure in the agreement; the member cannot be cited for violating the IBEW Constitution for taking such action.

424 On November 12, 1991, Vice-President Woods wrote to Mr. Dezentje (Exhibit 1-38) in reply to a letter he had received from him dated November 1, 1991 (Exhibit 1-36). Most of the letter concerns the pairs' attempt to lay International Union charges against Mr. Fradette. However, in that letter he says:

> Warchow's investigation into that grievance is ongoing and is hoped a resolve will be forthcoming in the near future.

425 That same day, V-P Woods wrote to Mr. Warchow sending copies of the correspondence he had received from the three complainants. He says, in his letter (Exhibit 12-12a):

> Those same individuals are involved in a grievance lodged against C.M.I. under the G.P.C. agreement at Fort McMurray.

> Please note from page 2, Roy is wondering why, after six months, he has received no word as to what has happened to his grievance.
>
> Your immediate efforts to resolve these matters are required.

426 The very next day, November 13, 1991, Mr. Warchow sent Mr. Burton of Catalytic the following fax message:

> Just a reminder the G.P.C. Western sub-committee will be hearing the grievances of Jan Dezentje and Gordon Dombrosky on Thursday, November 21, 1991 at the Edmonton Westin Hotel at 1:00 p.m.
>
> Suggest either you be in attendance or have someone knowledgeable present on your behalf.

427 Mr. Bendfeld recalls receiving telephone advice about this, but he was not invited to attend. His evidence, which we accept, was that Mr. Dezentje was in his office one day about then and he began to tell him he had spoken to Bill Warchow. Mr. Dezentje stopped him saying the matter was at Bill Warchow's level and that "I only deal with Bill from here on in."

428 Mr. Warchow took no steps to notify or invite either the grievors or Mr. Bendfeld to this committee meeting. He thinks he may have replied to V-P Woods orally, but that he did not reply to the individuals. He offered no explanation for this.

429 The GPC's Western Grievance Committee met in Edmonton on November 21, 1991. Mr. Dezentje and Mr. Dombrosky were not present, nor did they become aware that it took place until much later.

430 Mr. Burton presented the Employer's position, and Mr. Warchow put forward arguments for Mr. Dezentje and Mr. Dombrosky. Mr. Smillie says that it is not unusual to have a hearing at this level without grievors present, but sometimes they are called if it is important that they tell their story. Mr. Smillie was not present at this meeting. Mr. Burton says Mr. Warchow put the grievors' position to the panel of three members. No one other than Mr. Burton attended from the company.

431 Following that meeting, the Committee delivered the following decision, dated November 29th.

> In delivering our decision we wish to list the three (3) points of contention individually and give our decision on that basis with the intention that this format will be most explanatory for the benefit of the grievors.

We wish to express that in our opinion there was a lengthy delivery of defense put forth by both William Warchow representing the I.B.E.W. members and Terry Burton representing C.M.I.

POINT 1: "I was displaced from employment contrary to Article 11.500." This Article deals with transfer and displacing of employees between projects. It is the Committee's decision in this case that this contention is not applicable in this instance. This would only be applicable if the transfer of employees was from a separate project of a different location than Syncrude, example would be if the transfer was from the Suncor Project, or any other project distinctly separate from the Syncrude site.

POINT 2: "I was unlawfully discriminated against when the Employer selected me for lay-off." The Committee are cognizant the grievors were included in a lay-off of approximately 30 to 40 people and traditional management rights includes the right to terminate employees in a lawful manner. The Committee found no evidence of misconduct by C.M.I. in this matter.

POINT 3: "I was not given the same rights as all other employees under the Company Leave of Absence Policy." The Committee had to take note of the Leave of Absence Policy which has been in existence and has prevailed for the past several years and we state an excerpt from that agreed to policy under Procedure Step 2 concerning an L.O.A. quote "initiated by supervisor on mutual consent of both employee and employer!"

In conclusion it is the unanimous decision of our Committee that this grievance be denied.

(g) The period from December 1991 to May 1992

432 During this period Mr. Burton heard nothing from Mr. Warchow to advance the Dezentje or the Dombrosky matter to Stage IV (arbitration). Nor did he hear or receive anything about the Denis Roy matter. Mr. Bendfeld heard nothing. The complainants heard nothing.

433 Mr. Warchow's evidence of what happened after the November 29th GPC decision is as follows. He says that he felt there was no collective agreement violation they could prove but that

he should keep trying to negotiate. He said he kept negotiating for Mr. Roy and eventually got to a mutually acceptable settlement to bring him back to work. He maintains these negotiations were with Mr. Burton. He says they reached a settlement sometime after April 15, 1992, because he believes it was some time after Mr. Hank Penner left Catalytic. He has no notes or other documentation to support this evidence. He says he did not keep anyone else posted on the progress of these negotiations. In fact his file contained no records of anything between July 1991, and May 1992.

434 Mr. Warchow was examined about the bargaining stance Mr. Burton was allegedly adopting during these discussions. Mr. Warchow could not recall Mr. Burton ever saying they would not take Mr. Roy back to work. He says the company was looking for a suspension, but could not recall Mr. Burton ever saying as much. Mr. Warchow was taken through every point of the settlement allegedly set out in the letter he sent out in May, 1992 (see below). He was unable to identify with any clarity any of the points in this deal that had been the sticking points. He maintains that he wanted Mr. Roy to go back without conditions whereas the Employer wanted quarterly evaluations. He says the Employer was continuing to experience lay-offs and that any return for Mr. Roy prior to May, 1992 would have been a hollow settlement. Again, he was unable to say that it was Catalytic that was raising this concern. He did testify that "I had to be careful about bumping" and that "I wanted to make sure Denis wouldn't be in the next lay-off or the one after."

435 Mr. Warchow's explanation of what happened over Mr. Dombrosky's and Mr. Dezentje's grievance is as follows. He says he got the decision between December 3 and 5, and was disappointed his arguments had not been considered. He said he had difficulty deciding what to do next. He decided he was going to approach Mr. Hank Penner, a Catalytic Vice-President. He says he was hopeful he could get a positive decision from Mr. Penner and this is why he did not communicate the results of the GPC meeting to Mr. Dezentje and Mr. Dombrosky.

436 However, about the same time he says Mr. Penner suffered a serious heart attack after which he left the company. Mr. Penner subsequently died. Mr. Warchow says that he then reactivated his negotiations with Mr. Burton, got a settlement for Mr. Roy and that was the end of it. He says he could not go on to arbitration because, in his view, there was nothing in the collective agreement upon which to base the case. In his view, it was a very weak case. He says he then communicated his conclusion to V-P Woods and to the complainants individually.

437 Mr. Warchow's account of this period is also set out in a letter he sent to V-P Woods in May which included:

> After my attempt on their behalf at the Grievance Sub-Committee to obtain any satisfaction, I decided to appeal their cases directly to Catalytic's Vice President Hank Penner. The Sub-Committee decision was handed down at the annual General Presidents' Committee meetings in December and Mr. Penner agreed to hear this request in the New Year. Upon my return from the Palm Springs

> General Presidents' Committee meetings I was advised Mr. Penner, who had been commuting back and forth to Kuwait seeking work to rebuild and maintain the oil refineries destroyed in that short war, had suffered a heart attack and was hospitalized in Kuwait. He remained there for six weeks before being able to return to Canada. He was still convalescing when a corporate decision was made to retire him rather than have him again face the stresses and travel related to that job and jeopardize him again to another attack. That left me no where to go for any further considerations.

438 On January 6, 1992, Mr. Roy wrote a letter to Mr. Warchow, in a tone far less confrontational than previously, asking about progress on his case and setting out his point of view. He suggested:

> I personally feel that it is time to go on to the next step of the grievance procedure and that is Step IV between the Committee of the Unions signatory to this agreement and Senior Officials of the Company, except if you think you have one more ACE up your sleeve.

439 None of the grievors heard anything from Mr. Warchow until May. On May 1st Mr. Dezentje wrote to the Employment Standards Branch seeking to reactive his claim for severance given the delay in dealing with his grievance. The Employment Standards officer obtained the GPC Committee decision which must mean that she contacted the Union and asked about the status of the grievances.

440 The reason why Mr. Warchow eventually wrote to the three grievors in May of 1992 may have related to the Employment Standards inquiry. More likely, it was because Vice-President Woods was scheduled to meet with the members of Local 424 shortly after that date, as disclosed in Mr. Warchow's reporting letter to Woods dated May 14, 1992.

(h) Reporting to V-P Woods and the three grievors in May 1992

441 Mr. Warchow wrote to Mr. Roy on May 11, 1992. He began by saying "you have been most patient during this period of time while the continuing investigation, interviews and discussions took place." This clearly was meant to imply the delay was caused by some activity. He recited the basic facts. He went on to review the basis on which Mr. Roy felt his grievance should have succeeded. He rejected the argument that a person cannot be laid off while they are on compassionate leave.

442 He then rejected the argument that the lay-off was due to the March 6th grievance, with the sentence:

> Although the evidence indicates there is a connection to the March 6th grievance, I find no evidence and stand convinced the company's decision was made on

events prior to March 6th.

443 He dismissed the alleged denial of a right to a leave of absence on the basis that there was no such right in the agreement. He continued:

> When an employee with at least one year of service is affected by a Shortage of Work, it is fair to say that most if not all were offered an L.O.A. rather than given a lay-off. Early in 1991, the company's forecast of work from the client was not as good as past years. In April at the time of many lay-offs, the forecast over the next sixty days indicated lay-offs would continue and the work force would be reduced to under 300 from 900 before the year end. As a result the company has had to lay-off many long service employees.
>
> Based on available information the L.O.A. was not offered to all other employees and I must dismiss this allegation. I also cannot accept your argument that as long as one person is offered an L.O.A. then all other employees are entitled to the same.

444 Lastly, he dealt with the argument that Mr. Roy had not been dealt with fairly. On this he said:

> The evidence shows the company may have acted improperly when terminating you. Although, the company legitimately reduced their number of employees substantially because of a shortage of work, I believe the company terminated you for other reasons. These reasons go back over approximately one year, were not handled properly by the company although attempts were made and cause me to rescind the lay-off.

445 Mr. Warchow offered no explanation about how he could "rescind the lay-off." He then proceeded to describe two pages of concerns raised by union members and management about Mr. Roy's performance. From this he concluded:

> From all the evidence, discussions and information brought forth, it is my belief you were chosen for lay-off for reasons other than the shortage of work. When such a termination from employment occurs, and is a result of the grievor, it is really a discharge and must be viewed as a disciplinary action. The company intended to discipline you and a lay-off is an improper action to employ. I then must consider whether discharge is appropriate in this case.
>
> It is my belief you are deserving of discipline but discharge is unjust in this case. Progressive discipline is a more proven method to change undesirable and/or

> incorrect behaviour of employees. The company has not shown their responsibility in this case, I therefore decide the following resolve in this grievance:
>
> 1. The discharge (improper lay-off) is substituted with a suspension.
> 2. The grievor be reinstated within 30 days of the date of this decision with full recognition for the 8% vacation pay and his record of employment for seniority indicate continued employment.
> 3. The time off from employment to the time the grievor accepts reinstatement will be treated as suspension without pay.
> 4. The suspension will remain on the grievor's file for a period of two years and will be removed at that time if the grievor has no other justified discipline given to him.
> 5. The company will conduct quarterly evaluations of the grievor.
> 6. The company will issue a revised Record of Employment.

446 The allegations of workplace errors included the incident which gave rise to the written warning that was grieved and expunged. Some of the matters were raised in Mr. LaBossiere's letter to Mr. Warchow of June 24th and thus discussed at the July 10th meeting in Fort McMurray. However, there are other references to opinions and criticisms that obviously came from the July 11th meeting, in relation to which Mr. Roy was given no opportunity to explain or deny.

447 What is quite startling about Mr. Warchow's letter is that it is written as if it was a decision. Mr. Warchow had no authority to order any resolution. At best he had the offer from Mr. Burton dating back to the previous June. Mr. Warchow's "resolve" is, in substance, Mr. Burton's original proposal with the added burden of a year's suspension without pay, but with the advantage of reinstatement which meant the continuation of Mr. Roy's 8% vacation pay rate on account of his long service. Mr. Warchow sent this letter to Mr. Smillie, the local Union, and V-P Woods, as well as to Catalytic.

448 Mr. Warchow's letter of May 13, 1992 to Mr. Dezentje and to Mr. Dombrosky began by apologizing "... it is long overdue and you have been most patient and tolerant to permit it to take this mutual course to seek an acceptable solution." He offered his hospitalization at the outset as a partial excuse. He then went over the Step II meeting issue, and repeated his advice that Article 11:500 only applied between plants. He described the discriminatory lay-off issue as "a little more of a challenge." He advised that the policy was filed with the Committee even though it was not part of the collective agreement. He went on to say:

> It was also understood the LOA's must be mutually agreed to by both parties, were granted if work was anticipated up to sixty days in the future and would not be granted to employees with less than one year of service. At the time of your

> termination of employment the project shutdown was coming to an end and 30 to 40 other electricians were being laid off.

449 He then cited some of the statistical information supplied to him by Mr. Bendfeld, although cast in a light unfavourable to the grievors since it emphasized the total numbers laid off, rather than the very small number of one-year employees laid off instead of being offered a leave of absence.

450 He then told them of the GPC hearing and enclosed the decision. He offered no explanation for why he had not sent it to them earlier. He closed with the explanation of the December - May period quoted above, and ended:

> I have no other options open to me now to pursue these issues. Our attempts to fairly represent you did not bear the results we sought. I can only regretfully recommend that we now abandon these complaints.

451 Inexplicably, he forwarded this letter not only to other Union officials, but also to Mr. Burton at Catalytic.

452 On May 14, 1991, Mr. Warchow wrote a reporting letter to V-P Woods. He had obviously been asked to provide information on several outstanding matters to prepare V-P Woods for a trip to meet with the members of Local 424. In that letter Mr. Warchow describes the grievances and the grievors in the following terms:

> The grievance of Denis J. Roy has been finalized and I include a copy of that report for your information and records. Denis Roy is one of the group of individuals along with Gordon Dombrosky and Jan Dezentje who used a shotgun approach when they filed grievances and complaints. They wrote to anyone and everyone in government, labour, W.C.B. etc., where they thought they may get a sympathetic ear. Denis Roy took the approach he could not be disciplined as he had twelve years of service on that site.
>
> His background and work history as of the last few years had become very unstable for some unknown reasons to us. After this very lengthy and indepth investigation, it revealed the company terminated him rather than apply discipline action. I have ordered the company to reinstate him within thirty (30) days of the date of this report. The time off would have been considered a suspension.
>
> If I would have ordered Roy back sooner, it would have become a useless exercise. There have been a continuing reduction of the work force on the site from a total of 820 Catalytic employees in May 1991 to below 300 by the end of

> the year. That meant Denis Roy would have been included in one of the subsequent lay-offs. As Denis has been employed almost on a regular basis since his lay-off he would risk losing work opportunities if forced to be returned to Syncrude and then laid-off sometime thereafter. Upon his return (if he accepts) he will regain his seniority and be entitled to an extra vacation bonus of 2%.
>
> The cases of Gordon Dombrosky and Jan Dezentje are also enclosed. Although their grievances dealt with a lay-off, they maintained their interpretations of the Agreement are correct and ours are wrong. This matter was given to Steve Smillie to interpret as he was an employer representative some eighteen years ago and he did not agree with the grievors interpretation. It later was taken to a Sub-Committee Grievance Committee where it again was dismissed as an improper interpretation. These two individuals continue to be employed at the Syncrude and Suncor sites, one for another contractor and I believe the other for Catalytic on another dispatch.
>
> The background and work history on these two individuals leave much to be desired. It had reached a point where no foremen wanted them on their work crews and as a result they kept getting bounced around. They went from one gang to another until they no longer were wanted by anyone. Our Steward on site advised me these three grievors took up to 80% of his allotted time. Since they are no longer on site with Catalytic he now has free time on his hands to perform his regular assigned electrical work.

453 This letter did not go to the complainants. Based on these letters, Vice-President Woods then wrote to each of the complainants telling them that now that they had been advised of the disposition of their grievance, "the file in that matter is being closed accordingly."

454 Mr. Roy wrote to Mr. Warchow on June 8, 1992 (Exhibit 1 - Tab 68) telling him his "resolution" was unacceptable and protesting the lack of any opportunity to address the allegations made against him. Mr. Roy promised a more detailed response with new evidence for Mr. Warchow to go over. He also asked to meet with him that month when Mr. Warchow visited Fort McMurray. Neither occurred. Catalytic approached Mr. Roy to ask him if he was coming back to work on the terms proposed by Mr. Warchow. He wrote to them on June 8, 1992, saying they would hear from Mr. Warchow (Exhibit 1-69). Mr. Roy never received any reply from Mr. Warchow or anyone else in the Union.

455 He, along with Mr. Dezentje and Mr. Dombrosky obviously decided thereafter to pursue their remedies under the Labour Relations Code.

8. The Substance of the Grievances

456 We now turn to the substance of the grievances in contrast to the way they were pursued.

457 The grievances raised three issues.

- The meaning and alleged violation of Article 11:500
- Whether the L.O.A. policy was part of the collective agreement
- Whether the lay-off was a termination or an unreasonable application of the Employer's L.O.A. policy.

(a) Article 11:500

458 Clause 11:500 provides:

> 11:500 The Company may transfer employees with special skills or qualifications to projects where forces are being increased. Transfers are not permitted to displace existing employees.

459 Mr. Burton's evidence is that Article 11:500 dealt only with transfers between different projects. He says both he and Warchow knew that. He says it would make no sense within their operation to say the Employer could not transfer employees within the site. Mr. Warchow, Mr. Bendfeld and Mr. Smillie all agreed with that view.

460 The agreement begins with the statement that it applies to work for "the following projects: Syncrude Canada Limited, located at Mildred Lake, Alberta; Suncor Inc., located at Tar Island, Alberta; elsewhere in the agreement project is used in a broad sense - see for example Article 26. Smaller projects within the overall project are just referred to, if at all, as "the job". In Article 4:600 the agreement reads:

> In emergency situations, where the Company has two or more Maintenance Projects within the jurisdiction of the same Local Union, the Company shall have the right to transfer employee [sic] between projects after the Local Union has been given the opportunity to supply and has failed to do so within four hours.

461 In this article, it is quite clear that between projects does not mean individual bits of work (projects) within a site, but between different maintenance contracts.

462 Reading clause 11:500 as part of Article 11, it is clear the whole article is directed at the supply of manpower to the Employer's whole operation at the site (the project in a broad sense). It is not concerned with the movement of persons within the scope of that project. The article's heading is referral of men. Intra-project assignment of work is dealt with in several other articles.

463 We accept the evidence of those most closely involved in the bargaining relationship that they had a common understanding that this provision only applied between sites, not within a single site. While there is some apparent duplication between Article 11 and Article 4 of the agreement, we find the grievors' position was without merit.

464 Even if the grievors were absolutely right in their interpretation of this article, it was not in any event an issue worth pursuing. The uncontradicted evidence is that the two employees who came in to replace them were there only for the rest of one shift. This happened because of a mistake over the date of Mr. Chris' return. At most, the loss the two grievors suffered was pay for part of one shift. This was not an issue worth pursuing beyond the initial levels of the grievance procedure, particularly in the face of a common understanding that the clause had no application in any event.

(b) The Leave of Absence Policy

465 We find it absolutely clear both from the face of the documents and from the history of the negotiations that the Leave of Absence Policy was not and was never intended to be a term and condition of the collective agreement. It was only a policy before negotiations. The settlement documents show that all that was decided in negotiations was that the Employer would make a minor amendment to its policy to deal with the Union's concerns about short term involuntary lay-offs. This change neither elevated the policy to collective agreement status nor changed the provisions upon which the complainants seek to rely.

466 The pre-negotiation policy provided clearly that shortage of work leaves of absence for qualified (i.e. one year or over) employees were to be "... initiated by supervisor on mutual consent of both employee and employer." Nothing in the negotiations that ensued changed the requirement for mutual consent. It was not a right to which the employee was entitled, it was a discretionary benefit that could be allowed if the Employer wished and if the employee agreed. There may be an argument that the Employer had a duty to exercise its discretion fairly (see below) however, nothing changed the fundamental fact that this was not a right vested in the employee and it was not a term of the collective agreement. This is not surprising, since the shortage of work L.O.A. was a device that derogated from the general practice implicit in the hiring hall arrangement that jobs should go to the next person on the list, not be protected for certain employees.

467 The complainants argue that the Leave of Absence policy was the subject of negotiations. That is true, but insufficient to turn it into a right enforceable through the grievance procedure. And it was only the short-term aspect of the policy that was discussed. Nothing touched on the one year's service L.O.A. option.

468 The complainants argue that the negotiated changes to the Leave of Absence policy say the employee will be given the option of a leave of absence. This assumes this created a right in the employee, which we doubt. The negotiating history suggests it was to prevent the Employer forcing the employee to take a leave of absence the Employer had already decided it wanted to impose.

That aside, it only applies for shortages of work estimated to last between 3 and 10 days. We accept the evidence here that the Employer, at the time of the layoff, genuinely expected a longer shortage of work. That section had no application. By 1994 the Employer had recast its Leave of Absence policy again (Exhibit 16), but there is nothing to establish that this was the policy in force at the time of the lay-off in April 1991.

469 We find that, as the complainants were told consistently throughout this process, but refused to accept, there was no merit to this aspect of their grievances.

(c) Was the lay-off a termination or an unreasonable application of the L.O.A. policy?

470 In looking at the merits of the grievances in this area, we need to keep in mind what was included in the scope of the grievance and that which the grievors deliberately excluded.

471 The grievances, as we have found, were written by the grievors themselves, taking their own counsel and without drawing on the advice of their Union business agent even though that advice was available to them. The Dezentje and Dombrosky grievance provided:

> I was unjustly laid off on April 23, 1991 on the following grounds:
>
> 1. I was displaced from employment contrary to article 11:500.
> 2. I was unlawfully discriminated against when the employer selected me for lay-off for the following reasons:
>
> - I had filed a grievance in the past (October 1990)
> - I was not given the same rights as all other employees under the employer's leave of absence policy.

472 This grievance does not allege that the reason for the grievors' being selected for lay-off was due to some form of conspiracy by their Union opponents to get them discharged. It might have been argued in support of the grievors that such opposition, particularly if carried out through Mr. Fradette, was what resulted in the bucket wheel grievance and in their being selected for lay-off or in the decision not to offer them a leave of absence. The grievance, as written, was broad enough to include such grounds. However, Mr. Dezentje and Mr. Dombrosky made it very clear that was not a point they wished to have argued in support of their case. We repeat their letter to Mr. Warchow on the point:

> According to brother Bendfeld: "They further allege that John Fradette as a supervisor for Catalytic influenced the lay-off because of inner Union politics."

> Our comments:
>
> It seems to us that in making this statement brother Bendfeld exceeded his legal authority in misinterpreting and inaccurately representing our submitted written grievance.
>
> We think we made the points clear in our grievance which we based on factual evidence as: past set precedents in Catalytic's lay-off procedures, and the G.P.C. - Agreement and from which we consequently drew our justified conclusion.
>
> NOWHERE did we mention in our grievance "... inner union politics" and we sincerely hope that brother Bendfeld did not base our grievance on these detestable, inaccurate allegations when he solely proceeded with step 2 (two) of the grievance procedure at which he denied our presence, although this step clearly specifies otherwise.
>
> ...
>
> Please note, that brother Jim Bendfeld in his statement confuses "inner Union politics" partly with our grievance. Brother Bendfeld's alleged undefined "inner Union politics" may have caused the grievors' CHARGES, BUT HAVE DEFINITELY NO BEARING on the unfair discriminatorily lay-offs applied to us which were the main issue and basis of our GRIEVANCE.

473 Trusting the fine, yet distinguishable line between grievance and charges has been sufficiently defined, we sign with

474 Mr. Roy was not a signatory to this letter. However, he was making it similarly clear in his own correspondence that he wanted the intra-union matters dealt with through his charges, not through the grievance procedure.

475 Given the complainants' position on this point, they cannot now allege that the Union failed to represent them by not alleging a Fradette based plot that somehow tainted their termination. If there was some merit to this line of attack (and we are not convinced that there was) it was their choice to cut it from the grievance process and pursue it through the Union's Constitution. They cannot now complain of the consequence of that decision.

476 Within these limitations, there are two approaches that could be credibly taken in support of

the complainants. First, the collective agreement does contain a right to grieve unjust termination (Article 7:1000). We accept the proposition that this reference in the grievance procedure is a sufficient foundation for a grievance alleging unjust dismissal, even in the absence of a more explicit "no discipline or discharge except for just cause" provision. See:

> Re: Mississauga Hydro-Electric Commission and International Brotherhood of Electrical Workers, Local 636 (1990), 13 L.A.C. (4th) 103 (Springate)

477 However, that provision exists along side a right in the Employer to lay-off employees for lack of work without regard to seniority. It might be argued that, in these circumstances, the complainants were each laid-off for reasons involving discipline and that the Employer's decision to choose them for lay-off on that basis was tantamount to termination. In our view, such an argument would have been weak with only a modest chance of success. The Employer clearly experienced a shortage of work requiring a large scale lay-off so, leaving aside who was laid off, there is no doubt the lay-offs were, in a general sense, bona fide.

478 In answer to a claim of de facto termination, the Employer could legitimately say (as it was saying) that it was not refusing to rehire the three complainants, they could be redispatched by the Union at any time work was available. The only restraint on this came from the Union's hiring hall rules which meant they would have to wait their turn behind other Local 424 members seeking work. The Employer could also say, with some justification, since no seniority clause or similar restriction applied to require it to pick any one person over any other person for lay-off, it obviously retained the basic management right to keep those employees it felt best suited its business needs. Picking the most suitable employees to keep does not automatically mean you are disciplining those you lay-off.

479 The second approach that could be taken in support of the grievors is very similar to that suggested by Mr. Bendfeld in his letter when he advanced the case to Mr. Warchow. Recognizing that the Leave of Absence policy was discretionary in management, it could be argued that management was nonetheless obliged to exercise its discretion in a reasonable way in deciding who to grant a shortage of work L.O.A. This could be argued to include an obligation not to consider irrelevant factors in the decision-making process.

480 One approach would be to argue on the basis of the principles in KVP Co. Ltd. (1965) 16 L.A.C. 73 (Robinson) that rules and policies unilaterally promulgated by an Employer cannot be applied unreasonably. Brown and Beatty, Canadian Labour Arbitration, 3rd edition summarize the rule's effect as follows at 4:1500:

> ... these criteria may be said to require that any plant rules which are unilaterally promulgated must not be inconsistent with the terms of the collective agreement, that their enforcement not be unreasonable, and that they must be brought to the attention of those intended to be regulated by them.

...

> In applying the standard of reasonableness arbitrators assess the extent to which the rule is necessary to protect the employer's interest in operating the plant, in preserving its property, and generally in carrying out its operations in a reasonably safe, efficient and orderly manner.

481 More frequently, this line of cases is applied when evaluating rules, the breach of which result in discipline, rather than the situation here. Here, the policy purports to give a discretion to extend a benefit to employees who the Employer is otherwise free to lay-off.

482 A second line of cases, which remains controversial, stems from the decisions in Re Metropolitan Toronto Board of Commissioners of Police and the Metropolitan Police Association (1981), 124 D.L.R. (3d) 684 (Ont. C.A.), and Re Council of Printing Industries of Canada and Toronto Printing Pressmen and Assistants Union No. 10 et al (1983), 149 D.L.R. (3d) 53 (Ont. C.A.), leave to appeal to the Supreme Court of Canada refused [1983] 2 S.C.R. vii. That line of argument, put at its best from the complainants' point of view, would hold that:

> ... in exercising their managerial prerogatives, employers must act fairly and reasonably.

See: Brown and Beatty (supra) at 4:2320. This is the section of Brown and Beatty cited by Mr. Bendfeld. However, as the authors, and the cases surrounding this area make clear, in the absence of any specifics in the collective agreement, it is by no means certain a general duty of reasonableness exists over the exercise of a discretion left purely to management. A stronger case can be made that management cannot use its discretion to single out employees for adverse treatment, but even that is unclear in the face of some legitimate business interests, and a management right to lay-off without regard to seniority.

483 We are not here attempting to decide what an arbitrator would determine so much as the scope of arguments available, on these facts, that might have justified the Union proceeding or declining to proceed.

484 Any decision to approach the case on these lines would require an assessment of what led to the decision to lay-off the complainants and to decline to offer them a short-term leave of absence. While we were not hearing this case as arbitrators, we heard much evidence touching on this point, certainly enough to be in as good a position as a Union would be in estimating the chances of success prior to an arbitration.

485 The first theory is that there was simply a lack of work and no sufficient likelihood of more work coming from Syncrude within the next 60 days. This is the line initially taken by the Employer's representatives with Mr. Bendfeld. There is evidence of a significant decline in work

and substantial lay-off. However, some additional work did come along. There would have been little risk from the Employer to simply say to the three grievors there is little prospect of work, but you can stay on lay-off if you wish.

486 The evidence, as produced by Mr. Bendfeld in August 1991, and as brought forward by the complainants, is very strong that the Employer routinely offered such shortage of work L.O.A.'s to employees with over one year's tenure. It was to the Employer and Syncrude's advantage to do so for all the reasons alluded to above during the discussions over the negotiations on the base crew and L.O.A. policy. We accept that, aside from the three complainants, no other electricians with over one year's service had been refused a leave of absence since 1989. We accept that all their contemporaries who qualified were offered the L.O.A. option. We also accept that Mr. Pisotek was offered an L.O.A. even though he did not qualify, although this was later reversed by Mr. LaBossiere because of his short service. However, we also accept Mr. Bendfeld's research that this was not universally the rule across all the trades and there was evidence of a few refusals and an unsuccessful challenge by another Union through the grievance procedure.

487 This is enough to convince us there was something more direct and personal to the complainants involved in the decision to refuse them the opportunity of a leave of absence.

488 The second theory arises from the proximity of Mr. Roy's filing charges to the lay-off. He filed charges in Edmonton on April 22nd, and the lay-offs occurred on April 23rd. Under this theory, we are asked to infer that word of the charges quickly got back to the site, people affected by the charges were angered and a lay-off decision with no option of a leave of absence was the result.

489 Despite the coincidental timing, there was no evidence to indicate that anyone at the site knew of the charges at the time of the lay-off. The complainants believe it was Mr. Fradette and the other Union members who moved into management, particularly during shutdowns, that must have been the decision-makers. It is more likely that those persons would have received word of Mr. Roy's charges. However, we accept Mr. Burton's evidence, supported by others, that no one at Mr. Fradette's level would have had the authority to either lay-off or decide whether to allow an L.O.A. We have clear evidence that other managers authorized the L.O.A.'s by signing the forms. There is nothing to connect their having done so to persons in the Union, or to the fact charges had just been filed.

490 The next theory is that these decisions were a retaliation for the complainants' having filed their earlier grievances, over the bucket wheel incident in the case of Mr. Dombrosky and Mr. Dezentje, and the written warning in the case of Mr. Roy. Our conclusion is that the grievances themselves, and the incidents that gave rise to them, were relatively low-level issues for the Employer. Both grievances were more bother than substance.

491 However, we find that the Employer was upset about the fact the grievors continued to push matters after the grievances were settled. This was particularly so in relation to Mr. Dombrosky and

Mr. Dezentje who threatened to sue their Employer if it did not disclose the identity of the frontline supervisors involved in the bucket wheel incident. Mr. Blakely's letter threatening to sue, if nothing else, brought the complainants to the attention of Catalytic's higher management. Employers generally do not welcome such lawsuits at the instance of their employees. Even before the threatened lawsuit, management representatives had made it clear they were not going to entertain a request for any plant-wide apology, for a face-to-face confrontation, or to expose their supervisory staff to threats of lawsuits.

492 When Mr. Roy made an issue out of his written warning we believe the Employer saw in this the threat of a repetition of what had happened with the other two complainants. We find it is that side aspect of the grievances, not the grievances themselves, that upset management.

493 A fourth alternative is that the Employer was, in any event, trying to cull its workforce. At this time the Employer was actively trying to establish a base crew of people it would treat as semi-permanent employees. It had indicated in negotiations it intended to go ahead with this despite the Union's objection, using powers it already had in the collective agreement (the power to lay-off, the absence of seniority and so on).

494 The Employer had already issued invitations to certain employees to be on the base crew. We know this because Mr. Roy complained of this in one of his letters. Indeed, we sense behind what we view as the complainants' overreaction to their earlier grievances, an underlying concern about their tenure, probably generated by a sense that they would not be among those chosen.

495 The whole of the evidence suggests to us that the Employer was indeed thinking of pulling together the best possible base crew and, because of supervisory and perhaps co-worker sentiments, the complainants were not seen as candidates. This led the complainants to be particularly sensitive to incidents like the bucket wheel incident and, in Mr. Roy's case, the argument over the verbal warning. Their way of handling these matters, threatening to sue or charge co-workers, was counterproductive. It made them less popular and also attracted management's more direct attention.

496 When the time for lay-off came, the Employer, we believe, decided not to offer these individuals leaves of absence. It was not proven before us that Mr. Roy's filing charges precipitated this. However, even if the word of charges did get back, it was only one more instance in a developing pattern of threatening persons acting in a supervisory position. Management has throughout taken responsibility for the decision not to offer leaves of absence. We believe management, and not Union officials like Mr. Fradette and Mr. Rolseth, were responsible for the decision.

497 Assuming this evidence, was there merit to the argument that management's lay-off was tantamount to a termination or that management acted unreasonably in applying its leave of absence policy, denying the benefit to the complainants? Our conclusion is that the case for the complainants was arguable, but not really strong. The strongest point in the complainants' favour is the argument that, by considering in Mr. Roy's case, matters that had been settled through the

grievance procedure, they were acting unreasonably and proceeding on illegitimate considerations. This is dampened somewhat by the fact Mr. Roy resurrected these matters himself when he charged four Union members for what they did while acting in a supervisory capacity. This argument would not apply to Mr. Dezentje and Mr. Dombrosky.

498 We believe there is a substantial likelihood that an arbitrator would say the Employer retained the discretion as to who to lay-off and who to offer a leave of absence. Reviewing all the facts, there were sufficient legitimate (albeit subjective) reasons why the Employer chose not to offer the L.O.A. to the complainants. While this had an unfortunate impact on the complainants, this was more due to the hiring-hall construction-like systems used to staff this operation than to any discriminatory treatment or any violation of the collective agreement's just cause terms.

499 In our view, Mr. Dombrosky and Mr. Dezentje had at best a 1/3 chance of success in arbitration. This is not to say it was not worth pursuing, but it was far from an open and shut case. Success would depend upon an arbitrator finding a duty to apply the leave of absence policy reasonably, or at least not in a way that treated these complainants arbitrarily. The arbitrator would have to go further and find that the company's decision in respect to these grievors was in fact unreasonable or arbitrary, not justified by general concerns about performance of the type expressed to Mr. Warchow in June, or perhaps suitability for continued long-term employment given the switch to a base crew concept. Against this chance one must also weigh the possibility an arbitrator would simply apply the letter of the leave of absence policy itself and rule that the benefit was simply unavailable without mutual consent.

500 Mr. Roy's chances were higher partly because of his long service but more particularly because the Employer, in the June 14th meeting, offered evidence that might be construed as them acting on complaints that had been grieved and settled.

501 It follows from this analysis that we find that of the three issues available under these grievances as framed (and as analyzed by Mr. Bendfeld), the first issue lacked merit, and the second issue was not a collective agreement right. There is no right to complain of a failure of fair representation under s. 151 if the alleged right does not arise from the collective agreement. See:

> Rheal V. Dionne v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W.-Canada) Local 199 [1994] OLRB Rep. 532 at 537.
>
> Rocca and Ontario Catholic Occasional Teachers' Association and Metropolitan Separate School Board, 2 CLRBR (2d) 111 at 126 (OLRB).

502 On the third issue we find there is an arguable case that does arise out of the collective agreement, which could found a grievance, and may therefore be the basis for a finding of a breach under section 151.

9. The duty of fair representation

503 We now return to Section 151:

> 151(1) No trade union or person acting on behalf of a trade union shall deny an employee or former employee who is or was in the bargaining unit the right to be fairly represented by the trade union with respect to his rights under the collective agreement.
>
> (2) Subsection (1) does not render a trade union liable to an employee for financial loss to the employee if
>
> (a) the trade union acted in good faith in representing the employee, or
> (b) the loss was as the result of the employee's own conduct.
>
> (3) When a complaint is made in respect of an alleged denial of fair representation by a trade union under subsection (1), the Board may extend the time for the taking of any step in the grievance procedure under a collective agreement, notwithstanding the expiration of that time, subject to any conditions that the Board may prescribe, if the Board is satisfied that
>
> (a) the denial of fair representation has resulted in loss of employment or substantial amounts of work by the employee or former employee,
> (b) there are reasonable grounds for the extension, and
> (c) the employer will not be substantially prejudiced by the extension, either as a result of an order that the trade union compensate the employer for any financial loss or otherwise.

(a) The nature of the duty under s. 151(1).

504 This is not a case that calls for a detailed analysis of the scope of the duty itself. Its fundamental elements are clearly set out in the leading authorities and in the Board's own Information Bulletin No. 18. The basic principles are set out in this seminal quotation:

> 1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.

2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.
3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.
4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.
5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.

Canadian Merchant Service Guild v. Gagnon et al [1984] C.L.L.C. 14,043 (S.C.C.) at p. 12,188.

505 Cases involving job loss demand a level of attention commensurate with the critical importance such circumstances have for employees.

It goes without saying that a grievance involving a situation where an employee's career is on the line, demands the bargaining agent's full attention and energy, more so than any other type of grievance.

Cloutier and Cartage and Miscellaneous Employees' Union, Local 931 and Cast North America Ltd. [1981] 2 CLRBR 335 at 338.

506 Arbitrary conduct has been defined as follows:

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

Rousseau v. International Brotherhood of Locomotive Engineers and Canadian National Railway Company, 95 CLLC 220-064 at p. 143 ,558 (C.L.R.B.)

507 Failing to get the grievor's side of the case or accepting the assertions of management without offering any meaningful opportunity to reply has frequently been found to violate the duty. See, for example:

> Harry Finley and International Brotherhood of Electrical Workers, System Council No. 33, 91 d.i. 213 (C.L.R.B.) at 222.

> Robert Emand and Canadian Brotherhood of Railway, Transport and General Workers of Canadian National, (1993), 16 C.L.R.B.R. (2d) 59 at 64.

508 Delay and non-communication alone do not necessarily constitute arbitrary treatment.

> ... a lack of communication is not per se a violation of a union's duty of fair representation.

> Young v. United Transportation Union [1989] CLLC 16,034 (C.L.R.B.)

509 Non-communication will not be found to be a breach of the duty of fair representation where it results in no prejudice to the complainant.

> In the instant case, there is no prejudice to the complainant by the fact that she was not notified that her grievance had been dropped. The union, as the Board has concluded, was fully aware of the circumstances of the grievance, had fully considered them, and had determined that there was no merit in pursuing the grievance. There is nothing that the grievor could have done at that stage of the proceedings that would have convinced the union to continue. They had all the facts. There were no new facts that could have been added. They had already advanced with the employer all the arguments that she would have been able to advance.

> Jacqueline Brideau v. Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers Express and Station Employees and Canadian Pacific Ltd. (1986), 12 CLRBR (N.S.) 245 at 268 (CLRB).

510 A Union is not obliged to advocate strenuously on behalf of grievors at every encounter with the Employer.

> Daniel Adusei v. Ontario Nurses' Association [1994] OLRB Rep. 519

511 However, the finding in the Adusei case turned ultimately on the fact that nothing in the Union's delay or lack of communication amounted to purposeful delay or an abandonment of the

grievance.

512 It is not essential that grievors be allowed to be present during settlement discussions. We agree with the sentiment expressed in:

> Dwyer v. United Automobile Aerospace and Agricultural Implement Workers of America U.A.W. and Chrysler Canada Ltd. (1982), OLRB Rep. 1417 at 1424
>
> The complainant contends that his union representatives did not keep him fully informed of the progress of his grievance, and would not permit him to attend the grievance meetings. ... I find, as a fact, that it is not the practice of the union and employer to have the grievor present when the grievance is being discussed with company representatives, nor is that practice unreasonable. Persons familiar with the litigation process will know that settlement discussions can often proceed more productively in the absence of the aggrieved individuals, and this is most likely to have been true in the complainant's case. The complainant was in no mood to compromise or co-operate and his presence would likely have only inflamed the situation.

513 Many cases have reiterated the test in the Gagnon case cited above, declining to second guess a Union's decision about whether or not a case is worth taking on to arbitration. See, for example, the following quote from:

> Giammarino v. International Association of Machinists and Aerospace Workers and Air Canada [1993] d.i. 145 at 148:
>
> Disputes between a member and his union about the proper interpretation of a collective agreement are not a proper foundation for a complaint under section 37. The union may refuse to proceed to arbitration if it disagrees with the interpretation of the agreement that forms the basis of the employee's grievance (Garry Lloyd Ager (1991), 85 di 115 (CLRB no. 875)).
>
> In addition, the Board will not, by virtue of a section 37 application, pass judgement or second-guess the union's decisions not to proceed to arbitration: see Brenda Haley (1981) 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 (CLRB no. 304); and Y.B. Poon et al (1990), 79 di 156; and 90 CLLC 16,011 (CLRB no. 776). Our task is only to ensure that it does not exercise its exclusive authority unfairly, discriminatorily or in bad faith.

See also:

Hlady and Harris v. International Brotherhood of Electrical Workers, Local 1541 and ITT Federal Services Corporation [1993] di 8 at 12.

Coull v. Teamsters Local 880 and Trimac Transportation Services Ltd. (1992), 17 CLRBR (3d) 301 (CLRB).

(b) Was the duty breached in this case?

514 The representation in this case fell into two phases - the period from the filing of the grievances until the end of Step II and events subsequent to Step II. These coincide with the period of Mr. Bendfeld's involvement and the period of Mr. Warchow's involvement.

(i) The process at Mr. Bendfeld's level

515 We have already dealt with two of the criticisms leveled at Mr. Bendfeld, that of failing to ensure there was a job steward on duty at the time of the grievors' lay-off and that of failing to secure a face-to-face meeting at step two of the grievance procedure. We find that the remainder of the complainants' allegations directed at Mr. Bendfeld are also without merit.

516 Mr. Bendfeld's role was primarily in respect to Step II of the grievance procedure. We find that, from the time he was first contacted right through until he handed the matters over to Mr. Warchow, Mr. Bendfeld did a thorough and competent job, providing the grievors with good quality representation. He did so, despite the fact that during this time, the grievors were insisting on their own view of the applicable law and collective agreement interpretation. They were also bypassing Mr. Bendfeld by writing directly to the Local Union office in Edmonton, their lawyer, Mr. Warchow, then Mr. Woods, as well as a variety of other people as part of their letter writing campaign.

517 Mr. Bendfeld took detailed notes of their initial concerns. He went to the plant and conducted an investigation. He analyzed the case well. Realizing that, despite the grievors' assertions, the Leave of Absence policy was not in the collective agreement, he developed his arguments based on a line of cases that suggest that management's application of its policies must be done reasonably. He also explored the possibility that, despite appearing to be a lay-off, in the circumstances it was tantamount to a dismissal without cause.

518 He identified the grievors' concerns that Mr. Fredette and others within the Union might have been involved in the decision to lay the grievors off and to withhold the opportunity for a temporary leave of absence. He explored this with the individuals involved including those higher up in management. He found that those more senior people accepted direct responsibility for the lay-off. His meetings with management produced a reply from the Employer which shows clearly that Mr. Bendfeld had fully advanced the grievors' position, since each point is dealt with in reply.

519 In passing the matter on to Mr. Warchow, Mr. Bendfeld summarized the case and pointed out the features in their favour. We accept Mr. Bendfeld's evidence that, in so doing, he was not expressing a personal view that they had a grievance that would succeed, but instead, was putting their case in its best light. This was appropriate, since the letter went to the Employer, and was at least in that respect a continuing effort to advocate a solution on their behalf. He was not at this point preparing the case in its final form. The matter was still at a fairly preliminary level, yet Mr. Bendfeld did a commendable job of fleshing out the main points that might justify some remedy in arbitration

520 We find no fault with Mr. Bendfeld in terms of the time limits the Employer purported to impose. Mr. Warchow had been advised of the matters and was already meeting with the Employer. Mr. Bendfeld copied the Employer with his letters to Mr. Warchow, indicating an intention to move forward. The time limits were in any event unilaterally imposed by Catalytic and were not provided for in the collective agreement, at least for that level.

521 The complainants argue that they trusted Mr. Bendfeld to identify and advance the appropriate collective agreement articles on their behalf. We do not accept that proposition. Quite the contrary, we find the complainants developed their own very firm views on what to advance and what to exclude. Even at the stage of Mr. Bendfeld's initial dealings, they were expressing firm and argumentative views, many of which we find in retrospect to be misinformed and inaccurate. If there were any flaws in the form of the grievances, then that is the grievors' responsibility. This is something to which section 151(2)(b) would apply. To the extent Mr. Bendfeld saw fit to refer to the grievors' complaints concerning Mr. Fradette, he was unjustifiably criticised in the letter from Mr. Dombrosky and Mr. Dezentje to Mr. Warchow of June 22, 1991.

522 The complainants suggest that it was Mr. Bendfeld, not the Employer, who first refused to allow them to have a face-to-face meeting at Stage II. They point out that Mr. Smillie was consulted on March 6th, whereas Mr. Bendfeld said management did not refuse their request until March 9th.

523 Mr. Bendfeld testified that the Employer first refused a face-to-face meeting and we accept that. Mr. Bendfeld's subsequent chronology supports his evidence that he met with the Employer's representatives on April 26th. We presume that they raised the question at that point, leading to the inquiry of Mr. Smillie. This fits with our broader conclusions that the Employer was upset at the earlier threats to sue and efforts to use the grievance procedure to force confrontations with supervisory persons with whom the complainants had differences.

524 The complainants suggest that Mr. Bendfeld's representation was substandard once he began assisting Mr. Warchow at Step III. They say he failed to advise Mr. Warchow that the complaints of poor workmanship had already been dealt with by the earlier grievances. We accept his evidence that he raised this at the July 10th meetings in Fort McMurray. Also, Mr. Warchow had earlier had details of these grievances. Mr. Warchow appears not to have relied on Mr. Bendfeld on these matters and already had substantial correspondence from the three grievors.

525 We find also that the complainants make too much of the earlier resolutions of their grievances. Mr. Dezentje and Mr. Dombrosky kept pushing their earlier complaints through their grievance and their threatened lawsuit. The Employer agreed, under this pressure, to give them the letter about the quality of their work. However, we suspect from all that had gone before, this was something of a forced affair, written to satisfy the grievors' demands more than as any accurate reflection of the Employer's opinion of their talents. Also, it addressed their work. It did not purport to address what appears to have been the more substantial concern, which is over the grievors' interaction with other employees at the site, their threats of various types of litigation and similar issues that also impact on an Employer's assessment of any employee. Mr. Roy's grievance was settled by the withdrawing of the written warning, but without any acceptance that the underlying observations were invalid.

526 The complainants fault Mr. Bendfeld for setting up the July 11th meeting at the plant site. We accept Mr. Bendfeld's evidence, supported on this point by Mr. Warchow, that it was Mr. Warchow who gave the instructions for this meeting, including the selection of people to attend. Mr. Bendfeld did not fail in his duties on this count.

527 Lastly, the complainants argue that Mr. Bendfeld did nothing to ensure that their grievance was advanced appropriately through the later stages of the grievance procedure. The first answer to this is that Mr. Dezentje agrees he told Mr. Bendfeld that he did not wish to deal through Mr. Bendfeld on these issues, but would deal with Mr. Warchow directly. More importantly, all three complainants, for what appear to be tactical reasons, had long since decided to deal with Mr. Warchow by writing registered letters to his superior, International V-P Woods. Again, rather than relying on the Local Union, the three complainants took charge of their own correspondence, much of which they never shared with Mr. Bendfeld. We find no failure on this account.

(ii) The process at Bill Warchow's level

528 The most striking fact, overall, about the period of Mr. Warchow's stewardship is his failure to communicate with anyone in Fort McMurray about what was going on. At one point Mr. Warchow testified that his responsibility as an International Representative was solely to his boss, V-P Woods. In fact, the evidence suggests that, after July 10-11th in Fort McMurray, the only thing that got Mr. Warchow to respond at all was a letter from Mr. Woods demanding an explanation. This occurred three times.

529 On August 13, 1991, V-P Woods wrote to Mr. Warchow asking for an immediate written reply about Mr. Roy's grievance and charges. Mr. Warchow replied with two letters on August 30th. In those letters Mr. Warchow clearly exaggerated the level of the investigation he had conducted. While some of his criticism of Mr. Roy's conduct (particularly at the July 10th meeting) may have been justified, he most unfairly repeated all he had been told on July 11th without giving Mr. Roy any opportunity to respond first.

530 He told V-P Woods "I am currently negotiating with the company to have him return with

certain conditions attached." He then goes on, quite significantly in our view to say "I request you keep this last subject confidential." The only conclusion we can reach at this point is that Mr. Warchow had by then realized he had an offer from the Employer to which he had not responded for over two months. He had not told Mr. Roy of the offer. No doubt he understood that Mr. Roy would object to that extra time-off being at his expense when he might have returned to work much earlier.

531 That same day, Mr. Warchow also told V-P Woods that Mr. Roy's charges against the four Union members were filed under the wrong section of the Constitution. He implies that the three appeals should be allowed and the charges against Mr. Fradette dismissed. He failed to mention the Trial Board's having dealt with and cured this technical irregularity. This itself is not a breach of the duty of fair representation, but suggests an unfair attitude towards the complaints.

532 On November 12, V-P Woods wrote to Mr. Warchow again, because of letters asking what was going on. He says "your immediate efforts to resolve these matters are required." Mr. Warchow responds by telling Mr. Burton he wants to present Mr. Dezentje and Mr. Dombrosky's grievance at the next scheduled GPC meeting. Mr. Warchow's explanation of why he wanted to advance these two and not Mr. Roy's grievance made very little sense. We conclude that Mr. Warchow found himself still having done nothing in reply to the offer on Mr. Roy. We find that because of that, he decided to proceed on the other two grievances to show V-P Woods at least some progress without having to disclose the fact that Mr. Roy could have gone back to work in June and it was now November.

533 The third letter from V-P Woods to Mr. Warchow came sometime in May of 1992, and led to his final letters. V-P Woods was about to go up to Fort McMurray and Mr. Dezentje was complaining again to Employment Standards. At that point Mr. Warchow decided to finally tell Mr. Dombrosky and Mr. Dezentje that a hearing had been held at Step III, that it had not succeeded, and that he would pursue it no further. This meant he also had to deal with Mr. Roy's situation. Rather than admit the offer was now over 10 months old, had still not been responded to or communicated to Mr. Roy, he wrote up a letter that looked like it was a decision. This decision presents a delicate balance between what Mr. Burton had offered along with what it might be reasonable to expect they would accept (particularly the 8% holiday pay) and what Mr. Roy would insist upon receiving. The gap remained the 10 months of lost pay which Mr. Warchow "awarded" as a suspension.

534 It may be that Mr. Warchow was overwhelmed with the flood of paper from the complainants, with their array of interrelated and in many respects unjustified or insoluble issues. It may be that, after the July 10-11th meetings he simply decided to do nothing for them and stonewalled hoping it would all go away. Whatever the motivation, two things are clear. Mr. Warchow's explanation of what took place over this time-frame lacks credibility and his overall performance, whether through inaction or through a more deliberate refusal to act, falls far short of what could be called fair representation.

535 Mr. Warchow failed to communicate with the complainants. He did nothing to research the legal arguments or take the case beyond the ground work well laid by Mr. Bendfeld. He was less than frank with Vice-President Woods and through him, with the complainants. He did nothing to move things forward except when prompted. His failure to afford the complainants some opportunity to respond to the allegations he was collecting was highly unfair, as was passing them along, in vigourous terms, implying they were the result of his substantial investigative work, which was not true. Whether he believed those allegations to be true or false does not matter, since his "investigation" was seriously flawed.

536 It is argued in defence of Mr. Warchow that, ignoring the problem of communication, what we have is the May, 1992 decision not to pursue three grievances that, objectively, lacked merit. We will address this argument in respect to Mr. Dezentje and Mr. Dombrosky, but it is no defence whatsoever in respect to Mr. Roy.

537 We find it was a clear and blatant breach of the duty of fair representation not to tell Mr. Roy the Employer had made an offer to settle his case. As we noted above, we reject Mr. Warchow's evidence that he did not get the offer. We also find it would equally have been a breach of the duty to fail to follow up with Mr. Burton in a timely way after he expressed a willingness to consider Mr. Roy's special circumstances. If Mr. Warchow's reluctance to tell Mr. Roy stemmed from his fear of putting him back and facing objection from those in the Union who Mr. Roy opposed, then his duty was to tell Mr. Roy that as well (although Mr. Warchow did not seriously advance any such explanation). We accept Mr. Roy's evidence that he would have accepted the offer in June or July 1991, had he been told of its existence.

538 Had Mr. Warchow written to Mr. Dezentje and Mr. Dombrosky after receiving Mr. Bendfeld's additional information and said "I do not think your case is worth pursuing" there would be an arguable case that he would have been acting within the limits of the discretion given to a Union in deciding whether or not to pursue a grievance.

> Assessing the probability that a contract claim would be allowed by an arbitrator is an undertaking that readily lends itself to differences of opinion, due to the vagaries of interpreting contract clauses and of proving facts. For this reason, a labour relations board should not lightly conclude that a bargaining agent's assessment of the merit of a grievance is wrong, let alone caused by perfunctory behaviour. See DeHavilland Aircraft of Canada Ltd. [1979] OLRB Rep. Oct. 933, at para. 17.
>
> Westerman v. CUPE Local 1692 and North York General Hospital [1984] OLRB Rep. 286.

539 This is particularly so given the difficulties surrounding the cases on the reasonable exercise of management's prerogatives. See, for example:

Re York Region Roman Catholic Separate School Board and Ontario English Catholic Teachers' Association (1995), 52 L.A.C. (4th) 285, particularly at 289-294 (an arbitration case).

Rocca and Ontario Catholic Occasional Teachers' Association (1989), 2 CLRBR 111 (OLRB) (a duty of fair representation case).

540 However, Mr. Warchow failed to explain why the line of cases suggested by Mr. Bendfeld was inapplicable. He researched no further and sought no advice. His analysis, if it can be called that, in the letters to Mr. Roy on the one hand and Mr. Dezentje and Mr. Dombrosky on the other, is contradictory. Our conclusion is that Mr. Warchow failed to evaluate these avenues further, deciding instead based on his broader view of the complainants as difficult people, and based on the pressures created by his own inaction.

541 Aside from his view on the law, Mr. Warchow would have also had to show a more objective investigation than he conducted, affording Mr. Dombrosky and Mr. Dezentje some opportunity to reply to what was said against them. However, he did not do that in July, 1991, and nothing improved with the passage of time.

542 Mr. Warchow did present the case to the GPC Committee. We agree that it was not essential that the complainants be present at this Step, although it would have been helpful given Mr. Warchow's lack of objective or thorough preparation.

543 Three things that Mr. Warchow did after the GPC decision were unfair and seriously prejudiced the position of Mr. Dezentje and Mr. Dombrosky. First, by failing to tell them of the decision, he cut off their opportunity to press for further action. Second, by writing in a less than full and frank manner to V-P Woods he cut off their ability to persuade him to intervene on their behalf. Third, by sending his March letter to the Employer he virtually eliminated any opportunity to send the case on to arbitration.

544 For these reasons we find that the duty of fair representation was breached.

(c) Upon which trade unions or persons is the duty of fair representation imposed?

545 Section 151(1) begins "no trade union or person acting on behalf of a trade union shall deny ..." There are five candidates to be fixed with this duty in this case, Mr. Warchow and Mr. Bendfeld, IBEW, IBEW Local 424, and the GPC. This vexing question is made more complicated by a dispute over whether the IBEW is properly a party to these proceedings. We will address that question last.

(i) Persons acting on behalf of a trade union

546 The complainants' position is that s. 151(1) is clear and that the duty of fair representation falls equally upon the trade union and upon all those persons who act on behalf of the trade union. Individuals can be found to have breached the section because of the way they carried out their representation duties, and can as a result, be the subject of whatever remedial order the Board finds appropriate in the circumstances.

547 The question is academic in respect of Mr. Bendfeld because we have found his representation met the standard expected under the section. Counsel for Mr. Warchow argues that section 151, read in its entirety, does not allow liability to be assessed against persons acting on behalf of a trade union, just against the trade union itself.

548 Counsel points out that section 151(2) makes the two defences to liability available only to a trade union and makes no mention of persons acting on behalf of a trade union. Similarly, the Board's ability to extend time limits in 151(3) is predicated on a complaint against a trade union, without reference to persons acting on the Union's behalf.

549 Counsel for Mr. Warchow also argues that, as a matter of policy, the Board should be extremely cautious in imposing financial liability upon union officials, and perhaps others, for the steps they take as agents for a Union in the area of employee representation. Such a move would force Unions to provide their employees with negligence insurance and cause unnecessary fear amongst Union officials for no net benefit. It is the Union that has the basic responsibility of representation, albeit a responsibility it, as an organization, must discharge through human agents.

550 Mr. Warchow argues that, while the Union may use lawyers, officers or agents to carry out the duty, the legal duty (and thus, implicity, liability for any breach) remains throughout with the Union. As stated in Rousseau v. I.B.L.E. and C.N.R. (1995), 95 C.L.L.C. 220-064 (C.L.R.B.) at 143,560

> "Notwithstanding the fact that the Union sought and obtained a legal opinion and legal assistance, the "exclusive power" still belongs to the Union. The duty of fair representation always belongs to and remains with the union. The duty does not shift to its lawyer or to any agent at any time during the grievance process."

551 The CLRB subsequently reconsidered this decision, but not specifically on this point.

552 We find we do not need to answer the question for this case. Aside from costs, even if a remedy imposing a financial liability on Mr. Warchow is possible under the Code, we find it an inappropriate remedy to grant in this case. We accept as a general proposition that it is the trade union as an organization rather than its officers and employees that should compensate employees (or sometimes, under 151(3), employers) for any loss suffered due to a breach of the duty. It is a general rule that an employer is vicariously liable for the acts of its employees. This means they should not be able, in the usual course, to escape liability by blaming their employees' conduct. It is the employing organization that has the authority and the resources to make sure its employees do

what they ought to do. If they fail to do so, or do so unsuccessfully, it is appropriate that they bear the loss that may be caused by their employees' default.

553 We find this is the appropriate approach to take here. While Mr. Warchow's handling of these grievances was entirely inadequate, it was at all times open to Local 424 and the IBEW to bring pressure to bear on Mr. Warchow to do what he was entrusted to do. They had adequate warning, both through evidence of inaction and through the reminders sent by the complainants, that something was remiss. While we find Mr. Warchow failed to meet the duty, we find that it is not appropriate to remedy the breach he caused by making him personally responsible to pay for any financial loss.

(ii) The GPC

554 We have some difficulty with characterizing the GPC's position because its role under the collective agreement is somewhat different than the role contemplated for it under its Constitution.

555 We have already found that the GPC is not a trade union. We also find that under this collective agreement, the GPC is neither assigned nor assumes any significant aspect of the task of employee representation. Its role in the grievance and arbitration process is two-fold. At Step IV, a GPC Committee sits to hear the dispute. However, its decisions are not final and binding. Step V - standard third-party arbitration - remains available at the option of the Union or the Employer. The GPC's role is more like a mediator or third-party fact-finder than an adversary in the process. The avowed purpose of Step IV is to bring a unifying influence on the interpretation of each individual trade agreement so that, as far as possible, the various trades work under similar terms.

556 The role assigned to the GPC under its Constitution, rather than directly under the collective agreement, is to provide advice on the interpretation of the collective agreement. However, this too seems to be a multi-trade role, distinct from the role played by the International Representatives of the various trade unions.

557 The one role it does have by virtue of its Constitution is as exclusive and irrevocable agent for each of the International Unions. We address that aspect below.

558 We find, based on the above, that the GPC is not in its own right fixed with the duty of fair representation under s. 151(1), at least in so far as the facts of this case are concerned.

(iii) IBEW and IBEW Local 424

559 The complainants argue that there is no corporate distinction between IBEW and IBEW Local 424, the latter being a creature created by and dependent upon the IBEW International Union and its Constitution.

560 Counsel for IBEW Local 424 argues that the IBEW itself is not a party to these proceedings,

a fact due to the way the complainants framed their complaints. He goes on to argue that any liability should be based on what each entity was required to do and actually did. He argues that Local 424 and Mr. Bendfeld did all that was required of them given their role under the collective agreement. It would be unfair to fix Local 424 with liability jointly and severally with the IBEW, and Mr. Warchow particularly because, since the IBEW is not named, it has no way before the Board to protect its interests for any breach that IBEW may have caused.

561 Local 424 goes on to argue that the collective agreement in this case is between the IBEW and Catalytic, and even if the Local is bound by it, it is not a party to that agreement. Mr. Warchow is clearly a person acting on behalf of a trade union, but that trade union is the IBEW, not Local 424. Mr. Warchow's evidence is clearly that, as an International Representative, he reported to V-P Woods and the IBEW. He did not report to or take instructions from Local 424.

562 Counsel for Mr. Warchow argues that the obligation under section 151 is a singular obligation owed by one trade union, not by multiple parties. On behalf of Mr. Warchow he suggests it cannot be Local 424; that is if we accept the Local's argument that the Local is not a party to the collective agreement. It cannot be IBEW, because they were not named as a party in the complaint. Therefore, he suggests, only the GPC representing all 12 international trade unions, should be fixed with the s. 151 duty. Counsel does not, in arguing this, suggest there is any conduct the GPC should be liable for.

563 Counsel for Mr. Warchow goes on to argue that fixing joint and several liability is a common law concept inappropriate for proceedings before the Labour Relations Board. Before the Courts, defendants have the ability through the procedures set out in the Rules of Court, to bring in joint tortfeasors. The Labour Relations Code provides no analogous mechanism. Even if joint and several liability were to be used, he suggests this should be sought at the outset to let the various defendants assess their positions vis-à-vis each other and mount appropriate defences.

564 We approach this question by first asking how we would deal with the issue aside from the question of whether IBEW is properly a party to these proceedings. That is, on the basis of the Code and the collective agreement arrangements in place, without regard to the question of notice and party status in these particular proceedings.

565 Section 151 presumes the existence of a collective agreement, governed by the Labour Relations Code, under which the individual complainant claims rights in respect of which he or she might be represented. There is such a collective agreement. It is the GPC agreement entered into on behalf of the IBEW and (ultimately at least) executed by the General President of the IBEW. We have already found that the IBEW is a trade union and has the capacity to enter into such an agreement. The IBEW - Catalytic (Syncrude and Suncor sites) GPC agreement is the relevant collective agreement.

566 How does that collective agreement provide for representation? As we noted above, the terms of the agreement clearly see Local 424 and the IBEW acting in concert, with divided but

interlocking responsibilities, to give substance to the agreement's terms. Local 424 is a trade union itself but it is also a part of the IBEW. As we noted above, the strict division between IBEW and its Local is somewhat artificial given their constitutional relationships, the fact that members belong simultaneously and automatically to both bodies, and their de facto day-to-day operating arrangements. This last point is illustrated by the way Local business agents like Mr. Bendfeld routinely work along with International Representatives like Mr. Warchow. It is also illustrated by the collection and remission of dues from the Local to the IBEW on the basis of a per capita formula.

567 We see nothing wrong or contrary to the Code in such a sharing of representational responsibilities. There are good reasons for trade unions to structure themselves in this way, balancing central resources with the advantages of local democracy and influence. However, the consequence of such a shared arrangement is that the parties to such a joint structure must accept together the statutory duty to carry out the tasks thus shared, in accordance with the level of care required by the statute.

568 Reading the terms of this collective agreement, IBEW Local 424 and IBEW have jointly assumed responsibility for the tasks involved in representing employees under this agreement. They have assigned different aspects of the task to the Local level and to the International. However, this is a matter of their own internal arrangements. The statute imposes one duty, not subdivided duties depending upon how the trade unions involved split up their tasks. This internal division of duties may give rise to constitutional or contractual rights or liabilities between the IBEW or Local 424, but that is for them to work out on the basis of their own internal arrangements, not for the Board to decide for them. As far as the Code is concerned, IBEW and IBEW Local 424, under the collective agreement in question, have jointly assumed the responsibility for employee representation and are therefore jointly liable to ensure that the duty in section 151 is met.

569 We are reinforced in this by the similar conclusion arrived at by Canada Labour Relations Board in:

> Guy v. Canadian Council of Shopcraft Employees and Allied Workers et al, 86 CLLC 16,007

570 That case was a reconsideration decision, also involving a duty of fair representation complaint. It arose under the railway agreements which involve bargaining through a council of trade unions. The original panel had held the individual international trade unions liable, but not the Council. While the Canada Labour Code has some statutory provisions not found in the Alberta Code (for example s. 130), the general approach is nonetheless applicable to the matter before us. The Board said, at page 14,064:

> For reasons we now know, the Board is confronted with a breach of the Code for which two clearly identified and related parties, the Brotherhood and the Council, are responsible. From the worker's standpoint, this breach of the Code involves

> an indivisible obligation, namely, his right to fair representation from his certified bargaining agent. The employee who is dismissed faces what, for him, is an extraordinary situation, and he is entitled, regardless of the number of union players, to what might be termed an integrated solution. After all, the employee has only one certified bargaining agent.

571 We find, in this case, when s. 151 refers to the trade union it refers to IBEW and IBEW, Local 424 acting together, and it is to the two entities jointly that employees are entitled to look in the event of a breach of the duty. Local 424 may complain of having no control over IBEW and its agents. Conversely, IBEW in another case might complain of having no control over Local 424.

572 However, Local 424 is constitutionally bound to accept collective agreements negotiated by the IBEW, and this offers advantages like work and dues as well as burdens like representational duties. IBEW needs the Local, for without it, its members, hiring hall and union meetings, it could not claim to be a bargaining agent and agreements it purported to negotiate like the GPC agreement might well be invalid. The Local and the International have jointly assumed the obligations of bargaining agent. Like partners, they are jointly and severally liable for each other's acts in carrying out those obligations. The parties to whom the obligations are owed should not be dependent upon the particular manner the two parties have chosen to subdivide their singular responsibility.

(iv) Is IBEW a party with notice?

573 Counsel for Mr. Bendfeld and Local 424, and for Mr. Warchow, each for their own reasons argue that the IBEW has the duty under s. 151. However, they go on to argue that IBEW cannot be made the subject of an order because they have not had sufficient notice of these proceedings, or at least of the fact that claims were being made against that organization.

574 In reply, the complainants argue that the IBEW has been present for the entirety of the proceedings through its International Representative Mr. Warchow. The complainants have sought, and the Board has ordered, production of documents in the hands of the International.

575 The complainants also argue that Counsel for IBEW Local 424 and Mr. Bendfeld (who previously acted for other parties as well) made submissions on behalf of IBEW on March 25, 1994, in response to the Officer's report. That letter is detailed below. From this we are urged to conclude that at the time Mr. McGown was acting for the IBEW as well as for the GPC, Mr. Warchow, Mr. Bendfeld and Local 424. In the alternative, the complainants argue that throughout, the IBEW, Mr. Warchow and the GPC were all conducting their activities as agents of Local 424.

576 The position of the International has come up on a few occasions throughout these protracted proceedings.

577 All three original complaint forms say the complaint is against:

> "The General President's Maintenance Committee to which the IBEW is a signatory"

as well as Mr. Warchow - listed as International Representative of the IBEW and the Chairman of the GPC and Mr. Bendfeld, Assistant Business Manager of the IBEW Local Union 424. In the section of the form headed "Trade Union Information" the heading "Legal Name" is filed in "GPC with the International Brotherhood of Electrical Workers (IBEW) signatory to the GPC Agreement." The address listed is Mr. Warchow's address in Ottawa. However, the heading "Local number" is also filed in as "LU 424".

578 The Board's Director of Settlement sent notice of the original complaints to Mr. Warchow as Chairman of the General President's Maintenance Committee and Mr. Smillie as Executive Director of that Committee. The notice letter says, in part:

> I am writing to you in your official capacity as council officers of the committee. Therefore, I am not writing to each signatory member to the agreement. If you think they should be advised of these complaints, please so advise them as you feel appropriate.

579 The GPC Constitution, it will be recalled, provides as follows:

ARTICLE III - REPRESENTATION

Section 1(a): Whereas the Member International Unions have organized the General Presidents' Committee for Plant Maintenance in Canada (hereinafter called "The Committee") in order to act in concert through the Committee in the negotiation and administration of collective agreements and so as to ensure relative equity and uniform interpretation and application, and for these purposes the Member International Unions have agreed to maintain the Committee and have empowered the Committee to act as the exclusive and irrevocable agent of the Member International Unions and of each Member International Union. (emphasis added)

580 The Board convened a preliminary meeting on April 20, 1993 in Fort McMurray. Mr. McGown appeared for the respondents except Catalytic, which was represented throughout by Mr. Ponting. At this point, the complainants were unrepresented. They were raising issues that appeared inconsistent, particularly by attempting to set aside the same agreement as they relied upon for their grievance rights. There was a discussion during this hearing about the propriety of Mr. Lynn being named personally. That was resolved by leaving Mr. Lynn off as a respondent. The Board's hearing log then shows, in retrospect ambiguously, "complaint is therefore against the IBEW, Bendfeld and Warchow" making no distinction between the Local and the International Union.

581 When the hearing resumed on that afternoon, and after issues had been clarified during the

morning, Mr. McGown advised that he would not be able to proceed to evidence because he had not been aware of all the facts. He also pointed out that there may be other parties affected and that "the only trade union here is the IBEW and there are twelve others who are party to that document." Mr. McGown also noted at the same point, the incongruity of the complainants' wanting damages for breach of fair representation under the same agreement they sought to set aside.

582 At the end of this preliminary hearing the Board commissioned a detailed Officer's report. In 1993 the complainants retained Mr. Renouf, who quickly narrowed and focused the issues in dispute. In particular the Charter challenge was dropped and so was the attack on the validity of the collective agreement.

583 The Officer's report went to the parties in February, 1994. Its list of affected parties includes the following entry:

> Trade Union: International Brotherhood of Electrical Workers, Local Union 424
>
> Jim Bendfeld, Assistant Business Manager, Fort McMurray Bill Warchow, International Representative, Ottawa
>
> Murray McGown, Counsel
>
> The GPC: Steve Smillie, Executive Director, General Presidents' Maintenance Committee, Oakville
>
> Murray McGown, Counsel

584 At page 3 of the report the officer characterized the issues remaining after the preliminary hearing, describing the section 151 issue as follows:

> Section 151 - duty of fair representation - IBEW 424 did not fairly represent the three applicants in advancing their grievances;

585 These documents clearly exclude IBEW. Counsel for the complainants filed a detailed reply, commenting in part on the above paragraph.

> Page 3 Statement of Complaints - Complaint #1 Re: Section 151
>
> In addition to complaining that the Union did not fairly represent the three Applicants in advancing their grievances, the Applicants also claim that the

> Union acted in a fashion which was arbitrary, capricious, discriminatory and wrongful in handling the complaints' grievances. Further, the complainants complained that the Union acted with serious or major negligence in failing to forward the complaints in a timely fashion to Step III of the grievance procedure.

586 At this point, much of the evidence and the documents about Mr. Warchow's activity or inactivity remained undisclosed.

587 On March 25, 1994, Mr. McGown wrote the letter referred to above. We find that, in the first page, Mr. McGown indeed appears to make inquiries on behalf of the IBEW as well as Local 424. He then asks at page 2, again apparently on behalf of the IBEW amongst others:

> It would also be helpful if counsel for the complainants could summarize and particularize the exact remedy requested against each of the respondents. It is my position, since monetary damages claimed by the complainants is such a large number, that I should know whether these are against Local 424, the International Union(s), the employer or the named individual respondents.
>
> As well, are the allegations of unfair representation made against Local 424, the International, or both?
>
> I would note all parties represented by this office deny the allegations and any of the claims for remedies and put the complainants to the strict proof thereof.

588 He copied this letter to Mr. Lynn and Mr. Bendfeld, each at Local 424, and to Mr. Smillie and Mr. Warchow each at the General President's Maintenance Committee. On June 30, Mr. Renouf acknowledged receipt of this letter, but did not at that time address the questions raised.

589 On August 31, 1994, the Board convened in Fort McMurray. At that hearing, Mr. Renouf made a detailed opening statement, partly to support his request for the production of documents. Following that opening statement, Mr. McGown proceeded with an opening statement. He questioned whether the bad faith and negligence raised by Mr. Renouf on the s. 151 issue included the GPC, the IBEW International or the IBEW Local. He pointed out specifically that the collective agreement steps were divided between the Local and the International and noted both Mr. Bendfeld and Mr. Warchow were named as respondents. He then asked "Is he [Mr. Renouf] seeking damages against the GPC. Does he want separate damages against 424 or against the International or both."

590 Mr. Renouf replied that his dilemma was that his clients had (at that time) so little information on Mr. Warchow's role that, on the issue of negligence (s. 151), in the absence of complete disclosure he could not pinpoint "who wants what against whom." At the end of the day on August 31, 1994, the Board agreed to provide a written order concerning the production of

documents directed in part against the IBEW. Mr. McGown advised that "the Union" was going to go digging for documents in Washington (the International Union's headquarters).

591 The Board's hearings resumed in March, 1995. At that point, Mr. McGown advised the Board he had to withdraw as Counsel because a conflict had developed between his clients. Mr. Renouf pointed out at this hearing that while there was mention of representation for Local 424, the International Union had not been mentioned. This inquiry went unanswered and the underlying issue unresolved. Mr. McGown was left to advise the Board once arrangements for new Counsel were made of who would be acting for whom. On May 1, 1995 Mr. McGown advised that he would be acting on behalf of IBEW Local 424 and Jim Bendfeld, and that Mr. Chivers would take over on behalf of the General Presidents Maintenance Committee and Mr. Warchow (consent having been given for Mr. McGown to continue to act). The hearings continued on this basis. On July 26, 1996, Mr. Chivers wrote to the Board saying, in part:

> As you know, Mr. McGown originally represented all Respondents in these proceedings, being IBEW Local 424; Jim Bendfeld, Assistant Business Manager; Bill Warchow, International Representative; and Steve Smillie, Executive Director - General Presidents' Maintenance Committee. As a result of an earlier conflict which emerged I was consulted and retained by the GPC. On May 1, 1995 Mr. McGown wrote to advise the Board that he would be acting on behalf of the IBEW Local 424 and Mr. Jim Bendfeld and that I would be acting on behalf of the GPC and Mr. William Warchow.
>
> Unfortunately, Mr. Warchow wears two hats, that of Chair of the GPC and that of International Representative of the IBEW. As International Representative of the IBEW he is a named Respondent in the Section 151 complaint. Recent developments between the IBEW and the GPC cause me to conclude that I cannot represent Mr. Warchow in his capacity as International Representative of the IBEW.
>
> I have advised Mr. Warchow and the GPC that in the circumstances I am unable to represent Mr. Warchow in respect of the Section 151 proceedings. The GPC has been in touch with the IBEW regarding this matter. The GPC may be taking a position or leading evidence which is adverse to the interest of the IBEW and Mr. Warchow in his capacity of International Representative of the IBEW.
>
> I advised the GPC that in view of the emergence of this conflict, I must draw the matter to the attention of the Board.

592 On August 1, 1996, Mr. Warchow wrote to the Board, on IBEW Canada letterhead, saying:

> In the Section 151 complaints I am named as a Respondent as International Representative of the IBEW. Section 151 refers to "acting on behalf of a trade union" and fixes the responsibility to provide representation upon a trade union. In light of the conflict that has emerged between the IBEW and the GPC, I am left unrepresented in these proceedings.
>
> My involvement in these proceedings insofar as it relates to the Section 151 complaints, is solely in the course of my employment as an International Representative of the IBEW. I feel that it is the responsibility of the IBEW to provide me with counsel. I have verbally made this request to the IBEW but they declined to appoint counsel for me. I am submitting to the IBEW a written request to that effect. I have asked that the IBEW give me an immediate response.
>
> I cannot proceed unrepresented in these proceedings. The matters are simply too complex and the possible consequences too serious. I fear that my interests as International Representative of the IBEW and the interests of the IBEW will be seriously compromised if I am not represented by counsel.
>
> I will advise you of the response of the IBEW as soon as I receive same. I would request the hearings be adjourned in order to permit me to obtain counsel.

593 On August 12, 1996, Mr. Landry's office advised that he had been retained by Mr. Warchow. On August 26, 1996, Mr. Landry's office sought an adjournment to prepare. Mr. Renouf, in opposing this request reiterated his position that there are three Union players involved, the GPC, the IBEW and Local 424. He said then that his clients had maintained for some time that each one was liable under section 151 and that it was inevitable, from that point on, that those three entities would "point fingers at each other."

594 IBEW's position through these proceedings has been somewhat ghostlike, felt at every turn but never physically "in the room." There has never been a notice going directly to IBEW (aside from those sent to its representative Mr. Warchow and its "exclusive and irrevocable agent" the GPC, saying "you are a party and the complainants seek monetary compensation against you for a breach of s. 151." The question was put on occasion in the early days, but because of lack of documentary production, Counsel for the complainants was unable to answer. Later, at least by August 12, 1996, the complainants were saying clearly they sought such relief. However, by then conflicts had caused Respondent's Counsel to change. In the Counsel roster that emerged, no one purported to speak for IBEW. While it may have appeared that IBEW was being represented early on when no one anticipated conflicts emerging, it is not sufficiently clear in retrospect that this was

the case. They had notice in a general sense of the proceedings:

- through their agents Warchow and the GPC,
- through their being subjected to and complying with the notice to produce documents,
- through the correspondence that led to Mr. Chivers finding himself in a conflict,
- through Mr. Warchow's request for independent representation.

595 However, they have never been directly and independently sent a notice warning them of a claim against them. We have found Mr. Warchow breached the Code in his representation. He did so in the course of his employment with the IBEW. He did so while acting on behalf of a trade union under section 151. We have found the trade union to be Local 424 and the IBEW acting jointly. In the ordinary course, absent the notice question discussed above, we would have made an order in favour of the complaints against the two entities jointly and severally. Such an order would leave the complainants free to collect against either party. It would also leave the two parties to sort out amongst themselves who should pay what, based on the contractual and constitutional arrangements under which they undertook their representational activities in the first place, and based on which persons caused the breach.

596 Given the question now raised about notice (not, we should add, by IBEW) we are going to proceed as follows. Our order will be directed to Local 424 alone. However, the Board remains seized with the issue and Local 424 is given leave to return to the Board, on notice to IBEW, to vary that order to include IBEW in a joint and several order if it feels it is able to justify such a step. Obviously it would be completely open to the IBEW to argue against any such step. Hopefully, our decisions so far will allow the IBEW and Local 424 to resolve these issues between them without further proceedings, and without the necessity of involving the complainants in further litigation. As the Canada Board said in Guy, they are entitled to an "integrated solution."

(d) Do the defences in s. 151(2) apply.

(i) good faith representation

597 For the same reasons we gave in finding that the unions breached the duty in s. 151(1) through Mr. Warchow's representation, we find that there was a lack of good faith in the representation of these employees. Indeed, since all modern descriptions of the duty described in s. 151(1) incorporate this good faith notion in any event, it is difficult to see that s. 151(2) serves more than an informational purpose.

(ii) loss due to the employees' own conduct

598 Any loss Messrs. Dombrosky and Dezentje suffered arose through the loss of their

opportunity to have their grievance heard and decided through arbitration. Had the matter proceeded to arbitration, the chances of success were limited, for the reasons we cite above. The complainants lost that opportunity through Mr. Warchow's failure to represent them. While there is much in their conduct in respect of these grievances that might be faulted, they were not responsible for that loss. In Mr. Roy's case, his loss is due to the failure to tell him an offer was available. He was in no way responsible for that failure.

(e) The measure of loss

599 For the reasons set out in the next section, we find this is not a suitable case to send on now for arbitration. Instead, we have decided to award damages. In so doing we base our award on the approach set out in:

> Barry Martin v. Allied Food and Commercial Workers Union Local 397, Alta LRBD 85-048.
>
> Grievances vary in quality. Some are almost certain to succeed, others are speculative at best. It would be a serious error for the Board to assume that any grievance, frustrated by a breach of the duty of fair representation, would have succeeded if it had been arbitrated. What the grievor loses is not his claim for damages but his opportunity to have his claim determined. He loses the chance of success, not success itself. The value of such a chance is not always easy to determine, however, the Board must do its best given the evidence before it to assess both the value of the disputed claim if successful and the chance at that success.
>
> Support for the view of the measure of damages can be drawn from the cases involving solicitors negligence and the chance to pursue a law suit. (sic) a dealing with the loss of such a chance are discussed in Govieu v. Simonot [1982] 6 W.W.R. 221 (Sask. Q.B.) and Hornak v. Paterson et al (1967) 62 D.L.R. (2d) 289 (B.C.S.C.).
>
> Valuing a grievance going to arbitration is not always easy, particularly one involving the dismissal or demotion of an employee ...
>
> Assessing the chance of success is equally fraught with difficulty ...
>
> ...

> In this case the calculation is made simpler by Mr. Martin's largely undisputed claim that he lost $3,2000.00. In our view his chances of success on his first grievance were very low, but his chances of success on the second were quite high. Recognizing that this is an imprecise estimate, but equally recognizing that arbitration (or litigation) is by no means a precise science either, we believe he had a 80% chance of success. ...

600 The Board then went on to award damages that pro-rated the monies lost based on the estimated chance of success.

601 No such calculation is necessary in the case of Mr. Roy. His loss occurred because he was not told of an offer he would have taken. We find if he had have been told he would have accepted the offer. We find that Mr. Warchow either had, or with reasonable diligence would have found out about the Employer's offer by July 15th, 1991. We date Mr. Roy's losses from that date.

602 In the case of Mr. Dezentje and Mr. Dombrosky, what they lost was the opportunity to test their case through arbitration. We have already estimated their chance of success at about 1/3. While it is a rough and ready estimate, we believe their loss is fairly valued at the damages they suffered pro-rated by that factor.

603 The parties agreed that we should reserve our jurisdiction on the specific items of damages claimed but asked for general guidance. We make the following general comments on damages as claimed.

604 Claims for lost overtime should be assessed recognizing that Catalytic was in any event reducing its workforce. It should be estimated based on what overtime was experienced by employees who continued to work during the period in question, not on the basis of the period prior to the lay-offs.

605 Claims for travel time for work out of Fort McMurray must allow for the fact that work in Fort McMurray also involved travel time. Also, it is not usual to set travel time at full labour rates.

606 Claims for travel costs. Travel costs should be calculated on the basis of some customary allowance per kilometer. If it is to be calculated on actual costs incurred, it should in any event be pro-rated where more than one person travelled in the same vehicle.

607 Lost vacation entitlement. Compensation figures should include the added percentage payments for such periods as those payments would have applied had the employees continued to be employed (with the exception in Mr. Roy's case, for the break, up to July 15).

608 Duty to mitigate. A duty to mitigate existed for those periods where the complainants claim

lost work. This includes taking available calls, to Catalytic or other employers, through the Union hiring hall as available.

609 Duration of damages. We have insufficient information to rule, even in a general way, on an appropriate cut-off point for claims for lost wages. A factor to consider would be the continuing employment situation at Catalytic in terms of lay-offs, as well as the availability of comparable work through other employers or through the Union hiring hall. Partly this is related to continuity at Catalytic and partly it is related to mitigation.

(f) Is this an appropriate case to send on to arbitration?

610 We have had a great deal of evidence on this matter; more than a Union would customarily have before deciding whether to arbitrate. Section 151(3) allows us to rectify the breach in this case by directing that the complainants' grievances proceed on to arbitration. We have decided not to do so. In Mr. Roy's case, the breach is due to the failure to tell him of an offer. The offer was certain, arbitration is uncertain. He should not be forced to accept an uncertain result for what should have been a certain resolution.

611 In the case of Mr. Dombrosky and Mr. Dezentje, we have decided to award damages for monetary loss rather than making a s. 151(3) order. We think the passage of time substantially prejudice the Employer's position, and perhaps the complainants as well, as memories will have faded beyond what is acceptable. We have heard much of the available evidence. While the process unfairly led to their grievances being abandoned, as we have said already, their chances of success were in any event limited. We take account of the fact that their lay-offs did not disqualify them from future work with Catalytic. They were free to apply for other jobs, including jobs with this Employer. Similarly, reinstatement if achieved would still have been to employment under a contract that allowed, legitimately, for lay-off. This distinguishes their situation somewhat from those cases where the employee has lost what might otherwise have been a lifetime's career. We find this is not a case where any prejudice can be dealt with through a compensatory order and so we will not apply s. 151(3).

PART 4
Remedies

612 The remedies sought by the complainants are:

1. A declaration that the respondents breached section 151 of the Code in relation to the complainants.
2. A declaration that the complainants are entitled to be compensated for their financial losses by IBEW (International and Local, jointly and severally) as a result of the breaches of section 151.
3. A declaration and order that the complainants are entitled to their costs, on

a reasonable solicitor-client basis, including disbursements and including their own lost wages, travel and accommodation costs for these proceedings.

4. An order pursuant to section 151(3) that the grievances dealt with in this matter proceed to arbitration with the complainants being entitled to independent legal representation at the arbitration proceedings at the expense of the union (Local and International).
5. A declaration that the GPC and the IBEW (Local and International) were, in the 1991 round of collective bargaining, in breach of section 59(2) and section 59(4) of the Labour Relations Code.
6. An order that the GPC and the IBEW (Local and International) comply with section 59 of the Labour Relations Code in all future negotiations.
7. A declaration that Catalytic has breached section 146(1) of the Labour Relations Code by contributing financial or other support to a trade union.
8. An order that Catalytic cease and desist providing financial support to the GPC.
9. An order that the complainants receive compensatory damages against the respondents, jointly and severally, for the full amounts as set out in the complaints.

1. Declaration on section 151

613 We declare that the respondent, William Warchow breached s. 151 in respect to each of the three complainants. We also declare that the trade union in this case upon whom the representational duties fall, and upon whose behalf Mr. Warchow was acting was the International Brotherhood of Electrical Workers and Local 424 of the International Brotherhood of Electrical Workers acting jointly. We declare (subject to point 2 below) that Local 424 of the International Brotherhood of Electrical Workers has breached its duty under s. 151 with respect to each of the three complainants.

2. Compensation for financial losses

614 We direct that the complainants Dombrosky and Dezentje be compensated by the International Brotherhood of Electrical Workers Local 424 for a sum equal to 1/3 of their financial losses as a result of their lost opportunity to arbitrate their grievances. We direct that the complainant Roy be compensated by the International Brotherhood of Electrical Workers Local 424 for a sum equal to the monies he would have received had he accepted the Employer's offer of June 26, 1991, and returned to work as of July 15, 1991.

615 These directions are subject to Local 424's ability to apply to the Board, on notice to the IBEW, and subject to their right to raise any arguments in opposition to have the Board consider

whether to add the IBEW as a second party, jointly and severally liable with Local 424.

616 These declarations are also subject to the general directions given herein on the principles on which damages are to be calculated. The Board reserves its jurisdiction (as agreed by the parties) to quantify the damages and to resolve any question about mitigation, should the parties be unable to agree upon exact figures following the framework set out in this decision.

3. Costs

617 The complainants ask for their costs on a solicitor-client basis. The Board's power to award costs comes from section 11(2)(i).

> 11(2) The Board may for the purposes of this Act
> (i) award any costs it considers appropriate in the circumstances if an application, reference or complaint, or a reply or defence thereto, is, in the opinion of the Board, trivial, frivolous, vexatious or abusive.

618 The Board has awarded costs under these provisions previously, see: U.F.C.W. Local 401 et al v. European Cheesecake Factory et al [1994] Alta. L.R.B.R. 30 at p. 90. The grounds for costs alleged by the complainants, in summary are:

- The complainants have proven all the major elements of the statement of facts originally set up in this case.
- They have been subjected to adjournments and delays because of changes in counsel due to conflicting interests and due to delays in producing documentation.
- The defences advanced at the end of the case are narrow and legal in nature and could, at the outset, have been dealt with on the basis of admitted facts.
- The respondents are sophisticated, large and wealthy organizations in contrast to three individual tradespersons.

619 The last point is not significant under section 11(2). However, given our findings of credibility and the other three factors, we find section 11(2) applies and that a limited award of costs is justified. The complainants have in fact had mixed success in these proceedings. The matters were substantially extended by their seeking, at the outset, to set aside the GPC agreement and thereafter by their challenge to the GPC funding arrangements. They were complicated substantially by the grievors' insistence throughout that they had a contractual right to a leave of absence, a right under s. 11.500 of the collective agreement and by their emphasis on Mr. Fradette et al's role in their lay-offs. On the other hand, the proceedings were also extended substantially by delays caused by Mr. Warchow's initial failure to produce highly relevant documents from the IBEW files and by the two occasions when Counsel found themselves in conflict and unable to continue to represent Mr. Warchow.

620 Weighing these factors including the overall success in the proceedings we direct:

1. That Mr. Warchow pay the complainants (jointly) costs on a reasonable solicitor-client basis for their representation for 5 days (which includes hearings and preparation for hearing). In the event Mr. Warchow believes the responsibility for these costs should be borne jointly between himself and his employer the IBEW or by the IBEW alone, he is free to apply to the Board, on notice to the IBEW, to have the Board consider adding them to this aspect of the Order, subject of course to IBEW's right to oppose any such Order.
2. That IBEW Local 424 (again subject to the ability to apply to bring in the IBEW on notice) pay the complainants an additional 7 days solicitor-client costs (for hearings and preparation). In addition, IBEW Local 424 shall pay the three complainants all their reasonable disbursements and out-of-pocket expenses for attending the hearings.
3. IBEW Local 424's request for costs against the complainants is dismissed. Local 424 did not specify whether it was seeking costs against Mr. Warchow or any other party. If it is seeking costs against Mr. Warchow or the IBEW, that question may be referred to the Board panel, on notice to the parties concerned, for resolution.

621 No other costs are awarded.

4. Referral under s. 151(3)

622 This remedy is denied, for the reasons given above.

5. Section 59(2) and (4)

623 The Board finds the question under section 59(1) or (2) are moot and makes no order in that respect. The Board directs the General President's Committee for Maintenance on its own behalf and as agent for the International Brotherhood of Electrical Workers as follows: In future rounds of collective bargaining; if conducted under the GPC structure, the IBEW and the General President's Committee is directed to ensure that the bargaining committee includes at least one representative of the local union on whose behalf the negotiations are being conducted. That representative (or those representatives) must be selected by the trade union locals who will be involved in the resultant collective agreement rather than by the General President's Committee itself.

6. Section 146(1)

624 The complaint under s. 146(1) is dismissed.

625 Point 6 in the complainants' relief is dealt with under item 5, point 8 under item 7 and point 9

under item 2.

626 These matters have been complex and as a consequence protracted. While the Board has reserved jurisdiction to address a number of matters it is the Board's hope that the parties will work diligently to resolve these issues amongst themselves. The type of inter-union co-operation and International - Local Union co-operation that has made the GPC form of collective agreement work cannot be sustained if an individual employee's representation rights become subrogated to inter-union disputes. Those parties involved in such co-operative ventures must recognize that, on occasion, lapses may occur due to the default of one party within the co-operating group. Such matters should not result in insurmountable procedural difficulties for the individual Union members affected.

627 The Board wishes to thank Counsel for their assistance during these difficult proceedings.

qp/i/drk

---- End of Request ----
Print Request: Current Document: 1
Time Of Request: Tuesday, June 29, 2010 09:40:05