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Directed to: Blakely & Dushenski - Micah Field, McLennan Ross - Hugh McPhail, Q.C., Simon Renouf Professional - Simon Renouf, Q.C., United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union No. 488 - Vern Stephens, Techint Somerville JV - Joe Phillips / Nick Dekoning, Dennis Radke

RE: An application for reconsideration brought by United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union No. 488 affecting Dennis Radke – Board File No. GE-06233

[1] The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 488 (the "Union") applies under section 12(4) of the *Code* for reconsideration of a Board decision issued September 20, 2011 upholding the duty of fair representation complaint of Dennis Radke ("Radke") in Board file #GE-05907 (the "Original Decision"). Radke asks us to summarily dismiss the reconsideration application. Techint Somerville J.V. (the "Employer") is the employer affected by the application.

[2] Following the usual procedure in reconsideration applications set out in *CUPE, Loc. 3421 v. City of Calgary*, [2000] Alta. L.R.B.R. 47, a panel of the Board (Kanee, Kozielec, Moench) has reviewed the written materials filed. We are of the view the reconsideration application has no prospect of success and, therefore, dismiss the application without a hearing under section 16(4)(e) of the *Code*. Our reasons follow.

Background

[3] Radke's complaint was heard by a panel of the Board (Schlesinger, Basken, Williams) (the "original panel") on February 10, 2011, together with the
complaints of two of Radke's co-workers (the "other complainants"). Those other complaints were dismissed by the original panel and are not the subject of the Union's reconsideration application. We therefore limit our review of the background facts to those set out in the Original Decision that relate to Radke.

[4] Radke has been a member of the Union for many years. In the summer of 2009, he was employed as a pipeline welder on a pipeline being built by the Employer for Enbridge. The work consisted of operating automatic welding machines. Radke was assigned to the "cap shack". He started work on June 23, 2009. His work was governed by the United Association Mainline Pipeline Agreement for Canada (the "Collective Agreement")

[5] The project was anticipated to last two months. But, his employment came to an abrupt end on June 27, 2009. Radke's termination letter said his dismissal was for: "poor workmanship with regard to the quality of the welds performed, as discussed with the client Enbridge."

[6] Radke filed a timely grievance with the Union, seeking to challenge his termination.

[7] In early July 2009, Vern Stephens ("Stephens") the Union's pipeline representative wrote to the Employer's Project Superintendant, Joe Phillips. He asked to have any applicable timelines waived in order to have the opportunity to fully investigate the allegations in the grievance. The Employer agreed to the request.

[8] On July 8, Dwight York ("York"), another Local 488 pipeline representative, wrote to Radke, saying:

> I have conducted a thorough investigation of your allegations regarding the above grievance. UA Local Union 488 will not be proceeding any further with this grievance.
>
> During my investigation, I attempted to substantiate your version of events; however, I was unsuccessful in this attempt. After reviewing your statement and the statements of others, the decision was made not to proceed to arbitration with this grievance as your claim cannot be substantiated.
>
> If I do not receive a written response from you by July 20, 2009 I will consider this matter to be concluded and I will close this file.

[9] Shortly after receiving this letter, Radke received from the Union the documents relied on by the Employer to support its position. The documents provided were: (1) Daily Field Welding Data from June 20 to June 27 (This Employer-generated document lists the number and status of welds performed by employees, along with any observations noted by the Employer's quality control people); (2) weld photographs, identifying problems with some of the welds; and (3) written statements of individuals who claimed to have witnessed events relevant to the terminations.

[10] On the same date that York's letter to Radke went out, Stephens sent the Employer a letter saying:

> On July 3rd and 7th I wrote to you requesting that the time limits for this grievance be waived. I have now completed my investigation and am advising you that Local 488 Plumber & Pipefitters Union will not be pursuing this grievance any further.

[11] This letter was never copied to Radke.

[12] In his testimony, York explained the reason the Union decided to drop the grievance was primarily based on two June 30 letters from Enbridge to the Employer asking that Radke's employment be terminated. One letter asked that Radke and one of the other complainants be terminated due to "increasing number of repairs and poor quality of workmanship". A second letter asked that all three be terminated due to "increasing number of repairs and poor quality of workmanship".

[13] The Union investigated the grievance until it learned of the Enbridge request that the Employer terminate Radke's employment. Indeed, by the time York received the Enbridge letters, he had gathered information from the job steward and obtained the documentation relied on by the Employer to support the terminations. But, once the Union learned of the Enbridge request, York believed there was nothing further the Union could do and the grievances were dropped. York expressed the matter this way when he testified: "... it was plain and simple in his mind –if the client wants an employee off the project, there is nothing the Union can do."

[14] While the Union may have believed the grievances were at an end after its July 8 letter to the Employer, Radke did not. He did not get a copy of the letter Stephens sent to the Employer abandoning his grievances. Based on the July 8 letter he received from York, he believed he still had a chance to convince the Union that it should forward his grievances to arbitration.

[15] Radke phoned the Union before the deadline indicated in York's letter to voice his concerns about the documents. He indicated that, from the information provided, he could not understand why the Employer had any concerns. His welds, for the most part were rated as fine. He told the Union the photographs provided were difficult to read. In any event, he could not understand how the pictures supported the Employer's position. He also asked for the reports from the inspection company hired by Enbridge. By the deadline set out in York's letter, Radke sent the Union a written request saying that his grievance should proceed.

[16] On August 7, 2009, Radke sought help from the Union's International representative Rob Kinsey ("Kinsey") who agreed to look into the matter by reviewing it with York and Stephens. In late August, Radke received Kinsey's response. Kinsey confirmed that the Union had provided Radke with all the documents it had on its file relating to his dismissal. In particular, he noted that the Union would not attempt to get the quality control documents of a third party, saying those documents were viewed as proprietary and the Union had no right to them. Kinsey did acknowledge that the information provided by the Employer showed a minimal repair record, but ended by saying the Union would have difficulty winning a grievance in the circumstances.

[17] In September 2009, Radke contacted a lawyer in Saskatchewan. The lawyer sent the Union a letter on Radke's behalf on December 14, 2009. The letter stated that Radke had been terminated without just cause and the Union had a duty to proceed to arbitration because Radke's claim was valid and supportable. The letter went on to say that a duty of fair representation complaint was being contemplated.

[18] In early January 2010, the Union's counsel sent a letter saying the matter had been referred to him. He indicated the matter would be reviewed and a response would be sent in due course. On March 3, 2010, the Union's counsel responded, saying that no grievance would proceed because the Union was of the view that a proper investigation had been done. Counsel also noted that Alberta was the proper jurisdiction for any duty of fair representation complaint.

[19] After confirming this last piece of information with the Saskatchewan Labour Relations Board, Radke set about trying to find a lawyer in Alberta that was willing to take the matter on. A number of lawyers he contacted had conflicts because of the parties involved and were unable to assist him. His complaint was ultimately filed along with the other complainants' on May 28, 2010.

[20] The original panel chose to accept Radke's complaint even though it was filed beyond the 90 day time period provided for in section 16(2) of the *Act* for the following reasons:

a) Radke was unsophisticated and unrepresented by counsel for much of the period of delay;

b) Radke was entitled to some greater latitude because of the jurisdictional complexity of his case (Although the employment relationship was based in Alberta, the work was performed in Saskatchewan.);

c) Radke was not aware the Union had formally abandoned his grievance because he did not receive a copy of the Union's letter to the Employer dated July 8, 2010;

d) It was reasonable for Radke to delay filing his complaint while the Union's lawyer was reviewing his concerns; and

e) Radke's complaint raises serious rights involving the termination of his employment.

[21] With regard to the merits of Radke's complaint, thze original panel found the Union breached its duty of fair representation and ordered that Radke's grievance proceed directly to arbitration. In arriving at its conclusion, the Board found the Union:

a) should have reviewed the documents provided by the Employer with Radke to obtain his response before abandoning the grievance;

b) failed to give Radke's grievance any meaningful consideration once it received the letters from Enbridge supporting Radke's termination.

Alleged Grounds for Reconsideration

[22] The Union submits the original panel made serious errors of facts and law in:

a) refusing to rely on the notes of Stephens;

b) finding that Radke's complaint was timely;

c) finding that the Union breached its duty of fair representation to Radke; and,

d) ordering that the grievance proceed directly to arbitration.

Decision

Scope of the Board's Power of Reconsideration

[23] In *J & N Technical Services Ltd. (Re)*, [2004] Alta.L.R.B.D. LD-044, the Board set out the principles it applies to reconsideration applications:

Principles Applied on Reconsideration

[12] Section 12(4) of the Labour Relations Code empowers the Board to reconsider any decision, order, declaration or ruling made by and to vary, revoke, or affirm the decision, order, directive, declaration or ruling. In Information Bulletin #6, the Board has identified some of the circumstances in which it may exercise the power of reconsideration:

- One of the original parties seeks to present new evidence. This evidence must be significant and on point and not reasonably available at the earlier hearing.
- Accidental slips or mistakes need correction. A formal hearing is not normally held in these cases.
- The Board's interpretation of the *Labour Relations Code* or the *Public Service Employee Relations Act* conflicts with earlier decisions of the Board not presented to or considered by it in the recent decision.
- Another statute was not considered or the Board's interpretation of another statute conflicts with court decisions. The statute must be important to the outcome of the decision. This ground will not apply if the argument was heard and dealt with in the original decision.
- Correction of substantial errors of fact or errors of law is necessary.
- A fundamental change has occurred in the employer's operation making the current certificates functionally inoperable.
- The name of a party to a certificate or registration certificate has changed. This does not include cases requiring a successor rights application.

[13] Decisions of the Board have established the following principles with respect to the scope of the power of reconsideration:

- Merely because an unsuccessful party is dissatisfied with a decision reached by a panel of the Board and calls the decision unreasonable, outrageous, or wrong, this is not a sufficient ground for reconsideration. Something more is required: *Wayne Hamilton v. Edmonton Police Association*, [1993] Alta.L.R.B.R. 113 at page 121.
- The power of reconsideration ought not to be used to enable one panel to simply substitute its exercise of discretion for that of another panel. The reconsidering panel ought not to unduly stretch concepts of errors of law or substantial errors of fact, or any of the other grounds upon which a reconsideration might be based, as a guise to simply carry out this substitution of discretion: *Canadian Paperworkers Union, Local 1118 v. MacMillan Bathurst Incorporated*, [1990] Alta.L.R.B.R. 662 at page 669.
- The Board expects a reconsideration application to be based on matters of some significance: *Health Care Employees Union of Alberta v. Versa Services Ltd.*, [1993] Alta.L.R.B.R. 650 at pages 651-652.
- Merely omitting reference to some portions of the evidence is not a substantial error of the sort that would prompt reconsideration: *International Brotherhood of Electrical Workers Local Union 424 v. TNL Industrial Contractors Ltd.*, [1996] Alta.L.R.B.R. 194 at page 203.
- The role of the original panel hearing the evidence is to assess the evidence,

draw inferences, and make findings of fact. Sometimes, the panel's view will differ from one of the parties. That alone does not create a ground for reconsideration. Weighing the evidence differently than one of the parties would have preferred is not grounds for reconsideration: *Sani-Tech Mechanical Ltd. v. PPF Local 488*, [2022] Alta.L.R.B.R. LD-018 at page 3.

- Reconsideration is not to be used as a forum to simply reargue the points raised before the first panel. Reconsideration is not to be a forum for a routine rehearing of every decision that an unsuccessful party is not happy with. To be successful an applicant for reconsideration must demonstrate that the original decision was seriously deficient: *Cardoza v. Machinists, Local 99*, [2001] Alta.L.R.B.R. LD-059 at page 1.
- The power to reconsider its own decisions should not be used to give unsuccessful parties a full right of appeal from the Board's original decision: *Phillips v. C.A.W. - Canada, Local 4080,* [2003] Alta.L.R.B.R. LD-006 at page 1.

[24] In the case of *IAMAW, Loc. 99 v. Finning International Inc. et al.*, 2007 ABCA 319, the Alberta Court of Appeal highlighted the rationale for deferring to the factual findings of the original panel at [46]:

> As established by the Supreme Court, factual findings are given deference on appeal so as to limit the number of appeals and their associated costs, to promote the autonomy and integrity of the trial process, and to respect the advantageous position of the original trier of fact: *Housen v. Nikolaisen,* 2002 SCC 33 at paras. 16-18, [2002] S.C.R. 235. These rationales are no different for reconsideration proceedings before the Board. The number of reconsideration motions, and the associated costs, would skyrocket if every finding of fact were subject to review. Furthermore, deferring to the factual findings of the original panel protects the integrity of the process; the original panel has to be assumed to have commensurate ability to the Reconsideration Panel since the panel members are equally members of the Board. Finally, the original panel has the advantage of actually hearing the evidence and seeing the witnesses.

a) Stephens' Notes:

[25] The parties entered certain exhibits by agreement before the original panel including the notes of Stephens. However, Stephens did not testify. At paragraph 5 of the Original Decision, the original panel commented on Stephens' failure to testify:

> [5] All three Complainants filed timely grievances with the Local, seeking to challenge their terminations. Vern Stephens is a Local 488 pipeline representative. We pause here to comment on the evidence as it relates to Stephens. From the evidence we heard, it is obvious Stephens was involved in the handling of the Complainants' grievances. The extent of his role, however, remains unclear to us. He did not testify. Local 488's pleadings contain statements suggesting that Stephens took steps to investigate the Complainants' concerns. For example, the pleadings say he conducted a thorough investigation into Christensen's dismissal for showing up in a condition where he was unable to work safely. Local 488 attempts to rely on Stephens' grievance notes to prove the work he did to assist the Complainants. Unless the information in the notes is corroborated by witnesses or consented to by the Complainants, we are not

> prepared to rely on it. It seems to us that Stephens was a key player in the events that transpired and we heard nothing to explain why he did not testify before us.

[26] The Union submits the original panel should have accepted Stephens' notes except where there was contradictory evidence because by including the notes in the joint submission of exhibits, Radke had "consented to Mr. Stephens' notes."

[27] As Radke indicates in his reply to the Union's application, the consent of a party to admit certain evidence is not an agreement that the evidence is true nor an agreement as to what weight the Board should give to the evidence. The original panel concluded Stephens was a "key player" and it was not prepared to place any weight upon his notes without hearing from him or others who might corroborate the evidence.

[28] The Union claims it chose not to call Stephens "to avoid duplicitous evidence". It is not "duplicitous" to call a witness to testify about events he made notes of. As the original panel commented, unless the other party agrees to the information in the notes, the note-taker must testify as to the events recorded for the Board to accept the notes as accurate.

[29] Finally, the Union does not indicate in its application why the original panel would have come to a different conclusion if it had relied upon Stephens' notes. It does not point to any factual findings in the Original Decision that are contradicted by Stephens' notes. In order to determine that an alleged error of fact or law is of a substantive nature, the Board must be satisfied that the alleged error would have resulted in a different conclusion than that set out in the decision being reconsidered.

b) Timeliness of Radke's Complaint:

[30] Under this ground the Union identified five alleged errors of the original panel. It submits the original panel:

(i) misstated the test;

(ii) misapplied *Toppin*;

(iii) improperly found Radke's attempt to resolve the matter with the Union excused his delay;

(iv) improperly found Union counsel's January 27, 2010 correspondence acted as a waiver;

(v) erred in granting an extension to Radke because his counsel was extra provincial.

[31] Before briefly addressing each of these alleged errors, we would comment generally, that we find these to be simply an effort to reargue the issue that was squarely before the original panel – the timeliness of the complaint. The Union had an opportunity to make all of these arguments before the original panel and it is inappropriate for them to rehash them before a reconsideration panel.

[32] The original panel accurately set out the factors the Board considers in determining whether to accept a complaint that is beyond the 90 day time period in paragraph 16 of its decision when it referred to the decision in *Toppin* v. *PPF Local 488*, [2006] Alta. L.R.B.R. 31. The original panel concluded, on the facts presented, that Radke ought to have known by late August, that the Union was not proceeding with his grievance. It was in late August that Radke received the reply from Kinsey, the Union's International representative. The Union disagrees with this determination and asks this panel to consider certain evidence which it submits supports the conclusion that Radke ought to have known the Union was not proceeding by some time in July. All of this evidence was or ought to have been before the original panel. This is purely a finding of fact and we defer to the original panel.

[33] The Union refers to a number of cases in which the Board has dismissed complaints that were filed more than six months after the complainant knew or ought to have known of the circumstances giving rise to the complaint. It submits it is unaware of any case in which the Board has accepted a delay of eight or more months. This does not establish an error of law. *Toppin* does not determine that the Board will never accept a complaint that is filed more than five months past the 90-day time limit in section 16(2). It does not establish any fixed period of time after which complaints will never be accepted. Section 16(2) requires the Board to exercise discretion. *Toppin* sets out many of the factors the Board considers in exercising that discretion. The original panel carefully and thoroughly review factors that influenced its decision to exercise its discretion in favour of Radke.

[34] The original panel did not find that Radke's attempt to resolve the matter with the Union "excused" his delay. Rather, it found that one of the considerations leading to its decision to accept Radke's complaint was that, on the facts presented, he had a reasonable belief that the Union might change its mind and proceed with his grievance, particularly since he did not know the Union had formally withdrawn his grievance.

[35] Nor did the original panel find Union counsel's January 20, 2010 correspondence acted as a "waiver". It simply identified Union counsel's letter and the undertaking of counsel to review matters with his client, as relevant to its decision to accept Radke's complaint. The original panel indicated that it was reasonable for Radke to wait for counsel's promised response before filing his complaint.

[36] Finally, the original panel did not grant Radke an extension because his counsel was extra-provincial but rather found the fact that there were "jurisdictional complexities" to be relevant to its decision to accept the complaint. The jurisdictional complexity arose because the employment relationship was based in Alberta but the work was performed in Saskatchewan. Radke initially hired counsel in Saskatchewan. When it was determined that any complaint would need to be filed in Alberta, he chose to retain counsel in Alberta and encountered some delay in finding counsel who could assist him.

c) Breach of the Duty of Fair Representation

[37] The Union argues that it reasonably concluded Radke's grievance had no chance of success because the Employer and owner "considered his welding to be deficient" and hence "there was little or no basis on which the Union might challenge Mr. Radke's termination". This is precisely the argument rejected by the original panel. Contrary to the Union's assertion, the duty of fair representation is not generally met by a union simply accepting, without further investigation, the grounds upon which an employer has terminated an employee. Here, the original panel faults the Union for deciding to drop the grievance without first reviewing the

documentation provided by the Employer with Radke. The original panel did not impose an onerous obligation upon the Union. We find no error in this conclusion of the original panel.

[38] The Union also argued that the original panel's findings are contrary to the jurisprudence relating to third-party dismissals. It submits that owner-imposed site-bans cannot be grieved by unions.

[39] The original panel addressed this issue at paragraphs 41 - 43 of its decision:

> [41] We also wish to express our concern about the approach taken by this union (and many others) regarding terminations that are allegedly made at the instance of third parties. Unions must take a cautious approach when dealing with the actions of third parties that are said to result in an individual's employment coming to an end. A third party's involvement is not a license for a union to do nothing. That is an arbitrary approach to an employee's rights under a collective agreement. In *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 488 et al.* v. *Bantrel Constructors Co.*, [2007] A.G.A.A. No. 33 [2007 ABQB 721; 2009 ABCA 84] (at para. 109), an arbitration board observed that if a third party site ban does not meet the just cause standards imposed by a collective agreement, "arbitral jurisprudence has found that the appropriate response from the employer is to lay off the individual from the site in question and transfer such employee to another site, if the employer has such site available". See also: *Finning (Canada) v. International Association of Machinists and Aerospace Workers Local Lodge 99*, [2005] A.G.A.A. No. 11. Radke goes so far as to suggest that where there is no just cause, an employer should insist on the employee's return to the worksite or bear the costs of its decision not to so insist: *Dynamex Express* v. *Teamsters' Union, Local 141 (Dea Grievance)* (2001), 102 L.A.C. (4th) 284, at para. 15; but see the comments in *Finning (Canada) v. International Association of Machinists and Aerospace Workers Local Lodge 99*, *supra*.
>
> [42] In addition, Radke argues the cases involving third party site bans are distinguishable to what happened here. He says the termination in this case was not initiated at the instance of a third party. Instead, it was based on the Employer's independent decision to end Radke's employment when it did not have just cause to do so. That the Employer's decision was subsequently supported by a request by the client that Radke's employment be terminated is irrelevant to the issues under the collective agreement. Because it is the Employer's actions that caused the loss of employment, it is responsible for the costs flowing from its decision under the collective agreement. Radke suggests there was much to support this view of events, including the Enbridge letters being issued after the terminations were implemented and Robert Kerr's testimony suggesting the decision to terminate was based on his observations as the Employer's welding supervisor and discussions with the Employer's superintendent rather than at the instance of a third party.
>
> [43] All of this serves to highlight why cases involving third party site bans are not easy and require unions to give careful consideration regarding whether a grievance should be pursued. Unfortunately, that kind of analysis was not engaged in here. Once Local 488 received a copy of the Enbridge letters

> requesting that Radke's employment be terminated, the Local viewed the case as closed without allowing Radke to view and comment on the information it had collected and without giving any meaningful consideration to the issue of whether the Employer had just cause, and if it did not, what options might be available in the circumstances. That cavalier approach to Radke's rights under the collective agreement led Local 488 to breach its duty under section 153 of the *Code*.

[40] The original panel concluded that the Union did not give due consideration to this issue and hence acted arbitrarily when it made its decision to abandon Radke's grievance. The original panel did not state that Radke's grievance would necessarily succeed – that is not its task. It was commenting on the Union's process of determining to abandon the grievance so readily, without first considering the complexities of the law in this area, and in particular the facts of this case, where the owner's letters supporting the termination (arguably not a "site-ban") were delivered after the Employer terminated Radke. The original panel made no substantial error of fact or law in reaching this conclusion.

d) Directing the Grievance to Arbitration

[41] The Union argues the original panel should have directed the matter to be addressed by the Pipeline Industry Grievance Panel, which is a precondition to arbitration under the Collective Agreement. The original panel rejected this alternative because the International had already reviewed the matter and it was concerned with any further delay. The decision of the original panel to direct that the grievance proceed directly to arbitration was within the scope of its jurisdiction and we find no error of fact or law in its conclusion.

Conclusion

[42] The application for reconsideration is summarily dismissed pursuant to section 16(4) of the Code as it has no reasonable prospect of success.

Lyle S.R. Kanee, Vice-Chair