IN THE MATTER OF:

THE LABOUR RELATIONS CODE

- and –

DENNIS RADKE, PAUL CHRISTENSEN AND JOE ROCKO

Applicants

- and -

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL UNION 488

Respondent

TECHINT SOMERVILLE JV

Respondent

FILE NO.: GE-05907

BOARD MEMBERS

Nancy E. Schlesinger – Vice-Chair
Reg Basken – Member
Cliff Williams – Member

APPEARANCES

For the Applicant: Simon M. Renouf (Counsel), Shasta Desbarats (Co-counsel)
For the Respondent Union: Micah J. Field (Counsel), Dwight York (Advisor)
For the Respondent Employer: Hugh J.D. McPhail (Counsel), Joe Phillips (Advisor)

REASONS FOR DECISION

[1] Paul Christensen, Dennis Radke, and Joe Rocko (the "Complainants") allege the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union No. 488 ("Local 488" or the "Local") breached its duty of fair representation under section 153 of the *Labour Relations Code* (the "*Code*") when it failed to pursue grievances challenging the termination of their employment from Techint Somerville JV (the "Employer").

[2] Local 488 and the Employer argue the complaints are untimely under section 16(2) and should be dismissed. They also say the complaints fail on their merits. For the following reasons, we dismiss the complaints brought by Rocko and Christensen as untimely. We find Radke's complaint timely and Local 488 in breach of its duty of fair representation in respect of him.

I. Background

[3] The Complainants have been members of Local 488 for many years. In the summer of 2009, they were employed as pipeline welders on a pipeline being built by the Employer for Enbridge. Their work consisted of operating automatic welding machines. The Complainants were assigned to the "cap shack". Christensen started work on June 17, 2009 and Radke and Rocko started work on June 23. Their work was governed by the United Association Mainline Pipeline Agreement for Canada (the "Collective Agreement").

[4] The project was anticipated to last two months. But, their employment came to an abrupt end on June 27, 2009. Christensen was dismissed with letters from the Employer identifying two separate reasons for dismissal. One letter claimed he was dismissed for "reporting to work unable to perform his duties in a safe manner". A second letter said he was dismissed for "poor workmanship with regard to the quality of the welds performed, as discussed with the client Enbridge." He was also dismissed, he says, for driving to the line instead of taking transportation

arranged for employees. Radke and Rocko were also let go on June 27. Radke's termination letter said the dismissal was for: "poor workmanship with regard to the quality of the welds performed, as discussed with the client Enbridge." Rocko was dismissed for the same reason.

[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.

[6] In early July 2009, Stephens 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 of unjust dismissal. The Employer agreed to the request.

[7] On July 8, Dwight York, another Local 488 pipeline representative, wrote to the Complainants, 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. [Emphasis added.]

[8] Shortly after receiving this letter, the Complainants received from Local 488 the documents relied on by the Employer to support its position (although Christensen says he never received all the documents because his fax machine did not work properly). 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;[1]

(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.

[9] On the same date that York's letter to the Complainants 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.

This letter was never copied to the Complainants.

[10] York explained the reason Local 488 decided to drop the grievances was primarily based on two June 30 letters from Enbridge to the Employer asking that the Complainants' employment be terminated. One letter asked that Radke and Rocko be terminated due to

[1] This information is different from what may have been collected by inspection crews working for another contractor.

"increasing number of repairs and poor quality of workmanship" and Christensen for failing to adhere to the Enbridge and Employer drug and alcohol policy. A second letter asked that all three be terminated due to "increasing number of repairs and poor quality of workmanship".

[11] It is evident to us that the Local investigated the grievances until it learned of the Enbridge request that the Employer terminate the Complainants' employment. Indeed, by the time York received the Enbridge letters, he had gathered information from the job steward, obtained the documentation relied on by the Employer to support the terminations, and even contacted the Employer to suggest it had wrongly handled Christensen's alleged inability to work on June 27. But, once Local 488 learned of the Enbridge request, York believed there was nothing further the Local 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."

[12] While Local 488 may have believed the grievances were at an end after its July 8 letter to the Employer, the Complainants did not. They did not get a copy of the letter Stephens sent to the Employer abandoning their grievances. Based on the July 8 letter they received from York, they (quite reasonably, we might add) believed they still had a chance to convince Local 488 that it should forward their grievances to arbitration. After all, at this stage, they had not yet reviewed the information relied on by the Employer. Local 488 had not yet heard any concerns they might have had about that documentation and had given them a deadline within which to contact it, suggesting that by doing so, they could keep their grievances alive.

[13] Radke phoned Local 488 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 Local 488 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 Local a written request saying that his grievance should proceed.

[14] Christensen sent a letter on July 17, 2009: complaining that some of the documents he received were not signed; asking for additional documents, including information from the third party inspection company; claiming no one from the Employer had told him there were problems with his welds; maintaining that a leadhand, inspector and welding supervisor specifically told him there were no problems with his welds; and alleging he was being set up. Local 488 never contacted him in response to this letter.

[15] Rocko never contacted the Local after receiving the July 8 letter. Instead, he contacted Rob Kinsey to voice his concerns about the documents Local 488 sent to him. Kinsey is an International Representative with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada. Kinsey said there was nothing he could do. The first time Local 488 heard from Rocko following York's July 8 letter was when he filed his complaint with this Board on May 28, 2010.

II. Legislation

> *16(2) The Board may refuse to accept any complaint that is made more than 90 days after the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint.*
>
> *153(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 the employee's or former employee's rights under the collective agreement.*
>
> *(2) Subsection (1) does not render a trade union liable to an employee for financial loss to the employee if*
>
> > *(a) the trade union acted in good faith in representing the employee, or*
> >
> > *(b) the loss was as the result of the employee's own conduct.*

(3) When a complaint is made in respect of an alleged denial of fair representation by a trade union under subsection (1), the Board may extend the time for the taking of any step in the grievance procedure under a collective agreement, notwithstanding the expiration of that time, subject to any conditions that the Board may prescribe, if the Board is satisfied that

(a) the denial of fair representation has resulted in loss of employment or substantial amounts of work by the employee or former employee,

(b) there are reasonable grounds for the extension, and

(c) the employer will not be substantially prejudiced by the extension, either as a result of an order that the trade union compensate the employer for any financial loss or otherwise.

III. Decision

A. Timeliness

[16] *Toppin* v. *PPF Local 488*, [2006] Alta. L.R.B.R. 31 sets out this Board's approach to the 90-day time period referred to in section 16(2). At para. 30, it states:

> Our purposes in writing these reasons are to pull together the strands of thinking in the Board's case law since *Gulerya*, to re-examine some of the principles behind the 90-day time limitation in s. 16(2) of the *Code*, and to attempt a concise restatement of the Board's current approach to that limitation. In our opinion, the correct approach to the 90-day time limit, and the approach that best reflects this Board's actual practice is as follows:
>
> 1. The 90-day time limit is a legislative recognition of the need for expedition in labour relations matters.
>
> 2. "Labour relations prejudice" is presumed to exist for all complaints filed later than the 90-day limit.
>
> 3. Late complaints should be dismissed unless countervailing considerations exist.

4. The longer the delay, the stronger must be the countervailing considerations before the complaint will be allowed to proceed. There is no separate category of "extreme" delay.

5. Without closing the categories of countervailing considerations that are relevant, the Board will consider the following questions:

(a) Who is seeking relief against the time limit? A sophisticated or unsophisticated applicant?

(b) Why did the delay occur? Are there extenuating circumstances? Aggravating circumstances?

(c) Has the delay caused actual litigation prejudice or labour relations prejudice to another party?

(d) And, in evenly balanced cases, what is the importance of the rights asserted? And what is the apparent strength of the complaint?

[17] The background upon which to assess the timeliness objection is different for each complainant. There are, however, a few common elements. First, none of the Complainants is knowledgeable about labour relations. In *Toppin*, *supra*, the Board said (starting at para. 42):

> ***Who is seeking the relief against the time limit?*** The most important general consideration in favour of a lenient approach to the 90-day time limit is the need to maintain reasonable and meaningful access to the Board as a forum for resolving labour relations disputes of statutory proportions. "Reasonable" and "meaningful" access is a practical standard, and it is an important practical consideration that not all parties to labour relations proceedings have the same knowledge, resources or sophistication. Employers and trade unions are presumptively knowledgeable and sophisticated about labour relations or have the resources to enlist the assistance of people who are. Employees are rarely knowledgeable and sophisticated about labour relations, and often do not have the means to get professional assistance. This observation is borne out by the distribution of cases involving the 90-day time limit. They are overwhelmingly cases where employees have filed the complaint late. By far the largest number of them is duty of fair representation cases.
>
> The cases suggest that late complaints by employers or trade unions will not proceed unless there are strong reasons to waive the time limit: e.g., *Lethbridge Handi-Bus Association*, *supra*; *Angel Merchandising Services*, *supra*. Late

> complaints by employees, on the other hand, will generally be allowed if the delay is short. The cases noted above suggest that a "short" delay is roughly two months or less: *City of Lethbridge*, *supra*; *Colin Anten*, *supra*. Beyond this point, employee complaints are likely to be dismissed: *Jeff Neiman*, *supra*; *Eulalia Jalotjot*, *supra*; *Vernon Hauck*, *supra*.

[18] Local 488 suggests that employees who hire legal counsel are not entitled to the benefit of the more lenient standard described above. We think the analysis is more nuanced than that. An employee who hires legal counsel right after a union declines to proceed with his or her grievance might not get the benefit of the lenient approach discussed in *Toppin*. In other cases, legal counsel is retained so late in the day, it would be unfair to deprive employees of the benefit of the more lenient approach to the 90-day time period. Other cases may fall between these extremes. In this case, the Complainants ultimately obtained the assistance of Simon Renouf, but that was close to the time the complaints were filed with this Board. From about mid-September 2009 to the beginning of March 2010 Radke[2] had the assistance of a lawyer in Saskatchewan. Overall, we view Rocko and Christensen as entitled to the benefit of the more lenient approach under section 16(2) based on their lack of sophistication in labour relations and the fact that, for most of the delay, they were not represented by counsel. Radke is also entitled to some flexibility here, but more because of the jurisdictional complexities of the case, as we discuss later.

[19] What is also the same is the way the Complainants were first given notice that Local 488 was not pursuing their grievances. The last sentence of York's July 8 letter left the impression that even though Local 488 was refusing to proceed with the grievances, it might later change its mind if the right information came forward. The Complainants never knew their grievances were abandoned and so they had no reason to believe the Local would not change its mind. This feature of the case distinguishes it from those cases where a complainant might continually challenge a union about its decision not to pursue a grievance and use that in an attempt to extend the time for filing a complaint with this Board. As noted by all the parties before us, hopeless optimism will not result in the Board extending the time period under section 16(2).

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[2] Rocko also claims to have been represented by the Saskatchewan lawyer. But, for reasons set out later in this decision, we are prepared to treat him as unrepresented for the purposes of our analysis here.

The factual issues for us are when the Complainants became aware the Local was truly not prepared to advance their grievances and what steps they then took to challenge that decision. The answer is different for each.

[20] Finally, the complaints were jurisdictionally complex. Although the employment relationship was based in Alberta, Saskatchewan was the location where the Complainants were working at the time they were dismissed. As discussed below, this led to some confusion about where to file a complaint against Local 488 and made it more difficult to retain counsel.

[21] We start with Christensen's complaint. He contacted Local 488 soon after receiving the July 8 letter and raised concerns about the Local's decision. He got no response to his July 17 written request for further information and his allegations of a set up. He made some inquiries with the Local because he received no response to his letter and had not received all the documents sent by Local 488. Those inquiries were ignored. From November 2009 to February 2010, he took no steps whatsoever to pursue the matter because he had found other work. On February 10, 2010, he contacted the Local a second time in writing, asking for the information he had requested in July and saying his grievance was not settled. Local 488 responded on February 17, 2010 with a letter saying it had provided him all the information already and indicating there was no basis to proceed with a grievance. Over the next few days, Christensen sent documents to Local 488 in an attempt to show the information he had been provided from Local 488 did not support the Employer's decision to terminate. He also began trying to find legal counsel to assist him and took steps to contact the Saskatchewan Labour Relations Board. On March 19, 2010, Christensen met with Local 488's executive board to discuss his grievance. The same day, he was told that board did not have the authority to do anything for him. His duty of fair representation complaint was filed May 28, 2010.

[22] In our view, even taking into account the wording of York's July 8 letter, Christensen must have known by mid-September 2009 that Local 488 was not prepared to do anything for him. By that point, over eight weeks had passed since his first letter taking issue with the

information he had received. No one had contacted him about that letter and his subsequent inquiries were ignored. He did little to pursue the matter until February 10, 2010 and, in fact, he took no action at all from November 2009 to February 2010. In our view, this is fatal to his complaint. Even adopting a more lenient approach because of the jurisdictional complexities of the case and Christensen's lack of knowledge about labour relations, the countervailing considerations are not compelling enough to overcome the delay. We do not view this as a close case that justifies taking into account the merits the complaint.

[23] Whereas Christensen took few steps to pursue his complaint, Radke took several. He vigorously pursued the matter from the outset. He contacted Local 488 by letter on July 20, 2009, saying he wanted to continue with his grievance. Radke also voiced his concerns to Vern Stephens about the documents provided. On August 7, 2009, he sought help from the International and Kinsey agreed to look into the matter by reviewing it with York and Stephens. In late August, Radke received Kinsey's response. Kinsey confirmed that Local 488 had provided Radke with all the documents it had on its file relating to his dismissal. In particular, he noted that Local 488 would not attempt to get the quality control documents of a third party, saying those documents were viewed as proprietary and Local 488 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 Local would have difficulty winning a grievance in the circumstances. By the end of August 2009, therefore, Radke must have known the Local was not prepared to do anything further. The ball was in his court and he knew it.

[24] In September 2009, Radke contacted a lawyer in Saskatchewan. He sent Local 488 a letter on Radke's behalf on December 14, 2009. The letter stated that Radke had been terminated without just cause and the Local 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. In early January 2010, Local 488'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, Local 488's counsel responded, saying that no grievance

would proceed because Local 488 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. 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 filed along with Christensen and Rocko's on May 28, 2010.

[25] Radke's complaint was filed late. As we note above, he must have known by the end of August 2009 that Local 488 would do nothing further for him. We turn to consider the countervailing considerations. In *Toppin*, the Board found that labour relations prejudice is presumed when complaints are filed after the 90-day period. The length of the delay affects the strength of the countervailing considerations required before the lateness will be excused. One of the countervailing considerations looked at by the Board in *Toppin*, is "why did the delay occur". At para. 47, the Board said:

> ***… Are there extenuating circumstances? Aggravating circumstances?*** The Board will be interested in, and will often demand, a reasonable explanation why the complaint was not filed in a timely fashion. Examples that come to mind are the complainant's incapacitating illness; misrepresentation or obstructionism by a respondent in its dealings with the complainant; and continuing or repetitive complaints, where a complainant has perhaps decided to commence litigation only after repetition or after the failure of more conciliatory approaches (it should be noted that in such cases, the 90-day time limit may still be relevant for purposes of selecting the appropriate remedy). There are undoubtedly other reasonable explanations that the Board will accept.

[26] We do not wish to discourage unions from having a second look at their decisions declining to bring a grievance or from having a lawyer review decisions they have made for fear of extending the time limits for filing complaints with this Board. But, in this case, Local 488's decision to send the issue to a lawyer for review coupled with the wording of the July 8, 2009

letter from the Local would have led any reasonable person in Radke's position to believe the Local was willing to rethink his grievance and might finally take into account his concerns. Again, we stress that Radke still had no idea his grievance had been abandoned with the Employer. His reaction, of waiting to file a duty of fair representation complaint during the time that Local 488 was reviewing the matter with its counsel, is understandable. He wanted to give the Local a chance to reconsider its decision. We also take into account that the complaint was jurisdictionally complex. After receiving the March 2010 letter from Local 488's counsel, Radke contacted the Saskatchewan Labour Relations Board which said his complaint likely fell within Alberta's jurisdiction. Radke then set about finding a lawyer in Alberta that was willing to take on his case. We accept it took some time for him to find someone that would help him. All these countervailing considerations prompt us to exercise our discretion to allow Radke's complaint to proceed. But, even if this was a close case on the issue of timeliness, the complaint raises serious rights involving the termination of Radke's employment and (as we note later in these reasons) the complaint against Local 488 is strong.

[27] Rocko's complaint is dismissed as untimely. He never contacted Local 488 to let it know he wanted to pursue his grievance after he received York's July 8 letter. He did contact Radke's lawyer in September to explain that he and Radke had the same problem and were pursuing the matter together. However, it is not clear to us what instructions he gave to that lawyer. Rocko's name does not appear on any correspondence that lawyer later sent to Local 488. In fact, Rocko never received any correspondence from the lawyer in Saskatchewan. From Local 488's perspective, Rocko's file was closed. In fact, the first time Local 488 received notice that he was taking issue with its July 8 decision was in late May 2010 when the duty of fair representation complaint was filed.

[28] To be sure, some of the countervailing considerations that apply to the other two complainants are likewise applicable to Rocko. Like Christensen, he is entitled to a more flexible approach under section 16(2) because of his lack of knowledge in labour relations. The jurisdictional complexities of the case also made filing a duty of fair representation complaint

more difficult. The only arguable additional countervailing reason is the Saskatchewan lawyer's apparent failure to pursue Rocko's concerns after being instructed to do so. (As noted above, it is not clear to us that Rocko ever gave that lawyer instructions to pursue the matter.) Assuming there was some sort of mistake made by the lawyer, we note the following remarks in *Toppin* (at para. 49):

> *Gulerya* suggests that it is a reasonable explanation for delay that the complainant has received faulty legal advice. We wish to express our disagreement with this proposition. Experience has shown the Board that this occurs with regrettable frequency. Lawyers unfamiliar with labour and employment law may recommend a wrongful dismissal or other civil action, not realizing that the law has almost completely closed off these avenues in a collectively-bargained workplace in favour of grievance arbitration or complaints before the Labour Relations Board… Operating on this faulty understanding, the lawyer may follow the more leisurely time frames that apply to civil actions in the Courts. Only long after the events, perhaps even when the wrongful dismissal action is struck by the Court, does the complainant seek to file an untimely grievance, or complain to this Board that the bargaining agent failed to represent him or her fairly. Complainants seeking relief from the 90-day time limit argue that it is no fault of theirs that the complaint was late. That may be so, but neither is it the fault of the respondents, who must live with the prejudice created by the delay. In such clear-cut cases the fault rests squarely on the lawyer. It strikes us as unfair for the Board to relieve against that fault, for which the lawyer may well be liable, at the expense of the other parties to the collective bargaining relationship. [Emphasis added. See also: *Horvath* v. *I.B.E.W., Local 424*, [2006] Alta. L.R.B.R. LD-021, at para. 26.]

[29] While the context referred to in this passage is somewhat different from what may have transpired in Rocko's case, we think the comments apply with equal force.

[30] Overall, the countervailing reasons in respect of Rocko's complaint are not sufficient to satisfy us that we should exercise our discretion to allow his complaint to proceed when it is filed over ten months after the time Rocko knew Local 488 would do nothing further without action from him. Unlike Radke, he never got any indication from Local 488 that it was looking into his grievance further for him. He did not even contact the Local by the July 20 deadline given by York. We decline in these circumstances to extend the 90-day period in respect of Rocko's complaint.

[31] We should add that we reject the Complainants' suggestion that the time for filing a complaint in this case starts to run from some time in March 2010, when Local 488's counsel confirmed the Local would do nothing further for Radke and its executive board said it would not assist Christensen. Section 16(2) of the *Code* speaks of the 90-day period running from the time a complainant "knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint." As we note above, all three complainants must have known sometime over the summer of 2009 that Local 488 was not prepared to assist them further.

[32] These findings mean that only Radke's complaint proceeds to a consideration on its merits.

B. Merits of Duty of Fair Representation Complaint

[33] The principal elements of the duty of fair representation are encapsulated in this passage from *Canadian Merchant Service Guild* v. *Gagnon et al.*, [1984] C.L.L.C. ¶14,043 (S.C.C.) at p. 12,188:

> 1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.
>
> 2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.
>
> 3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.
>
> 4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.

> 5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.

[34] The Canada Labour Relations Board in *Rousseau and B.L.E.* (1995), 28 C.L.R.B.R. (2d) 252 at p. 275 described what is meant by "arbitrary conduct" – in our view, the key concern with Local 488's representation in the case before us:

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

[35] As noted in *Re Dezentje*, [1999] Alta. L.R.B.R. 267 at p. 399 (upheld: [2002] Alta. L.R.B.R. 305 (C.A.)): "Failing to get the grievor's side of the case or accepting the assertions of management without offering any meaningful opportunity to reply has frequently been found to violate the duty."

[36] York testified that his mind was made up on July 8 that Radke had no viable grievance. He was of the view there was a site ban and there was nothing Local 488 could do. As a result, Local 488 sent the Employer a letter saying it was not proceeding with Radke's grievance. York claims the last sentence of the July 8 letter was intended to indicate that if Radke could provide further information to support his grievance, the Local would look into it. We find York's evidence on this point difficult to understand. It is inconsistent with his evidence that his mind was made up that there was no viable grievance at the time he sent the July 8 letter. And, because the grievance was abandoned, it is not clear to us what he could have done after July 8 in any event.

[37] There is little to suggest Local 488 gave any serious consideration to Radke's grievance after sending out the July 8 letter. We know that Kinsey, on behalf of the International, looked into the matter in August 2009. We also know Radke had some discussions with Stephens in July 2009. But, in our view, nothing was done to consider or investigate in any meaningful way the additional information Radke later brought forward. The decision not to proceed with the grievance was already made.

[38] In support of its position that it has not breached section 153, Local 488 relies on this statement from *Re Construction and General Workers' Union, Local No. 92*, [2009] Alta. L.R.B.R. LD-030 (at para. 18): "… there is no requirement that a union follow a specific process into how it investigates a complaint or how it arrives at its decision." It follows, according to Local 488, that it did nothing wrong when it abandoned Radke's grievance without first allowing him to review and comment on the information it had collected from the Employer. In our view, this argument takes the comments in *Construction and General Workers' Union* too far. At the end of the day, the question of whether a union has met its duty depends on whether the union acts:

> … in good faith, objectively and honestly, *after a thorough study of the grievance and the case*. The union's decision must not be arbitrary, capricious, discriminatory, or wrongful. The union's representation must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee. [*Re Construction and General Workers' Union, Local No. 92, supra*, at para. 18, emphasis added.]

[39] The Board's comments relied on by Local 488 were not intended to excuse unions from ever having to review the fruits of their investigation with a grievor. This is not a case where seeking out further information from the grievor would have been a pointless exercise (*e.g.*, where a grievance might appear hopeless from the outset and that view is simply confirmed by the information collected from the employer). Radke came to Local 488 confused about why his work was criticized. When Local 488 obtained information that it believed showed his work was poor, it had an obligation to allow him to review it and provide him with an opportunity to

respond. Radke did not know the case against him and had a lot to say about the documentation the Employer put forward, including: raising concerns about the legibility of some of the information provided (a problem acknowledged by York in his testimony); taking the position that some of the photos provided did not relate to his welds; it was possible to interpret the Daily Field Welding Data in a way that made the “recap” observations non-culpable; and a different recollection regarding a discussion with a relief welder who allegedly advised Radke there were problems with his welds.

[40] Had Local 488 given Radke an opportunity to respond to the information the Local received prior to making a decision on his grievance, the Local could have weighed any conflicting information, sought further information from the Employer or others if necessary, and helped Radke better understand the information the Employer relied on. If Radke’s concerns persisted at that point, Local 488 would then have been in a position to make an informed decision regarding whether to proceed with the grievance. Instead, Local 488 accepted the assertions provided by the Employer and never provided Radke any opportunity to respond before it made the decision to abandon his grievance.

[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*.

IV. Remedy

[44] We declare Local 488 in breach of its duty of fair representation in section 153(1) of the *Labour Relations Code* in respect of Radke. Local 488 says we should simply refer the matter back for another investigation, this time by the International. But, the International already had a chance to review the matter. Further investigation also raises the prospect of more time passing before these issues are resolved.

[45] Pursuant to our authority under section 153(3), we find it appropriate to rectify the breach by directing that a grievance be filed and that it proceed directly to arbitration despite missed time limits under the collective agreement. Radke is entitled to be represented at the arbitration by legal counsel of his choice, at Local 488's expense. We reserve on the matters set out under section 153(3)(c) until after the arbitration process has run its course.

V. Conclusion

[46] For the reasons set out above, we dismiss the complaints brought by Christensen and Rocko as untimely. Radke's complaint is allowed and we order his grievance sent directly to arbitration. We encourage the parties work on a resolution to Radke's grievance that does not involve its further litigation.

ISSUED and DATED at the City of Edmonton in the province of Alberta this 20th day of September 2011 by the Labour Relations Board and signed by its Vice-Chair.

Nancy E. Schlesinger, Vice-Chair