Shelley Alcorn and Edythe Detwiller, Applicants, and Grain Services Union, Respondent

[1995] S.L.R.B.D. No. 26

LRB File No. 247-94

Saskatchewan Labour Relations Board

B. Bilson, Chairperson
B. Cunningham, J. Jones

April 28, 1995

(24 pp.)

Trade unions -- Trade union discipline -- Whether trade union can impose fines on non-members -- Board deciding non-members outside disciplinary jurisdiction of trade union.

Trade unions -- Trade union discpline -- Whether trade union constitution authorized union to impose fines against employees working during strike -- Board finding constitution did not provide disciplinary authority for imposition of fines.

Natural justice -- Bias -- Trade union discipline -- Whether breach of natural justice when discplinary body composed of employees who had taken part in strike -- Board deciding composition of discplinary body not breach of natural justice.

Natural justice -- Discrimination -- Whether assessment of additional union dues disciminatory against employees not taking part in strike -- Board deciding assessment not punitive or discriminatory in nature.

Natural justice -- Notice -- Whether trade union breached principles of natural justice in giving notice of meeting where additional dues assessed -- Board deciding union had not breached natural justice.

Unfair labour practice -- Union unfair labour practice -- Interference and intimidation -- Whether trade union had coerced or intimidated employees not taking part in strike -- Board deciding unfair labour practice had not been committed.

Appearances:

Larry Seiferling, for the Applicants.
Neil McLeod, for the Respondent.

REASONS FOR DECISION

The Grain Services Union, Local 1000, is the bargaining representative of a number of units of employees of the Saskatchewan Wheat Pool. Ms. Shelley Alcorn and Ms. Edythe Detwiller have brought this application on behalf of themselves and other employees alleging that the Union has committed unfair labour practices and violations of The Trade Union Act by certain steps taken in the course of a strike conducted by the Union from September 7 to September 18, 1994.

Of the approximately one thousand eight hundred employees represented by the local Union, there are only about one hundred who fall within the jurisdiction of this Board. They are employed at the Western Producer newspaper, and in what was formerly called the Livestock Division of the Saskatchewan Wheat Pool, which has now become a separate company, Heartland Livestock. The other employees represented by the Union fall under federal jurisdiction.

It should be noted that the relationship between the Union and the Employer in connection with the employees at Heartland Livestock seems to be based on voluntary recognition rather than on a certification Order from this Board. The parties to this application did not make any representations concerning the possible implications of this, and we have not made any differentiation between the circumstances at Heartland Livestock and the Western Producer on this basis.

Between three hundred fifty and four hundred employees have retained counsel to file applications both with this Board and with the Canada Labour Relations Board, and to commence legal proceedings relating to the employees who fall within federal jurisdiction.

The applicants allege in their application to this Board that the Union has violated Sections 11(2)(a), 36(5) and 36.1 of The Trade Union Act, which read as follows:

> 11(2) It shall be an unfair labour practice for any employee, trade union or any other person:
>
> (a) to interfere with, restrain, intimidate, threaten or coerce an employee with a view to encouraging or discouraging membership in or activity in or for a labour organization, but nothing in this Act precludes a person acting on behalf of a trade union from attempting to persuade an employer to make an agreement with that trade union to require as a condition of employment membership or maintenance of membership in the trade union or the selection of employees by or with the advice of a trade union or any other condition in regard to employment, if such trade union has been designated or selected by a majority of employees in an appropriate unit as their representative for the purpose of bargaining collectively;
>
> 36(5) No trade union shall require any member to pay an assessment or fine pursuant to subsection (4) unless the constitution of the trade union provides for the assessment or fine prior to the commencement of the strike;
>
> 36.1(1) Every employee has a right to the application of the principles of natural justice in respect of all disputes between the employee and the trade union certified to represent his bargaining unit relating to matters in the constitution of the trade union and the employee's membership therein or discipline thereunder.

(2) Every employee shall be given reasonable notice of union meetings at which he is entitled to attend.
(3) No employee shall unreasonably be denied membership in a trade union.

The complaints enumerated in the application arise from the steps taken by the Union to address two issues which became a matter for concern from their point of view during the strike. The first of these issues was how to deal with members of the bargaining unit who did not comply with the strike call. The other was how to provide some financial help for the employees who were on strike.

According to the evidence of Mr. Hugh Wagner, the General Secretary of the Union, the Union had been contemplating possible strike action at least since the beginning of 1994. It was his evidence that the question of strike discipline had been discussed by the executive board of the Union in January, 1994. A strike vote was conducted among members of the bargaining unit between March 17 and April 19, and the executive was given a mandate to proceed with strike action.

In June, the executive board approved a "Strike Solidarity Policy" which had been formulated by the delegates to the 1994 Policy Convention provided for in the Union constitution. The introduction to the policy read as follows:

> Henceforth it shall be the policy of Local 1000 that when a majority of the members voting authorize the Executive Committee of the Local to invoke strike action, it shall be the duty and responsibility of each person in the bargaining unit(s) to support the strike and/or response to an employer lockout. Accordingly, a member who continues to work for the employer during a strike or a lockout, unless authorized to do so by the Executive Committee, shall be in violation of this Strike Solidarity Policy, hereinafter referred to as "Policy".

The policy went on to specify procedural steps which would be followed in determining whether employees had breached the policy.

The strike was ultimately called to commence on September 7 and continued until September 18, 1994. According to Mr. Wagner, charges were brought by the Union pursuant to the strike policy against three hundred seventy-two employees who had worked during the strike. The employees were notified of the charges against them by letters dated October 18 over the signature of Mr. Wagner which were in the following terms:

> Re: Grain Services Union - Local 1000 Strike Solidarity Policy
>
> As you are aware, on Wednesday, September 7, 1994, the members of Local 1000 of Grain Services Union commenced legal strike action as a result of a collective bargaining dispute with Saskatchewan Wheat Pool.
>
> We have been advised that you did not honour the democratic decision of the members of Local 1000 and that you continued to work in contravention of the strike. Your actions have harmed your fellow employees. Therefore, we are sending you this letter to advise you that proceedings have begun to apply the full extent of the Local 1000 Strike Solidarity Policy with respect to your actions.
>
> Subsequent to this letter you will be notified of a hearing by a jury of peers which will be convened to review the allegation that you have violated the

Strike Solidarity Policy. You have a right to attend the hearing and make representations when it is convened.

Conviction for a violation of the Strike Solidarity Policy will result in a fine equal to a day's wages/salary for each day of violation. Convictions can be appealed. Legal proceedings will be commenced against individuals who fail to pay fines assessed according to the Policy.

If the allegation made against you is incorrect, please advise.

Yours truly,

Hugh J. Wagner
Secretary-Manager
Executive Committee
Local 1000 - Grain
Services Union

On Behalf of:

cc GSU Central Zone

The employees against whom disciplinary action was to be taken were subsequently sent a summons to attend a hearing of the charge against them, as provided in the strike policy. The wording of these documents was as follows:

SUMMONS TO A PERSON

CHARGED WITH A VIOLATION

CANADA PROVINCE OF SASKATCHEWAN

ON BEHALF OF THE MEMBERS OF LOCAL 1000, GRAIN SERVICES UNION (CLC)

TO: Alcorn Shelley
4 111 St. Lawrence Cres.
Saskatoon

GSU FILE NO.:

SASK VOLUNTARY PAYMENT:
945.97

WHEREAS it has been charged that during the period of time September 7, 1994, to September 18, 1994, inclusive, you did continue to work for Saskatchewan Wheat Pool for 8.0 days, in spite of the commencement of a legal strike by Local 1000 of Grain Services Union (CLC), contrary to the Strike Solidarity Policy of said Local 1000.

This is, therefore, to request your attendance before the presiding Adjudicator and Jury of Peers at UNION CENTRE SASKATOON on the 16TH day of

November, 1994, at 7:30 p.m. to answer the charge that you violated the Strike Solidarity Policy of Local 1000 of Grain Services Union (CLC).

YOU ARE WARNED THAT FAILURE TO ATTEND WILL RESULT IN A VERDICT BEING REACHED IN YOUR ABSENCE. Each person who is found guilty of violating the Strike Solidarity Policy of Local 1000 of Grain Services Union (CLC) will be subject to a fine equal to a day's gross wages/salary for each day that the violation occurred.

DATED this 17th day of October, 1994,
REGINA in the Province of Saskatchewan. Notary Public

At the bottom of each summons was a seal. The evidence suggested that in some cases this was a red legal seal, and in other cases a photocopy of such a seal.

Approximately three hundred fifty of the employees who were summoned decided not to attend the hearings, and determinations were made concerning their cases in absentia. The employees were then sent a letter in the following or similar terms:

Dear Ms. Detwiller:

Re: Notice of Verdict and Fine - GSU Local 1000 Strike Solidarity Policy

This is to advise you of the following:

1. You were requested to attend and participate in a Local 1000 Solidarity Policy Hearing which was convened at 7:30 p.m. on November 16, 1994, in the community of Saskatoon.
2. A Jury of Peers empanelled to consider the allegation and evidence that you violated the above-noted Strike Solidarity Policy. Said Jury deliberated and found that you were guilty of violating the Strike Solidarity Policy between September 7, 1994, and September 18, 1994.
3. Following the Jury's verdict the Hearing Adjudicator ordered that you pay a fine of $696.29 which is equal to 8 days' wages/salary.
4. You have fourteen calendar days from receipt of this letter in which to appeal the finding. If you choose to appeal you must forward notice of same by registered mail to the writer. Following receipt of your notice of appeal, you will be advised of the appeal hearing location, date and time. Please refer to the appeal process which is set out in the Strike Solidarity Policy.
5. If you do not register an appeal the fine is owing and we request that it be paid by August 31, 1995, therefore you may prefer to pay by 8 monthly instalments in the amount of $87.03 per month commencing with the first of the month following the expiry of the appeal period referred to in paragraph 4. above.
6. Arrangements to pay the fine can be made as follows:

    a) A single cheque in payment of the full amount of your fine.

b) Eight postdated cheques commencing January 1, 1995; the cumulative value of which is equal to the total amount of your fine.
c) Completion of the attached payroll payment form which will direct your employer to deduct 8 monthly instalments of $87.03 per month from your wage/salary and remit same to Grain Services Union. A copy will be returned to you following receipt by the Union.

7. If you do not appeal or do not make arrangements with Grain Services Union to pay your fine, the Union will have no option but to take legal proceedings against you. The fine is owing pursuant to a contract that you have made with the Union, therefore, the Union has the right to collect the fine as a debt due and owing pursuant to that contract.
8. All fines collected will be deposited with the Grain Services Union Defence Fund which is distinct from the Local 1000 Strike Fund. The monies from fines deposited to the Grain Services Union Defence Fund will be held in trust in that account pending consultation between the Local 1000 Executive Board and the Joint Executive Council of Grain Services Union as to the terms of disbursements.
9. When you have completed paying your fine you will be issued a receipt.

The past several months have been difficult for all of us. We understand that you believe you had compelling reasons for making the decisions you made, however, we are all in the same boat and we cannot excuse your actions because of the harm they caused your co-workers. We strongly urge you to pay your fine, to make amends, and to put this chapter behind us.

Yours truly,

Hugh J. Wagner Secretary-Manager

cc Executive Committee

The sum specified as the fine in these letters differed from the sum named in the summons issued before the hearing. The explanation given by Mr. Wagner for this was that the Union had become aware of the provision of the Saskatchewan Trade Union Act, Section 36(4), which apparently limits the power of a trade union to impose fines under these circumstances to an amount not exceeding the net earnings of employees who work during a strike. This provision reads as follows:

> 36(4) Notwithstanding subsection (3), a trade union may assess or fine any of its members who has worked for the struck employer during a strike held in compliance with this Act a sum not more than the net earnings that employee earned during the strike.

The applicants have raised a number of objections to this series of events. The first of these has to do with the imposition of fines against employees who are not members of the Union. From the evidence, it would seem that there has been some confusion about the status of a number of em-

ployees. Three of the witnesses who gave evidence in support of the application, Mr. Mike Covey, Ms. Alcorn and Ms. Shelley Wichmann, said that they had not, as far as they knew, ever signed membership cards. They stated that they had attended a number of Union meetings at various times, and did not really know if they were members of the Union. They all said that they had tried to attend a Union meeting held in February of 1995, at which time they had been denied admittance on the grounds that they were not members of the Union.

Mr. Wagner said that the question of whether all of the employees in the bargaining unit were actually members of the Union had not really been carefully considered prior to the dispute which has arisen over the disciplinary proceedings. He said that a recent review of the records of the Union indicated that thirty-eight of the person against whom disciplinary action had been taken did not seem ever to have signed Union membership cards.

The issue of trade union membership for those employees in a bargaining unit has traditionally been one of considerable significance for trade unions. The regime established under trade union legislation of the kind which exists in this province confers upon a trade union the exclusive right to represent a group of employees for the purpose of bargaining collectively with an employer regarding the terms and conditions of employment of those employees. One of the implications of these exclusive rights to bargain is that a concomitant obligation is imposed upon the trade union to represent all of the employees in the bargaining unit equitably, regardless of whether they are actually members of the trade union or support the objectives or policies of the trade union.

In this context, a situation in which there are a significant number of employees in the bargaining unit who are not members of the trade union clearly creates certain risks for the trade union, because the obligation to provide adequate and fair representation to non-members is unaccompanied by a capacity to direct or control the conduct of those employees. That this is a significant disadvantage becomes particularly obvious during a labour dispute, when it is of added importance to the trade union to be able to insist that employees adhere to the strategies adopted by the trade union to maximize the exercise of collective power.

For these reasons, trade unions have historically attempted, in their bargaining with employers, to attain "union security" provisions which impose a requirement on employees to obtain and maintain membership in the trade union as a condition of their employment. In many Canadian jurisdictions, legislative provisions allow trade unions to insist on the inclusion of a union security clause of some kind in their collective agreements. In Saskatchewan, Section 36(1) of The Trade Union Act reads as follows:

> 36(1) Upon the request of a trade union representing a majority of employees in any appropriate unit, the following clause shall be included in any collective bargaining agreement entered into between that trade union and the employer concerned, and, whether or not any collective bargaining agreement is for the time being in force, the said clause shall be effective and its terms shall be carried out by that employer with respect to such employees on and after the date of the trade union's request until such time as the employer is no longer required by or pursuant to this Act to bargain collectively with that trade union:
>
> > Every employee who is now or hereafter becomes a member of the union shall maintain his membership in the union as a condition of his employment, and every new employee whose employment commences hereafter shall, within 30 days after the commencement in his employment, apply for and maintain membership in the union, and maintain membership in

the union as a condition of his employment, provided that any employee in the appropriate bargaining unit who is not required to maintain his membership or apply for and maintain his membership in the union shall, as a condition of his employment, tender to the union the periodic dues uniformly required to be paid by the members of the union;

and the expression "the union" in the clause shall mean the trade union making such request.

A review of the relevant provisions of the two collective agreements in this case reveals that the Union has accepted clauses of a somewhat different nature. In the Western Producer agreement, the following provision appears:

ARTICLE 5 - MAINTENANCE OF MEMBERSHIP

1. The Company agrees that as a condition of employment, membership dues or sums in lieu will be deducted from the wages earned by employees in the following categories:

    a) All employees for whom the Union has bargaining authority under this collective agreement, and
    b) All new employees under this collective agreement, as of their first complete pay period following commencement of employment.

2. Membership dues or sums in lieu so deducted from salaries shall be paid monthly to the Secretary-Manager of the Union within fifteen calendar days following completion of the last payroll period in the calendar month, remittance to be supported by information with respect to each individual employee, including the period covered by the remittance for that employee.
3. The Company shall furnish the Secretary-Manager of the Union with staff changes lists weekly, which shall include the name, location, classification, grade, salary, and effective date of all staff changes, including new hires.

In the agreement applying to Heartland Livestock, the provision is somewhat different again:

ARTICLE 5 - MAINTENANCE OF MEMBERSHIP

1. The Company agrees upon receipt of signed authorization cards from members of the Union to deduct from the salaries payable to such members the amount of membership dues payable by such members.
2. The Company agrees that as a condition of employment, membership dues or sums in lieu will be deducted from the wages of all newly-hired employees, hired on or after September 1, 1974, as of their first complete pay period following their commencement of their employment.
3. Membership dues or sums in lieu so deducted from salaries shall be paid monthly to the Secretary-Manager of the Union within fifteen calendar days following completion of the last payroll period in the calendar month, remittance to be supported by information with respect to each individual

> employee, including the period covered by the remittance for that employee.

Under these provisions, the Employer has clearly undertaken to deduct "membership dues or sums in lieu" from bargaining unit employees. The evidence, including that of the three employees who stated that they had never completed membership cards, indicated that this undertaking has been uniformly carried out in the case of all employees. Unlike the provision laid out in Section 36(1) of The Trade Union Act, supra, however, these articles do not require new employees to obtain membership, or current members to maintain their membership in the Union. A trade union is clearly permitted, under Sections 36(4) and 36(5) of The Trade Union Act, to impose discipline on members who contravene union discipline during a strike. These sections read as follows:

> 36(4) Notwithstanding subsection (3), a trade union may assess or fine any of its members who has worked for the struck employer during a strike held in compliance with this Act a sum of not more than the net earnings that employee earned during the strike.
>
> (5) No trade union shall require any member to pay an assessment or fine pursuant to subsection (4) unless the constitution of the trade union provides for the assessment or fine prior to the commencement of the strike.

A careful reading of these provisions, however, discloses that the power to impose such discipline can only be exercised over those employees who are members of the union. Neither can a trade union constitution, or policies developed pursuant to that constitution be held to have any jurisdiction with respect to employees who are not members of the union.

With respect to the employees in these two bargaining units who have not taken out membership in the Union, we have concluded that there was no basis established before us on which the Union can assert jurisdiction over them, other than to require the deduction of union dues or their equivalent from the wages and salaries of these employees, as all others. The Union thus had no capacity, in the case of those employees, to require adherence to union rules or to impose disciplinary penalties for infractions of the rules. The fines assessed against those employees must therefore be viewed as improperly assessed and void.

On the other hand, there is nothing improper about the Union excluding non-members from membership meetings or other participation in discussion or decision-making, with the exception of their statutory entitlements, such as the right to take part in a strike vote. There was some evidence on behalf of the applicant employees that they were denied entry to a union meeting held in February of 1995. With respect to those who were not members of the Union at the time, we are of the view that there was nothing improper about this.

The objections of the applicant employees who are members of the Union have been framed in different terms. Counsel argued on their behalf that there is no constitutional foundation for the imposition of such discipline, and that this is a statutory requirement under Section 36(5) of The Trade Union Act, which has been quoted earlier.

Furthermore, the argument was made by counsel, even if the "Strike Solidarity Policy" rested on a constitutional foundation, the Union committed a number of breaches of the requirements of natural justice in the application of the policy, and these constitute violations of Section 36.1 of The Trade Union Act, supra.

The nature of the relationship between a trade union and its members, and the procedural requirements for the internal processes of the union, have been the subject of considerable discussion,

much of it confusing and unilluminating. It is clear, however, that the characterization of this relationship has undergone changes in recent years. At one time, the internal affairs of trade unions were compared to those of purely domestic bodies or voluntary associations. Given this view of trade unions, it is not surprising that the courts maintained a position of extreme deference to their internal decisions.

The introduction of a legislative regime which conferred exclusive representational rights on trade unions, however, led the courts to deviate increasingly from this "club model" to a view which acknowledges the considerable powers which unions enjoy over the employment conditions and economic future of the employees they represent. They have scrutinized union constitutions and internal union proceedings with greater care, on the basis that there are important considerations of public policy at stake. Though the constitution of a trade union is still described as creating a relationship of a contractual nature between a trade union and its members, the courts have imposed restrictions on the possible character and content of such an agreement. In Lee v. Showmen's Guild of Great Britain, [1952] 2 Q.B. 329, for example, the English Court of Appeal made the following comment:

> Although the jurisdiction of a domestic tribunal is founded on contract, express or implied, nevertheless the parties are not free to make any contract they like. There are important limitations imposed by public policy. The tribunal must, for instance, observe the principles of natural justice. They must give the man notice of the charge and a reasonable opportunity of meeting it. Any stipulation to the contrary would be invalid.

The Ontario High Court made a similar observation in Bimson v. Johnston (1957), 10 D.L.R. (2d) 11, at 29:

> While discipline is essential for the maintenance of a Union as an effective organization, it may also be an instrument of oppression when misused by overzealous or misguided leaders. The very nature and purpose of the Labour Union demands unstinting loyalty from its membership. Important as that consideration may be from the Union's point of view, it is just as important as a matter of public concern that individuals in a democratic State and the rights of persons should be protected against undemocratic and tyrannical practices.

In the recent case of Stamos and Hotel Employees and Restaurant Employees International Union v. Belanger, 94 C.L.L.C. 12,263, the Ontario Court of Justice stressed that each member of a trade union has standing to rely on the terms of the union constitution:

> Indeed the constitution of a trade union and local by-laws create contracts between each member. Thus each member has an enforceable contract with all other members. Moreover, I am unwilling to engage in, what I believe to be, an untenable exercise of attempting to characterize each constitutional provision as being for the benefit of either the individual or the institution. All the claims made in this lawsuit are enforceable at the instance of an individual member. The absence of substantial public regulation of our trade unions makes it essential that those rules which the members have agreed to be bound by are complied with and that there be a relatively speedy and easily available mechanism for their enforcement.

In these and other decisions, the courts have made it clear that the basis of the jurisdiction of a trade union over its members and the obligation of those members to recognize that jurisdiction is the union constitution. They have also indicated that trade unions will be required to observe principles of natural justice in conducting their internal proceedings.

Issues arising from internal trade union proceedings have come before this Board relatively infrequently. This was especially true prior to 1983, at which time amendments to The Trade Union Act were introduced which made specific reference to the obligation of trade unions to observe the principles of natural justice, and also to the duty of trade unions to represent bargaining unit employees fairly. In a decision in Saskatchewan Union of Nurses v. Prairie Health Care Centre and Holy Family Hospital, LRB Files No. 190-92 and 191-92, this Board made the following comment:

> Those amendments, which from one point of view are arguably a codification of common law developments on these issues, appear to have originated in a lack of confidence in the ability of trade unions to conduct their internal proceedings with adequate fairness or respect for due process. The limitations placed on union disciplinary procedures in the amendments to Section 36 bear some logical relationship to such a premise.

As this comment suggests, these provisions may merely have articulated specifically obligations which the common law already imposed upon trade unions, and though the role of the Board in this regard was traditionally a peripheral one, we have always interpreted The Trade Union Act as containing certain requirements and prohibitions related to the conduct of trade unions with respect to their members. An example may be found in the provisions of Section 11(2), which have been included in the Act from the outset.

Section 36(5) appears to contain two specific limitations on the power of a trade union to impose disciplinary penalties on employees who defy union discipline by working during a strike: the penalty cannot exceed the net earnings of employees for the time worked, and the penalty must be contained in the union constitution prior to the beginning of the strike. In the Prairie Health Care Centre case, supra, the Board compared this provision with Sections 36(4) and (5) which had been in the Act prior to 1983:

> (4) Subsection (3) does not apply to an employee who has engaged in activity against the trade union.
> (5) For the purposes of subsection (4), activity on behalf of another trade union does not alone constitute activity against the trade union.

Counsel for the Union argued that the purpose of the current Section 36(5) may be seen as to set limits on the degree to which the assistance of The Trade Union Act and this Board can be invoked in support of the disciplinary actions taken by a trade union following a strike. He argued that even if this provision places limitations on the jurisdiction of the Board, it does not necessarily limit the power of a trade union to conduct disciplinary proceedings and impose penalties outside the scope of that section.

In the Prairie Health Care Centre decision, supra, we contrasted the effect of Sections 36(4), 36(5) and 36(6) as they currently stand with that of Sections 36(4) and 36(5) as they were before 1983. The provisions in place prior to 1983 permitted a trade union to insist on the termination of employment of an employee whose union membership was withdrawn as a consequence of action against the trade union, including the decision to work during a strike.

In that decision, we expressed the view that the amendments of 1983 removed this option, and limited the disciplinary power of the trade union under these circumstances to the imposition of a fine not exceeding the net earnings of an employee who had worked during a strike. We furthermore found that an employer could no longer be implicated in the enforcement of such penalty.

One of the implications of our analysis in that decision was that the amended provisions operate as an actual limit on the disciplinary authority of a trade union, not just on the ability of the Board to comment or intervene. As indicated above, we concluded that the legislative premise of the amendments was a concern that trade unions should not be left to determine their internal affairs entirely without regulation, and that The Trade Union Act should provide expanded opportunities to challenge the actions of trade unions before this Board.

In this context, if the terms of a trade union constitution purport to lead to some different result than the provisions of the Act, it is difficult to see how the constitution could prevail. In Quale v. Saskatchewan Registered Nurses Association (1970), 16 D.L.R. (3d) 550, at 555, the Saskatchewan Court of Appeal commented as follows on this point:

> Secondly, notwithstanding that the provisions of the constitution of the union may constitute contractual obligations which a member of the union has with all other members of the union, the Court will not give effect to those provisions of the constitution which, if enforced, may defeat, abrogate or vary the rights guaranteed and the duties imposed by the specific provisions of the statute.

Our stance continues to be one of considerable deference to the internal decision-making of trade unions. We have concluded, nonetheless, that the specific limitations placed by the statute on their authority to make certain kinds of decisions must be taken seriously. In our view, these limitations include the requirement stated in Section 36(5) that the fine imposed by a trade union for activity during a strike must be founded on constitutional provisions in place before the strike.

Counsel for the Union argued that, in any case, the steps taken by the Union pursuant to the strike solidarity policy were legitimately based on constitutional authority. In his evidence, Mr. Wagner stated that the decision-making authority within the Union has extensively devolved to the local level. A review of the constitution of the Union supports this characterization. Much of the constitution is devoted to a delineation of the legislative and decision-making structures of the Union, including those of the locals. According to Mr. Wagner, the locals have full autonomy to take a wide range of decisions, including the adoption of policies such as the strike solidarity policy and the imposition of discipline against members.

A number of cases have commented on the relationship between union disciplinary proceedings and the constitutional provisions which describe the offenses for which disciplinary action may be taken. In LeBlanc v. Winters and Mosienko (1986), 53 Sask. R. 22, the Saskatchewan Court of Appeal tied the legitimacy of disciplinary action closely to the specification of offenses in the constitutional documents of the organization purporting to exercise disciplinary authority.

Given the conclusion we have reached on this issue, it is not necessary for us to comment on the degree to which a constitution must specify the offenses for which disciplinary action will be taken, and the penalties attached to those infractions, nor to determine whether the terms of Section 36(5) require that the fines imposed in these circumstances be specifically mentioned in the constitution. It is our view that, whether or not the constitution of a trade union is of a contractual nature in the traditional sense, the principles of natural justice require, at the very least, that a trade union member can learn from the constitution where disciplinary authority lies and where to go for information about the disciplinary policies which are in effect.

In this instance, a review of the constitution discloses that there is no mention whatsoever of the source or division of disciplinary authority with respect to union members, although a recent constitutional amendment has been adopted which deals with union officers. Even assuming, for the sake of argument, that the strike solidarity policy could be seen as setting out an acceptable code of offenses and procedure for addressing infractions, we think that the authority of the local to put such a policy into effect was without foundation in the provisions of the constitution, and that the fines imposed by this means were not based on sound constitutional jurisdiction. In our view, the disciplinary proceedings which led to the imposition of the fines were void and without effect with respect to members of the Union as well as non-members.

Complaints were pressed on behalf of the applicants with respect to specific aspects of the disciplinary process. Counsel argued that even if the policy was well-founded constitutionally, its application was flawed both in terms of compliance with its own provisions, and in terms of more general considerations of natural justice. As we have determined that the process did not rest on a secure constitutional foundation, it is not necessary to address these objections in detail. There is one matter we wish to address, however, because the nature of this objection suggests that the applicants labour under a misapprehension about the status of their decision to work rather than to participate in the strike.

We refer to the objection raised by the applicants with respect to the composition of the "jury" which was to determine whether a penalty should be imposed on members who had worked during the strike. The argument was advanced on behalf of the applicants that the makeup of the jury was inherently unfair because the selection process would lead to a jury composed entirely of people who had taken part in the strike.

Statements made by the witnesses who gave evidence in support of the application, and during argument by counsel, indicated that those supporting the application viewed the decision to work during the strike as a neutral and benign one, based on some sort of individual free choice to take part in the strike or not. In our view, this view rests on a misconception of the nature of a strike, and the nature of the disciplinary power of trade unions over those who conduct themselves as these employees did.

The decision to embark on strike action is one of the most serious decisions a trade union can take. The importance of such a decision was described by this Board in the following terms in the case of International Woodworkers of America v. Moose Jaw Sash and Door Co. Ltd., LRB Files No. 061-80, 062-80 and 063-80:

> ... The strike weapon is the ultimate weapon which the union has in the collective bargaining process and amounts to economic warfare. It is authorized by a vote required by Section 11(2)(d) of The Trade Union Act and expresses the wishes of the majority of the members of the bargaining unit. Any crossing of a picket line by a member of the union defies the will of the majority of the members of the bargaining unit and constitutes strike breaking, which in any form, certainly threatens the effectiveness of the strike, and, in many cases, the very life and existence of the union local. It is difficult to imagine any other act by a member which a union would consider to be more treasonous conduct to it. In the opinion of the Board it constitutes activity against the union within the meaning of Section 36(4) of the Act....

The significance of the decision is signalled by the fact that everyone affected by it, including employees who are not members of the trade union, are entitled to register their opinion about whether strike action should be taken. It is a decision to use the major weapon available to employees, the

withdrawal of their labour, against an employer in an attempt to secure the goals of collective bargaining. It is a costly decision for employees, because it entails a loss of income for them during the strike, and a risk that this loss will not be made up if the strike is not effective, and the employees are forced to return to work on terms favourable to the employer and not the trade union. The effectiveness of the strike weapon is generally proportional to the ability of the trade union to secure the most comprehensive possible withdrawal of labour by employees.

Though it is open to employees to make vigorous objection to strike action prior to the vote, and to cast their vote against it, once the majority of employees have decided that strike action should be taken, employees are exposing themselves to disciplinary action if they make the decision to work during the strike. It is a matter which the trade union and their fellow employees take very seriously, with justification. Not only are these employees continuing to receive wages at a time when their colleagues are making a considerable financial sacrifice, which is a natural source of tension, but they are putting at risk the very objectives the majority are seeking to attain through the strike, by undermining the demonstration of collective power the strike represents.

In these circumstances, the trade union and its members are not required to be neutral about the decision to work rather than strike. They may be required to provide an opportunity for members to contest the facts on which disciplinary charges are based, or to provide an explanation which may mitigate the disciplinary penalty. The decision to work itself is not, however, entitled to even-handed consideration; the trade union is entitled to regard that decision as unacceptable, and to hold an employee accountable for it. The fact that the "jury of peers" is composed of persons who have honoured the decision of the majority to take strike action does not render the proceedings unfair; these persons represent what the union is entitled to regard as the norm from which those employees who have decided to defy the majority decision have deviated.

The second major aspect of this application concerns additional union dues which were levied during the course of the strike. At the time the strike began, the Union had no strike fund from which to provide financial assistance to employees who were taking part in the strike. The executive board of the Union devised a mechanism for providing a strike fund which they proposed to put before the annual meeting of the membership. The proposal was that, as of October 1, 1994, in addition to the one per cent of gross pay already levied as union dues, a special assessment of an additional one per cent would be made. A formula was proposed under which this "special union dues assessment" would be rebated only to employees who participated in the strike; in addition, the amount paid by those who did not participate in the strike would be shared among those involved in the strike action. The proposal was to put this system into effect initially from October 1 to December 31, 1994, and then to continue it until the annual meeting in the fall of 1995. At that time it was anticipated that the rebate aspect of the assessment would cease, but the collection of the additional levy would continue in order to build up a strike fund for a future occasion.

The annual meetings were held in a number of locations on September 15 and 16, 1994, while the strike was in progress, and the strike fund scheme outlined above was approved by the majority of those present. In fact, though the members who attended the meetings would have had no way of predicting it, the strike ended a few days later, before the first deduction was planned.

Counsel argued on behalf of the applicants that this mechanism for collecting and distributing strike pay discriminated against the applicants and constituted an unfair penalty for their decision not to participate in the strike. In support of this argument, he pointed to the aspect of the process which contemplated that the dues paid by the employees who did not strike would be divided among those who did.

It is common for trade unions, in assessing union dues, to anticipate that a strike fund may eventually be required, and to set union dues at a figure which will allow the accumulation of funds for this purpose. There cannot be said to be anything discriminatory about the fact that these funds are ordinarily paid to employees who participate in the strikes and are not paid to employees who continue to earn wages during the strike. Even in the case of partial or rotating strikes, it is common for funds to be collected from all employees, and paid out only to those who are called out on strike.

What is somewhat unusual about this case is that the strike fund was set up in the course of the strike and its operation was intended to be largely retroactive. Counsel argued that these features are an indication that it was intended as an attack on the non-strikers, and was designed to penalize them.

In conceptual terms, we do not think that there is any difference between a strike fund which is in existence before the beginning of a strike, and one which is set up in this way. In our view, it was not intended to penalize the non-strikers, but to provide financial relief for those who did participate in the strike, which was impossible on the basis of the financial resources of the Union when the strike began. It was designed in the way it was in the hope that it would be treated as an ordinary strike fund for tax purposes. The fact that all employees would pay into the fund, but only those who participated in the strike would draw a benefit from it does not distinguish it from any ordinary strike fund.

There is no evidence that the Union devised this scheme simply as a punitive measure against the non-strikers. Though, under the circumstances, the discussion of this scheme occurred in close proximity to discussions of the strike solidarity policy, we are persuaded that these were two different issues, and that the primary focus of the Union proposal for the special dues assessment was on the desirability of providing some financial assistance to the striking employees, who were undergoing serious financial hardship.

Counsel for the applicants further argued that proper notice had not been given of the meetings at which the special dues assessment was approved. The meetings at which this occurred were the annual meetings of the membership of the Union; these were held at fifteen different locations on September 15 and 16, 1994.

Mr. Wagner stated in his testimony that the annual meetings of the Union are held in the fall of each year. Their date is determined fairly close to the actual date when they are held, taking into account the dates of the harvest and the level of activity at grain elevators. There are no indications in the constitution of how notice is to be given for these meetings. Mr. Wagner said that generally notices are posted in the workplace, usually about a week to ten days before the meetings, and that sometimes this is followed up by telephone calls to employees by Union representatives.

On this occasion, Mr. Wagner said, the choice of meeting dates was not dictated by the exigencies of the harvest, but by events which were occurring connected to the strike. The dates were chosen to provide Union members with morale-boosting news about support for the strike among grain-handlers in Vancouver, and also to hold out the prospect of some financial help. The decision to hold the meetings was made on the weekend of September 10 and 11.

Under the circumstances, it was not possible to use the usual means for giving notice of the meetings. Notices were sent out to members by ordinary mail on Monday, September 12. In addition, notices were posted at strike headquarters, Union representatives passed the word among the strikers, and a phoning tree was set up to inform all of the employees, including those who were at work. Mr. Wagner said that explicit instructions were given to ensure that all employees were informed of the meeting, as it was hoped that even employees who were at work could be lured to leave work to attend the meetings.

The evidence of the five witnesses who testified in support of the application was somewhat confusing on this point. Ms. Alcorn, who got the notice, said that she never had any intention of going to the meeting, and did not think she had mentioned it to any other employees. Ms. Detwiller could not be sure whether she got a notice concerning this meeting or not. Ms. Wichmann said that she got the notice several days after the meeting occurred, but could not really be sure whether someone might have tried to telephone her, as her telephone number was unlisted. Both Mr. Covey and Mr. MacDonald said that they had not received notice of the meeting, though when pressed in cross-examination, Mr. MacDonald said he "maybe did." Mr. Covey said that someone had left a telephone message for him early in the strike, which he had not returned, but he did not think anyone phoned about the meeting.

It is, of course, important that a trade union give adequate notice of meetings at which matters are to be discussed which have a significant effect on members. As this Board pointed out in Jordan Ward v. Saskatchewan Government Employees' Union, LRB File No. 173- 94, the requirements of proper notice are especially important where matters of individual discipline are at stake. The principle of reasonable notice nonetheless applies to all circumstances where decisions may be made of more general effect.

We have concluded that, in this case, the Union took reasonable steps to bring the meeting to the attention of all employees. Not all of the usual methods of giving notice were available to them, but they did give instructions that all employees were to be telephoned. With the exception of Mr. Covey, who was not at the time a member of the Union, and Ms. Alcorn, who did get a written notice, the other witnesses were uncertain as to whether notice had been given to them. Though the notice period was shorter by a few days than the normal notice for annual meetings, the past practice of the Union was to hold meetings at fairly short notice, and on different dates, and there was nothing in the constitution to prevent this. Although with hindsight it might have been desirable to give longer notice, we think that the steps taken by the Union were reasonable under the circumstances, and did not violate the rights of members.

We have therefore found that there was nothing improper about the special dues assessment. It should be noted that, under the terms of the applicable collective agreements, this assessment would apply to non-members as well as members of the Union.

The final aspect of the application is the allegation that the Union committed an unfair labour practice and violations of Section 11(2)(a) of The Trade Union Act, which was reproduced near the beginning of these Reasons.

This Board has had relatively few occasions to consider the interpretation of this provision. In a decision in Alexander Spalding v. Federal Pioneer Limited and United Steelworkers of America, LRB Files No. 408-80, 002-81 and 001-81, the Board made the following comment:

> It would, in the opinion of the Board, be wrong for the Board to permit a union to punish a member for exercising a right given to him under The Trade Union Act. The Board will not permit the enforcement of any provision in the union constitution which might defeat, abrogate or vary any rights given by the statute. Any attempt to enforce such rights by a union amount, in the opinion of the Board, to a violation of Section 11(2)(a) of the Trade Union Act and the Board finds the union guilty of an unfair labour practice accordingly.

In that case, the Board interpreted The Trade Union Act as permitting an employee to attempt to persuade other employees that they should support an application for rescission of a certification order, and found that for the union to subject an employee to a penalty for such activity was an un-

fair labour practice under Section 11(2)(a). A similar conclusion was reached in a decision in the case of Diane Pyne v. Saskatchewan Government Employees' Union, LRB File No. 056-86.

As these decisions indicate, Section 11(2)(a) must be understood in the context of the trade union as a democratic organization. In this respect, the interpretation of Section 11(2)(a) cannot be quite parallel to that of Section 11(1)(a), for the relationship of an employee to a trade union is somewhat different than the relationship with the employer. In the case of the relationship with the trade union, the statute seeks to protect the right of employees to challenge the actions or objectives of the trade union, to take part in union decision-making, and even to take the position that they do not wish to be represented any longer by the trade union or any trade union. It is not open to a trade union to punish dissidents for legitimately raising issues for debate, no matter how unpopular they are, for seeking to unseat the union leadership or attempting to overturn the union altogether.

There is a distinction, however, between engaging in vigorous debate at an appropriate time, and defying a decision legitimately taken by the majority, such as the decision in this case to go on strike. In those circumstances, the fact that the Union took steps to discipline the employees is not in itself coercive, anymore than when an employer legitimately disciplines an employee.

The witnesses who testified in support of the application said that there was tension between them and the striking employees, and that their discomfort about the way this might manifest itself at union meetings effectively closed those meetings to them.

Earlier in these Reasons, we addressed the status of the decision to continue to work during the strike. We stated our view that the decision to work in defiance of the strike call is not neutral in nature, and it can be legitimately treated by the Union as an infraction of union rules, aside from the absence in this case of constitutional foundation for such proceedings. A corollary of this, in our opinion, is that the decision to work is not entitled to the kind of protection given to the right to persuade employees to support a rescission application, as in the Alexander Spalding case, supra, or the right to take part in a strike vote, as in the Diane Pyne case, supra.

Although we have earlier found the imposition of the fines by the Union to be flawed, in a constitutional sense, this does not mean that the Union committed any unfair labour practice under Section 11(2)(a) by proceeding as it did.

There is no evidence here that any of the applicants were directly threatened or intimidated. The Union did undertake disciplinary proceedings against them, but in our view these proceedings were entered into in good faith. The fact that the employees themselves felt discomfort about facing their fellow employees at Union meetings or at the disciplinary hearings is not surprising, given their admission of making a decision which the majority of employees would naturally regard as unacceptable. This discomfort and unease is not, in our view, suggestive of unlawful coercion or interference from the Union, but of the tension which would be expected to arise between striking employees and other employees who had made a decision which was understood to be an infraction of the rules of the Union. Indeed, the witnesses themselves, although they may have taken comfort in what they regarded as their right to make the decision to go to work, conceded that they expected the Union to be unhappy with that decision and to take some action against them.

For these reasons, we have concluded that the allegation of an unfair labour practice against the Union must be dismissed.

We would summarize our conclusions as follows:

1. The Union had no jurisdiction to subject those employees who were not members of the Union to the disciplinary policy, and the penalty of fines.

2. The constitution of the Union did not, at the time the fines were imposed, satisfy the requirements of Section 36(5), and thus the fines must be regarded as void.
3. There was nothing inherently punitive or discriminatory about the assessment of additional Union dues.
4. There was no violation of the principles of natural justice allued to in Section 36.1 in connection with the notice given at the annual meetings.
5. No unfair labour practice was committed under Section 11(2)(a).

Our orders will take the form of a declaration of these conclusions. We will remain seized, as requested by counsel, in the event the parties wish to make any additional representations concerning remedies.

d/smd