

Cited as:

Health Sciences Assn. of Alberta (Re)

**Rita Vickers, Cynthia Boodram, Jeannie Chow, Sandra Shokoples,
Marlin Benedet, Iris Perry, Dora Lee, Connie Tsang, Pauline
Tomlin, Lynn Douglas, Elsie Hill, D. Selvarajah, Heather
Stickney, Martha Gable, Tina Lowe, Catherine Lam, Helen Tabor,
Lynda Selzler, Patricia Ulmer, Donna Bedard, Edith Ashton,
Linda Kwong, Karen Huk, Patricia Diediw, Donna Trenholm, Carol
Marian-Dyer, Marilyn Evans, Usha Thaker, Chellamma Nageshwar,
Patricia McLeod, Marguerite Lovgren, Margaret Anne Valentine,
Louise Linarez, Anthony Chow, Karen Spinks, Barbara Leblanc,
Barbara Panter, Donna Fernandes, Betty Forwick, Lisa Meyer,
Sylvia Chomyc, Donna Breuer, Birgit Steinbach, Doris Bulawka,
Applicants and
Health Sciences Association of Alberta, Lynette McAvoy,
Respondents and
The University of Alberta Hospitals, Intervenor**

[1997] Alta. L.R.B.R. 11

37 C.L.R.B.R. (2d) 256

Board File: GE-01891

Alberta Labour Relations Board

M.L. Asbell, Vice-Chair, L. Ervin and L. Haag, Members

January 13, 1997.

Appearances:

For the Applicants: Simon Renouf (Counsel), Rita Vickers.

For the Respondents: Marta Burns (Counsel), Kay Willekes, Lynette McAvoy.

For the Intervenor: No representative.

Fair Representation -- s. 151(1) -- Where applicable -- Union to give due and fair consideration to minority interests -- Collective bargaining to be narrowly viewed where used as shield against fair

representation complaint -- Opportunity for democratic participation of members required.

In August, 1993, University of Alberta employees working in the Provincial Laboratory were transferred to the University of Alberta Hospitals ("UAH"). On accepting employment with UAH, the transferred employees became members of the Health Sciences Association of Alberta ("HSAA"). By way of a Letter of Understanding entered at that time, it was agreed that the seniority of the transferred employees would be recognized by the parties.

In later collective bargaining, HSAA and the Alberta Hospital Association ("AHA") entered into a Memorandum of Agreement which revised the method for calculating seniority. Seniority would thereafter be calculated on the basis of hours worked, rather than date of employment. Previous seniority would be converted from years into hours. The memorandum was ratified by membership in April, 1994.

Initially, transferred employees were credited with 7 3/4 hours per day for seniority calculation purposes. In fact, they had worked 7 hours per day. By agreement with HSAA, UAH recalculated transferred employees' seniority based on 7 hours per day, reducing their seniority by about 200 hours per year. The transferred employees filed an application for an order directing HSAA to cease and desist the breach of its duty of fair representation, and for an order restoring seniority.

HSAA argued that the duty of fair representation did not extend to collective bargaining. It categorized its discussions with UAH, regarding the seniority of the transferred employees, as bargaining and not subject to s. 151(1). The Board agreed the duty of fair representation did not apply to collective bargaining, but disagreed that the discussions with UAH constituted collective bargaining under s. 1(a).

The Board found that HSAA failed in its duty of fair representation. It held that collective bargaining must be viewed narrowly when used as a shield to protect against a duty of fair representation complaint. The opportunity for democratic participation by affected members, requisite in collective bargaining, was not provided by HSAA. Discussions were not entered into on behalf of the collective membership, and were prejudicial to the interests of the transferred employees. As well, at the time of discussions, the collective agreement had been concluded and was in effect.

The Board concluded that the Letter of Understanding entered at the time of transfer provided for a "seamless transfer of seniority rights," unaffected by the later collective agreement. While it did not find malfeasance on behalf of HSAA, the Board directed that HSAA immediately cease and desist the breach of its duty of fair representation. It further directed HSAA and UAH to restore full seniority to the transferred employees.

REASONS FOR DECISION

1 Mark L. Asbell, Vice-Chair: This application involves a duty of fair representation complaint brought by 44 employees of the University of Alberta Hospitals (the "UAH") against the Health Sciences Association of Alberta ("HSAA"). The 44 employees (the "Complainants") were all former employees of the University of Alberta ("U of A") employed at the Provincial Laboratory of Public Health for Northern Alberta ("Provincial Laboratory").

I. Background

2 The Complainants and HSAA entered an Agreed Statement of Facts and the Board Officers' Report by consent. The facts are undisputed and disclose the following.

3 On August 1, 1993 the U of A transferred the operation of the Provincial Laboratory to the UAH. The U of A Board, UAH, Non-Academic Staff Association ("NASA," the union representing the Complainants at the time) and HSAA entered into a Letter of Understanding addressing each parties' obligations with respect to the employees involved.

4 The parties agreed that employees employed with the Provincial Laboratory who accepted employment with the new employer would have their seniority recognized by HSAA. The parties agreed that seniority would be calculated in accordance with the collective agreement then in force between NASA and the University of Alberta.

5 The Letter of Understanding, dated July 2, 1993, reads in part:

5. Except as amended by this Letter of Understanding, employees of the U. of A. currently employed with the Provincial Laboratory who decide to accept employment with the U.A.H. effective August 1, 1993, shall be covered by the current H.S.A.A. Collective Agreement.
6. Employees currently employed with the Provincial Laboratory who decide to accept employment with the U.A.H. will have their seniority with the U. of A. recognized by the H.S.A.A.
7. Employees of the U. of A. currently working in the Provincial Laboratory and who accept an offer of employment with the U.A.H. effective August 1, 1993, shall be subject to the following terms and conditions of employment, in some cases modifying those terms and conditions specified in the H.S.A.A. Collective Agreement:

- notwithstanding the terms of the H.S.A.A. Collective Agreement, there shall be no requirement to serve a further probationary period or trial period;

- seniority as specified under the terms of the collective agreement between NASA and the U. of A. will be recognized;

6 Seniority and service in the NASA and U of A collective agreement reads:

1.27

Seniority means length of service in the bargaining unit.

1.28 Service means cumulative employment of an employee.

7 The transfer became effective August 1, 1993. NASA provided its seniority lists to HSAA the same day.

8 Around this time, HSAA was preparing for negotiations as the provincial collective agreement, to which UAH is also a party, had expired on March 31, 1993. One of the concerns HSAA heard from their membership was the method of calculation of seniority for full-time and part-time employees. Under HSAA's existing agreement, full-time employees accrued seniority based on their date of employment and part-time employees based on hours they worked.

9 During negotiations, HSAA sent regular updates to the membership, including the transferred employees from the U of A.

10 At the time of these negotiations, HSAA was aware that employees transferred from the U of A working at the Provincial Laboratory had previously worked a 7 hour day as opposed to the 7 3/4 hour day they now worked and always worked by the UAH employees. HSAA first became aware of the differential in daily hours at the beginning of discussions involving the transfer of employees from the U of A to UAH

11 On March 28, 1994 the Alberta Hospital Association ("AHA") and HSAA signed a memorandum of agreement. HSAA sent a letter to all members affected by provincial negotiations on March 31, 1994. The letter included a detailed summary of the negotiations, articles agreed to and instructions about the ratification process. Additionally, the letter included the following changes to seniority provisions. Neither the letter nor memorandum of agreement addressed the differential in daily hours between the UAH employees and those transferred from the U of A.

Article 28: SENIORITY

This article on seniority is one that a lot of discussion has taken place over the past year. Several members felt that the system currently in place with full-time employees accruing seniority from date of employment and part-time employees

on paid hours of work was unfair, as full-time employees gained seniority for leaves of absence, whereas part-timers did not. The Employer's proposal was date of employment for both full and part-time employees. The proposal agreed upon is as follows:

Both full-time and part-time employees will accrue seniority on the basis of the following hours. The following will take effect on date of ratification.

- (i) regular hours of work;
- (ii) additional hours of work in accordance with Article 44.03(C)(e);
- (iii) actual hours of overtime and call-back;
- (iv) vacation with pay;
- (v) Named Holidays inclusive of the Floater Holiday;
- (vi) Paid Absences, Inclusive of Sick Leave, WCB leave, Short Term Disability, Long Term Disability, Educational Leave, Bereavement Leave, Maternity Leave (valid health-related period of absence due to pregnancy only), Paternity Leave, Association Business, In-Service Programs, and Court Appearance.

Note: Prior to date of ratification of this Collective Agreement, the current method of calculating seniority will apply.

The Employers will have four months from date of ratification to calculate the employee's seniority from date of employment for full-time and paid hours of work for part-time, so that this amount can be included in their seniority bank. If the employee and Employer cannot reach agreement on the seniority calculation, then the Association and the Employer will meet to effect a mutually acceptable resolution. If employee's have gone from full-time to part-time or vice-versa, the correct calculation will have to be worked out.

12 The memorandum of agreement included Letter of Understanding #2 about Retroactive Seniority Calculations. It reads:

1. The parties agree that retroactive seniority calculations are required to convert seniority based on the provisions of the former Collective Agreement to the new seniority provisions described in the new Collective Agreement (reference Article 28.01) and in effect on the date of ratification.

2. Accordingly, the parties agree that, in the case of staff who have continuously been employed as regular full-time employees, seniority accrued prior to the date of ratification shall be converted to an hour figure on the basis of 2,022.75 regular hours per year of continuous employment. Staff who have continuously been employed as regular part-time employees shall have seniority accrued, prior to the date of ratification, on the basis of total paid hours of work. Staff who have had changes between the regular statuses shall have such changes accounted for in the calculation of the respective periods.
3. On and after the date of ratification, it is understood that seniority shall accrue for both regular full-time and regular part-time employees in accordance with the new provisions of Article 28.01.
4. The parties agree that the Employer shall develop such retroactive seniority calculations and shall provide such information to all affected staff, as soon as administratively feasible but no later than three (3) months after the date of ratification. All affected staff shall have one (1) month from the date such retroactive seniority calculations are communicated, to indicate if such respective calculations require further review.
5. The parties recognize that the onus lies with employees and the Employer to ensure the accuracy of each employee's respective seniority calculation. However, the Association may also assist employees with such reviews. If any objections are not raised within one (1) month from the date they are initially communicated to the Employer in writing, the Employer's calculation shall be final and binding.
6. Where it is not administratively feasible for the Employer to meet the requirements of paragraph 4, the Employer and the Association shall effect a mutually acceptable resolution.

13 The employees ratified the memorandum of agreement on April 28, 1994. HSAA signed the collective agreement containing Letter of Understanding #2 on August 23, 1994 and the AHA did the same on October 11, 1994.

14 The first seniority lists were circulated to the employees in July, 1994 based on 2022.75 hours per annum. When several employees at UAH questioned the hours of the transferred employees from the Provincial Laboratory, Ms. Lynette McAvoy, a Labour Relations Officer for HSAA, met with Mr. Mark Johnson of UAH to discuss the method of calculation of seniority hours utilized by UAH in reaching its seniority list. This meeting occurred in mid-October, after the expiry of the time limit provided for in Letter of Understanding #2. Ms. McAvoy questioned Mr. Johnson as to whether UAH had taken into account that the transferred employees from the U of A had previously worked only a 7 hour day as opposed to 7 3/4 hours. Mr. Johnson did not provide an immediate answer but subsequently informed Ms. McAvoy that UAH based its decision on 2022.75 hours per annum. The UAH arrived at this figure using a 7 3/4 hour per day base for all employees, including

those transferred from the U of A working at the Provincial Laboratory.

15 In light of this, HSAA concluded that as the employees transferred from the U of A had previously worked 7 hour days, their calculations for seniority should be based on this amount. As such the calculation used for their seniority should be 1827 hours per annum rather than 2022.75 hours per annum.

16 On October 25, 1994 Ms. McAvoy sent a letter to Mr. Johnson confirming their discussions about the calculations for seniority of those employees transferred from the U of A. This information was also provided to Ms. Rita Vickers as the local representative for the Provincial Laboratory employees. Ms. Vickers told Ms. McAvoy that she was not happy with the decision but she did not pursue it further with Ms. McAvoy.

17 In January 1995, a new seniority list was posted. Calculations were the same as those on the earlier list based on 2022.75 hours for all employees including those in the Provincial Laboratory.

18 On March 27, 1995 UAH, after consultation with HSAA, sent letters to the Provincial Laboratory employees changing the seniority and indicating their seniority would be based on 1827 hours per annum. This had the effect of reducing the number of hours of seniority credited to the various Complainants.

19 The Complainants contacted HSAA and requested that HSAA arrange with UAH to restore full seniority entitlement provided for under the collective agreement. HSAA refused to do so.

20 The Complainants now seek a cease and desist order as well as an order that HSAA and Ms. McAvoy take all necessary steps to reinstate their lost seniority and do whatever else is necessary to make them whole.

II. Section 151

21 Unions owe a duty of fair representation to their members pursuant to section 151(1) of the Code. This section reads:

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.

III. Positions

22 HSAA states it was faced with a situation where 53 former employees of the Provincial Laboratory joined 187 other employees already with UAH. Given that the two groups calculated seniority differently, HSAA took the position that the fairest way to proceed was to base seniority

on hours worked per annum. Therefore, the former employees of the Provincial Laboratory had their seniority based on 1827 hours per annum, while other employees had their seniority based on 2022.75 hours per annum. HSAA considered itself caught between a rock and a hard place.

23 In achieving this end, HSAA considered the discussion about seniority in Letter of Understanding #2 attached to the collective agreement to be ambiguous in relation to the transferred employees from the U of A. Specifically, HSAA considered the reference to "continuous employment" in paragraph 2 of Letter of Understanding #2 to be unclear. It reads in part:

... in the case of staff who have continuously been employed as regular full-time employees, seniority accrued prior to the date of ratification shall be converted to an hour figure on the basis of 2,022.75 regular hours per year of continuous employment.

24 Continuous employment in HSAA's opinion only applied to employees continuously employed by UAH and did not address the transferred employees' service before the transfer. As such, HSAA considered it well within its right to negotiate a clarification in regards to the transferred employees. The Complainants allege that HSAA has failed to represent them by asking or demanding that the UAH do something detrimental to these employees which is contrary to the collective agreement and contrary to the earlier July 2, 1993 merger/seniority letter of understanding. Seniority in Letter of Understanding #2 was based on 2022.75 hours per annum. There was an element of rough justice in this number as the collective agreement does not specify a 7 3/4 hour day which was used as the base number for the 2022.75 hours per annum. Rather the figure was arrived at through an assumption based on all paid hours including hours worked, holidays, overtime and call backs. While this is calculable for the UAH employees, the former U of A Provincial Laboratory employees were not paid a differential for shift work nor daily overtime, despite regularly working 30 minutes to 1 hour a day over and above their regular 7 hour shifts. Thus, they claim, a calculation based on actual hours worked is unfair.

25 The Complainants take the further position that Letter of Understanding #2 attached to the collective agreement was meant to ensure a "seamless transfer" and that "continuous employment" clearly included service and employment while in the employ of the U of A.

IV. The Duty

26 Both the Complainants and HSAA know the union was in a difficult position. The Complainants readily acknowledge the rationale behind HSAA actions. Notwithstanding this, the Complainants state HSAA still owes them a duty of fair representation. They claim HSAA's decision adversely affected them and they were not given an opportunity to address their concerns. It was an administrative decision without any consultation, general meeting or vote.

27 The Board's role in duty of fair representation complaints is not to substitute its decision for that of the union. The Board's Information Bulletin #18 describes the content of the duty of fair

representation as follows:

III. THE CONTENT OF THE DUTY

The duty of fair representation involves rights and obligations for both the trade union and the employee. The Supreme Court of Canada has set out the principal features of the duty in five points.

- * The exclusive power conferred on a union to act as spokesperson for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.
- * When ... the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.
- * This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and for the union on the other.
- * The union's decision must not be arbitrary, capricious, discriminatory or wrongful.
- * The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.

See: Canadian Merchant Service Guild v. Gagnon (1984) 84 CLLC 14,043 (S.C.C.).

V. DFR Does Not Extend to Collective Bargaining

28 Unlike some other jurisdictions in Canada, a unions' duty of fair representation to its members in Alberta arises only with respect to employee rights contained in the collective agreement. No such duty exists for matters arising from or out of collective bargaining.

29 The Complainants argue this matter arises out of the collective agreement. They suggest the Canada Labour Relations Board specifically addressed this matter as it relates to seniority in Brian J. O'Connor v. Canadian Air Line Pilots Association et. al, (1991) 85 di 78, Board File: 745-3506, Decision no. 871 (H.R. Jamieson, Vice-Chairman). The Canada Board held that the method of determining seniority which influences rights flowing from a collective agreement is a subject that comes within the scope of the duty of fair representation complaint if the process is contained in the

union's constitution, by-laws or other internal process. At pages 82 and 83, the Board stated:

... seniority is a fundamental and often critical consideration for many substantial rights flowing from collective agreements, i.e., promotions, transfers and, probably more important, lay-offs. According to CALPA's own description of the merger policy, which we reproduced earlier in these reasons, any integrated seniority list is put to the employer for inclusion in the collective agreement. The acceptance of these lists by the employer is normally only a matter of form and they become an integral part of the collective agreement. The seniority of the pilots for the purposes of the administration of the collective agreement is thereafter considered according to the position on the seniority list.

With respect, it is difficult for us to see how the method of determining the seniority position on the list can be separated from the seniority rights included in the collective agreement. Notwithstanding that the merger policy is part of the union's constitution, it seems to us that it would naturally follow that the rules to determine seniority cannot be, in themselves, discriminatory nor can the rules be applied in a manner that is arbitrary, discriminatory or in bad faith. All of this surely falls squarely within the duty of fair representation as contemplated by section 37 of the Code. To rule otherwise would be to provide an escape hatch for trade unions to avoid their responsibilities under the Code. ...

30 HSAA did not argue that the method of determining the seniority position on the list can be separated from the seniority rights included in the collective agreement. There can be little dispute that seniority and its computation are rights that fall under the collective agreement. Here, however, the method of determining the seniority position appears to have changed as a result of discussions between the bargaining agent and the employer. The issue becomes whether this is collective bargaining and, if so, whether the union still owes a duty of fair representation to its members for matters arising out of the discussions.

31 The Complainants acknowledge that in Alberta the duty of fair representation does not extend to collective bargaining. This is confirmed in *Gallagher and Loughheed v. Hotel Employees Local 47 et al*, [1992] Alta.L.R.B.R. 460; reversed in part [1993] Alta.L.R.B.R. 287 (Q.B.); Board upheld on review [1994] Alta.L.R.B.R. 333 (C.A.). At pages 480 and 481 of the original decision, the Board stated:

... We do not accept counsel's argument that s. 151 of the Code includes collective bargaining.

The Code imposes a duty on the Union regarding an employee's rights "under the collective agreement". It does not extend that duty to collective bargaining (see

Gendron v. Supply & Services Union, 90 CLLC 14,020 (S.C.C.) and Information Bulletin #18). The Alberta Legislature, in our view, specifically excluded collective bargaining from the duty of fair representation in 1981. The Labour Relations Amendment Act, S.A. 1981 c. 69 amended s. 138(i) of the Labour Relations Act by striking out the words "in matters arising from collective bargaining or from bargaining". The Legislature inserted the words "with respect to his" before the words "rights under the collective agreement. This resulted in the statutory duty which remains unchanged since then and exists in s. 151 of the Code.

Bargaining involves the union as a separate party, not merely as an agent of an employee. The union is often faced with difficult choices between the best interests of the majority of members and those of a few. The Union had to bargain collectively to get this as a union camp at all. Had they not done so, no Union members may have worked on the project. The results of bargaining, while advantageous overall, may impact detrimentally on some employees, as it did here. This effect alone does not give the Board the power to review the Union's collective bargaining actions. For these reasons, we find that collective bargaining is not the subject of a duty of fair representation complaint and we dismiss this part of the complaints.

32 The Complainants contend this application is not restricted by the principle outlined in Loughheed and Gallagher as this is not a matter involving collective bargaining. They note HSAA and UAH based their original calculations for seniority purposes in the collective agreement at 2022.75 hours per annum. This figure was included in the memorandum of agreement and ratified by the membership. Following these collective negotiations, and pursuant to the terms of the collective agreement, UAH completed its seniority list and compiled the employees' placing on that list.

33 The Complainants argue what happened next cannot amount to "collective bargaining." By confirming letter dated October 25, 1994, almost six months after the ratification of the memorandum of agreement and outside the term set for any amendment to the seniority list, Lynette McAvoy of HSAA raised concerns with Mark Johnson of UAH about the seniority list. Only then did HSAA request that UAH re-calculate the seniority list basing the Complainants' past service on 1827 hours per year rather than the 2022.75 required in the letter of understanding. UAH did not immediately comply, instead posting an updated seniority list in January 1995 continuing to base seniority on 2022.75 hours per annum for all employees including those transferred from the U of A. Only after further consultation with HSAA did UAH send out a revised seniority list on March 27, 1995 based on 1827 per annum for the former employees of the U of A.

VI. What is "Collective Bargaining?"

34 What is "collective bargaining" and why is a union protected against duty of fair representation allegations arising out of collective bargaining?

35 Both "collective bargaining" and "collective agreement" are defined in section 1 of the Code. The sections reads:

1. In this Act

- (a) "bargain collectively" or "collective bargaining" means to negotiate or negotiation with a view to the conclusion of a collective agreement or the revision or renewal of a collective agreement; ...
- (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;

36 From these definitions, we conclude that in its broadest sense collective bargaining means

- * negotiations
- * between an employer (or employers' organization) and a bargaining agent
- * with a view to the conclusion, revision or renewal of an agreement in writing
- * containing terms or conditions of employment.

37 The rationale for the Code's protection of a union against a duty of fair representation complaint while bargaining is that a union, when bargaining, is acting on behalf of a collective identity. A union represents a large number of interests and concerns, many of which conflict even in the best of times.

38 Further, our Code is based on the rights and opportunities of individuals to express their views through a democratic vote. The democratic ideals expressed in the legislation allow individuals to vote on matters of interest to them, thereby (by intent at the very least) enabling them to voice their approval or disagreement with the issue at hand. The opportunity to vote, as in any democratic entity, enables an individual to have a say to give voice to their concerns. In any democratic process, when put to a vote, one side wins and others lose. But at least a voter has the right to express their point of view. A person who votes but whose side or issue fails at least had the opportunity to sway others and express their interest.

39 In the collective bargaining schematic utilized by HSAA and most other unions, such opportunity for its members to express their choice is made available through the negotiation and ratification process. Article VII, of HSAA's Objects and Bylaws sets out its negotiation and ratification procedure. This Article reads:

Section 1 Labour Relations Conference

The Labour Relations Committee shall hold each fiscal year a Labour Relations Conference. All members of the Association shall be permitted to attend this conference; however, the Labour Relations Committee shall endeavour to ensure representation from each bargaining unit represented by the Association. ... The number of representatives from each local unit shall be designated by the Committee for each annual conference. Conference may be held on a regional basis if deemed desirable by the Committee. The labour relations conference shall deal with all matters relating to labour relations including, but not limited to, proposals from collective bargaining. All members of the Association in good standing and present at a labour relations conference shall be allowed to vote on any matter before the conference and a majority vote shall decide.

Section 2 Ratification

The Executive Council of the Association may administer the affairs of the Association in all things and make or cause to be made for the Association, in its name, any kind of contract which the Association may lawfully enter into and, save as hereinafter, provided, generally, may exercise all such other powers and all such other acts and things as the Association is by constitution or otherwise authorized to exercise. The Executive Council shall refer the memorandum of agreement to the membership for ratification or rejection and no Collective Agreement shall be binding upon members of the Association until ratified by a majority vote of the members affected by the Collective Agreement either at a duly called meeting of the Association or by secret mail-in ballot or under vote conducted by the Labour Relations Board or Public Service Employees Relations Board of the Province of Alberta or other such recognized authority.

40 It is clear from a review of HSAA's Objects and Bylaws that collective bargaining, from the Union's own perspective, entails not only negotiation with a view to the conclusion, revision or renewal of an agreement in writing containing terms or conditions of employment, but also that any memorandum of agreement reached be first vetted by the Labour Relations Conference and then ratified by the membership. The process provides an opportunity for members to provide input and have discourse on topics or issues of concern. Its a fair and equitable opportunity open to all affected members.

41 It is this process which is protected against duty of fair representation complaints. This is not the process which is before us now, however.

42 In the situation before us, the collective agreement including the seniority calculations had already been negotiated, vetted, approved and ratified. Almost one year after reaching agreement on the collective agreement, Ms. McAvoy, on behalf of HSAA convinced UAH to amend its seniority list to comply with HSAA's new calculations.

43 Although the discussions between Ms. McAvoy and Mr. Johnson could be seen to fall within the general definition of "collective bargaining" as outlined above as they were negotiations, between UAH and HSAA with a view to the revision of an agreement in writing containing terms or conditions of employment, we are of the opinion that collective bargaining, when used as a shield to protect against a duty of fair representation complaint, must be viewed narrowly as opposed to broadly. To view collective bargaining in its broadest context could cover virtually all discussions involving changes or potential changes to a collective agreement, letter of understanding or side deals of any description between a union, its members and the employer. This is surely not what was intended by the Legislators. Likewise, the form of discussions engaged in by Ms. McAvoy and Mr. Johnson cannot be the form of collective bargaining the Legislators intended to protect a union from with respect to a union's duty of fair representation.

44 When examining "collective bargaining" for these purposes, at the very least collective bargaining must be interpreted to include that the bargaining agent is acting on behalf of its collective members in a fair and equitable manner. The union cannot act in an exclusionary, arbitrary or discriminatory manner towards a minority of its members. The union must allow or give these members the opportunity to express their wishes. To do otherwise is not equitable nor can the union be said to be acting on behalf of its collective membership.

45 This was not collective bargaining within the context meant to be protected against duty of fair representation complaints. There was no possibility for employee input. There was no democratic opportunity for members to express their wishes. We are satisfied that this was not "collective bargaining" in the context protected in the Code.

VII. Duty Owed Even "When Between A Rock and A Hard Place"

46 In *Donna Burton v. HSAA*, [1995] Alta. L.R.B.R. 310, the Board examined the fairness of the union's actions. In *Donna Burton*, the Board heard that historically HSAA had reinstated seniority for former members moving back into the bargaining unit. However, as a result of cutbacks in the health industry, more and more former members were moving back into the unit from management positions. To address this problem, HSAA developed a new policy whereby it would no longer reinstate seniority. This policy, however, came into effect too late as far as the complainant in that case was concerned as the union refused to make the policy retroactive. In dismissing the duty of fair representation complaint the Board stated at page 315:

HSAA, in this case, had an unwritten exception to the seniority clause in its

collective agreement since 1972. Whenever an employee asked for their seniority to be reinstated, HSAA complied. HSAA applied this interpretation consistently and unfailingly. The AGM confirmed the policy in May, 1992.

With more and more requests for reinstatement because of reduced funding and hospital downsizing, the Executive Council of HSAA rescinded this policy in September 1993 after the reinstatement of Bertha Sinclair's seniority. HSAA reacted to a perceived difficulty and remedied the problem for others in like situations. Unfortunately for Ms. Burton, while she may have been the catalyst for the change, HSAA did not implement the change until after the policy had affected her in a negative fashion. In HSAA's view, it could not make the decision retroactive as this would be unfair to those members who had relied on its prior practice. The Union was between a rock and a hard place, and therefore unable to satisfy all concerned.

Having regard to all the facts outlined above, we find no violation of the duty of fair representation. HSAA's decision was not influenced by personal hostility, revenge or dishonesty. The Union considered legitimate interests of all its members, including Donna Burton. It sought and obtained legal advice and opinions. The former policy, although subsequently changed, had to be respected. The legal opinions stated that because the Union had relied on its own long standing policy and past practice, any grievance would prove unsuccessful despite the wording of the collective agreement. We find no arbitrariness or bad faith in HSAA's decision not to take this matter to a grievance or to make the change in practice retroactive.

47 In Donna Burton, the Board found no violation of the union's duty of fair representation even though HSAA was "between a rock and a hard place." Donna Burton, however, is the flip side of what is before the Board here. In that case, HSAA realized it had conflicting interests and embarked upon a mechanism of addressing the problem. It consulted its membership, then implemented the solution but "(did) not make the decision retroactive as this would be unfair to those members who had relied on its prior practice." HSAA's decision in Donna Burton did not impose the wishes of the majority upon the minority. The decision did not trample rights nor unfairly affect others.

48 In the case before us now, however, HSAA failed to consult with its membership; failed to investigate how their decision would affect others; failed to consider other options; failed to disclose its actions to those affected; failed to consider all relevant matters or even investigate into other relevant matters; took one side's opinion over another while being in possession of superficial facts and without concern for the other side's interests; failed to perform a thorough investigation of all the facts, and imposed its decision retroactively. It failed to apply the collective agreement,

negotiated and ratified by all employees, to all employees.

49 Despite the fact HSAA knew before the transfer of these employees to UAH that they worked different hours from those employed at UAH, it chose not to address the issue during negotiations for the collective agreement. Rather, it waited until after the memorandum of agreement had been negotiated, ratified, signed and the deadline passed for changes before it acted upon the differential. If, in fact, HSAA did not view the transfer as including a "seamless transfer" of seniority rights, it should have dealt with the issue during negotiations for the collective agreement. The fact they chose not to negotiate a differential during collective bargaining indicates HSAA either considered the seniority to be seamless or it simply missed the issue entirely and attempted to rectify it after the fact.

50 Either way, the manner in which the Union demanded and received a change to the Complainants' seniority status is the epitome of arbitrariness. Having said this, however, we have no doubt HSAA did not intend to cause any impropriety or wrongdoing. As everyone acknowledged, HSAA truly was between "a rock and a hard place." Seniority issues pitting one group of members against another are very often "no winners" for unions. No matter what they do or how they handle the situation, one group of members will always feel aggrieved by the union's actions and decisions. In light of this and HSAA's lack of intent to cause harm, we find no evidence of bad faith or malfeasance. This, however, does not negate HSAA's obligations or duty.

51 In situations involving a merger of one group of employees into another, (more frequently seen in successorship situations), unions must proceed with great caution to ensure they do not unwittingly, inadvertently or otherwise take one group's position over another's without due and fair consideration. This situation is rife for abuse, especially when emotions are running high because of real or perceived threats to employees positions. In such situations unions must make themselves aware of minority interests and provide fair and reasonable opportunity for all concerned. For all these reasons, we find HSAA has violated its duty of fair representation. With respect to the complaint against Ms. Lynette McAvoy, we are satisfied she was performing her duties under the supervision and complete control of HSAA. Her actions must be viewed as those of an employee of HSAA operating with its full consent and authority. We are not prepared to find any violation of the Code by her.

VIII. Remedies

52 As these complaints were originally filed on June 16, 1995, we recognize much may have changed at the work site and, therefore, we may not be aware of all the pertinent information necessary to adequately address this matter. Notwithstanding this, however, and especially because all parties acknowledge that HSAA is facing competing interests and may be unable to properly address this matter without the Board's input, we order the following:

- * HSAA shall immediately cease and desist from breaching the complainants' right to be fairly represented by the HSAA;

- * HSAA and the UAH shall take all steps necessary to restore the Complainants full seniority entitlement pursuant to the letter of understanding of July 2, 1993 and the collective agreement as ratified.

53 We reserve jurisdiction with respect to any and all other damages which may have arisen with respect to these Complainants as a result of HSAA's failure to properly represent its members.

qp/d/tjc

---- End of Request ----

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Time Of Request: Tuesday, June 29, 2010 09:41:31