[1975] 2 C.L.R.B.R. 196

ample, the Board cannot help being impressed by the serious manner in which the decision not to refer the case to arbitration seems to have been taken. To begin with, the Complainant himself failed to request the Union in writing to refer the case to arbitration, as provided in the collective agreement. In addition, the decision involved two distinct levels of decision-making. First, at a meeting of the General Chairmen, the District Lodge decided not to pursue the grievance. Then, the local Lodge reached a similar decision. As to the decision of the local Lodge, it was voted upon by the members of the Union at a general meeting, following what seems to have been a very serious investigation of Mr. Morrison's complaint. Thus, the evidence does not support the contention that Mr. Morrison has been unfairly dealt with by his bargaining agent. In any case, the collective agreement between Air Canada and the International Association of Machinists and Aerospace Workers further protects an employee by allowing him to pursue his own grievance in cases involving disciplinary action, without the concurrence of the union. The employee may even, if he so desires, refer the case to arbitration "in accordance with such special procedures as may be arranged between the employee and the Company". Thus, the instant case does not involve an employee who is deprived of a recourse under the collective agreement because of the failure of the bargaining agent to adequately represent him. Under this collective agreement, the employee, even acting alone, can pursue fully a grievance protesting a dismissal or disciplinary action taken by the employer. Few collective agreements provide such a recourse. It would totally defeat the very purposes and aims of the Code to allow an employee to circumvent such procedures as the Complainant is seeking to do here.

JUDGMENT

The complaint under s. 184(3)(a)(i) of the Canada Labour Code (Part V) is therefore dismissed.

RAYONIER CANADA (B.C.) LTD. AND INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL 1-217 AND ROSS ANDERSON AND FOREST INDUSTRIAL RELATIONS

Before: Paul C. Weiler, Chairman; John Brown and Ken Martin, Members.
British Columbia, June 16, 1975, No. 40/75.

Duty of fair representation — whether fulfilled by trade union — whether employer an appropriate party to proceedings.

The company operated two plants on the same property. The two groups of employees were covered by a single certification and collective agreement, but had separate seniority lists. The long-standing practice between the union and the company was that employees could move from one plant to the other, depending upon the availability of work, without loss of seniority.

In this case, an employee senior to the complainant was laid off at one plant but was given work at the other. While there, he was recalled to his former job, but decided to stay on at the second plant, and the complainant was given his position in the first plant. The employee subsequently returned to the first plant, and both he and the complainant worked there for a short while. Another lay off occurred, and the complainant was laid off, but the other employee was kept on. The union took the complainant's grievance to the third stage of the grievance procedure, but then dropped the grievance. The complainant here alleged that the union had not fairly represented him, and that the employer had failed to carry out the seniority provisions of the agreement. The company objected at the hearing to being joined as a party to a complaint essentially between union and member.

Held: Complaint dismissed.

The company's objection was overruled. In valid complaints of unfair representation under s. 7, the Board will exercise its discretion to deal with the employer's violations of the agreement as a contravention of s. 65(1) of the Code, and the employer is properly named as a party.

The Board explained the reasons for the development of the duty of fair representation, and the meaning of the terms "arbitrary", "discriminatory" and "bad faith". The duty of fair representation does not give the employee an absolute right to have a grievance arbitrated. The union's obligation to administer the agreement gives it the right to settle grievances in certain circumstances. In the present case, the complainant's grievance conflicted with the past practice of the parties, the interests of the employee unit as a whole, and the other employee's interest in his longer seniority. Moreover, the parties attempted to resolve the grievance through the grievance procedure. Finally, the complainant's grievance would not have succeeded on the merits in any event.

Stephen Kelleher for the Complainant.
John Laxton for the Union.
J.R. Parrott for the Employer and Forest Industrial Relations.

Decision of the Board:

On February 3, 1975, Ross Anderson lodged with the Board a complaint under s. 28 of the Labour Code alleging that Rayonier Canada (B.C.) Ltd. (Rayonier) had contravened s. 65(1) of the Code because it had not adhered to the terms of its collective agreement with the International Woodworkers of America, Local 1-217 (IWA). In particular, Anderson complained of a violation of Article XIX, s. 2(a)(i) when he himself was laid off for a short period of time, allegedly out of seniority. On that same day, Anderson lodged a complaint against the IWA about a violation of s. 7 of the Code in the "arbitrary, discriminatory, and bad faith" manner in which the Local, and also Clarence Murray, the Plant Chairman, had handled Anderson's grievance against Rayonier. In view of the broad implications of these two complaints a hearing was scheduled at which the legal issues were thoroughly canvassed by counsel for all three parties.

At the outset, we should say something about the use of s. 65 of the Code and the relationship of the positions of the Union and the Employer as defendants in cases of this type. The employee's original complaint is against his employer, about the latter's administration of the collective agreement which adversely affects the employee. Technically speaking, this does fall within the ambit of s. 65(1):

> Every person who is bound by a collective agreement, whether entered into before or after the coming into force of this Act, shall do everything he is required to do, and shall refrain from doing anything that he is required to refrain from doing, by the provisions of the collective agreement, and failure to do so or refrain from so doing is an offence against this Act.

However, as Rayonier pointed out in its preliminary objection in this case, the normal remedy for that kind of claim is the grievance and arbitration procedure established by that same agreement. The Board should not finesse that procedure by enquiring indirectly into the contract dispute through the vehicle of an alleged statutory violation (and that is especially true here where the direct s. 96(1) jurisdiction of the Board over grievances has been excluded by agreement of the parties). The difficulty is that control over the grievance procedure is vested in the trade-union as the statutory bargaining agent. This exclusive authority is subject to the legal standard established by s. 7 of the Code in the handling of individual claims. However, Labour Boards have experienced a persistent problem in cases of this kind where an employee has a contract claim against his employer but is unable to present it through the normal channel because his union representative refuses to carry it through to arbitration. The employee has no individual right of adjudication of his grievance vis-a-vis the employer but even if he successfully establishes the unfair labour practice of unfair representation by the union, this will not provide him with the practical relief he is seeking, which is the favourable settlement of his grievance against the employer (perhaps through reinstatement in employment). An apt device for solving that problem is s. 65(1) of the Code which transforms violations of the collective agreement into contraventions of the Code. If we find that the Union's misconduct in representing the employee will have the effect of insulating the Employer from answering in arbitration for its alleged violation of the agreement, then the Board will exercise its discretion to deal with the employee's grievance via s. 65 of the Code. (Apparently, this is the manner in which the Ontario Board has decided to handle the same problem: see *Ward Shellington* [1975] 1 Canadian LRBR 1.) It was for this reason that we rejected Rayonier's preliminary objection to Anderson's complaint and joined the Rayonier and IWA cases into the one proceeding.

With these preliminary observations, we can turn to the facts of this situation. Marpole Sawmill is a division of Rayonier. Its employees are represented by the IWA in a certification which also covers the employees of Rayflo Silvichemical plant, another division of Rayonier which is located on the same property as the sawmill. Both groups of employees are covered by the master collective agreement between the IWA and Forest Industrial Relations. However, they are treated as separate entities by the parties, each with its own elected Plant Chairman, Shop Committee, contract ratification votes, and separate seniority lists.

Last July 26, 1974, as a result of the serious economic condition of the lumber industry, there had to be a massive work reduction in the sawmill. This produced a layoff of more than 200 men, including almost all of the maintenance tradesmen. In particular, it affected the two main subjects of these proceedings, Ross Anderson and Angelo Nasato, both of whom were journeymen welders in the sawmill. Nasato's seniority date was listed as April 19, 1957, while Anderson, the next welder on the list, is dated November 17, 1964. In accordance with its previous practice, Rayonier had arranged to offer some work at Rayflo to the employees at Marpole who were being laid off. On this occasion it had a job for Nasato, but not for Anderson.

A few days later, Rayonier decided that it could conveniently proceed with a new scrubber-barker installation at Marpole during the mill shutdown. This meant there would be work for some tradesmen, including two welders, and the work would be paid for at new construction rates. However, when Tribe, the foreman, phoned Nasato and offered him this work, Nasato was reluctant to return to Marpole for a short-term project and give up his steady job at Rayflo which would likely last throughout the layoff at the sawmill. Tribe did not insist that Nasato return; instead, he contacted Anderson and the next junior welder on the seniority list, and the latter two were recalled to Marpole for work during August.

Eventually, the sawmill returned to production in mid-fall. However, Nasato remained at Rayflo until November 15, when he was laid off there. He returned to Marpole Sawmill on that date. A week later, on November 22nd, there was another layoff in the sawmill, again affecting the welders. This time, though, there was no work available at Rayflo because of the reduction in effect there. As a result, Nasato was retained at Marpole and Anderson was laid off until his recall on December 5th (losing a total of six working days in that period).

It was this last occurrence and its aftermath which produced these complaints. Accordingly, it is important to be aware of its background. For years, Rayonier and the IWA have operated under an informal arrangement for layoffs and recalls at Marpole. The senior employee is entitled under the agreement to be recalled before the junior employee. However, it is not unusual, especially for tradesmen, for there to be intermittent recalls for short-term jobs during a protracted slowdown. A senior employee may have secured a steady alternate job, perhaps outside of the Lower Mainland, which will probably continue during the entire foreseeable layoff at Marpole. Naturally, he will be reluctant to give up this job to respond to a recall for work at Marpole which may last for just a few days. Recognizing this, Marpole has adopted the practice of allowing the senior employee to decline to return to work in these circumstances and going on to the next man on the seniority list. There may be an exceptional case where the senior man has special qualifications required by Rayonier for its work, in which case Rayonier will insist that he accept the recall, but this is a rare occurrence. We were given a list of 17 employees who had used this arrangement dating back to 1958. The Union knows of and approves the practice, and it had been reaffirmed in August 1974 in discussions between Murray, the Plant Chairman, and Fleming, the Personnel Supervisor, about the Nasato case itself.

Anderson was aware of the long-standing practice and knew that this was the reason why Nasato had not reappeared at Marpole in August. However, for his own reasons, he decided to challenge the contractual basis of the practice on the occasion of the second layoff in November. In his view, when Nasato did not return to Marpole in August, he lost his place on the seniority list. When he did return on November 15th, he should be placed on that list far below Anderson. Hence, when the next work reduction occurred on November 22nd, it was Nasato who should have been laid off and Anderson who should have been retained.

Naturally enough, Anderson did not find a very sympathetic ear in the Union to listen to this claim. He went to Murray, his Plant Chairman, who

told him he had no grievance because Nasato had retained his seniority at Marpole during a leave of absence since August. (There was some dispute about whether Murray told Anderson that it was the Employer or the Plant Committee which had granted Nasato this leave. In reality, Nasato's leave was jointly agreed to by Murray and Fleming in their discussions in August.) Murray refused to allow Anderson to file a grievance at that time. After finding the same response at the office of the Local Union, Anderson consulted a lawyer, lodged a verbal first stage grievance with Tribe, his foreman, and wrote a formal letter to the Union. This letter did produce the grievance form from Murray, which Anderson completed and handed to Murray. The Plant Committee took the grievance to a second stage meeting with Rayonier on December 13th and to a third stage meeting on December 18th. Not surprisingly, Anderson's grievance was not successfully resolved there. The Committee then referred the matter to the Local Union which has control over grievances from the fourth stage on through arbitration. This case was discussed at a meeting of Thompson, the Local President, Evans, the Secretary-Treasurer, and Ewart, the First Vice-President, and they decided that Anderson did not have a valid claim which should be proceeded with further. Rasmussen, the Third Vice-President of the Local, was delegated the task of explaining this to Anderson at a meeting attended by Murray as well. Anderson was told then that the case would be dropped by the Union (and in our view, at that time he did not know how far it had been carried to that point). Anderson was not persuaded and brought his problem before the Board through these complaints.

With this background, we can turn to an analysis of the legal framework for evaluating complaints of this kind. Section 7 of the Labour Code, enacted as part of the last major reform of the legislation, places trade-unions under this obligation:

> A trade-union or council of trade-unions shall not act in a manner that is arbitrary, discriminatory, or in bad faith in the representation of any of the employees in an appropriate bargaining unit, whether or not they are members of the trade-union or of any constituent union of the council of trade-unions, as the case may be.

Like so much else in the Code (see *Cariboo Memorial Hospital* [1974] 1 Canadian LRBR 418), this provision finds its roots in the concept of the exclusive bargaining authority conferred by the statute:

> 46. Where a trade-union is certified as bargaining agent for an appropriate bargaining unit,
> (a) it has exclusive authority to bargain collectively on behalf of the unit and to bind it by a collective agreement until the certification is cancelled;

Once a majority of the employees in an appropriate bargaining unit have decided they want to engage in collective bargaining and have selected a union as their representative, this union becomes the exclusive bargaining agent for all the employees in that unit, irrespective of their individual views. The union is granted the legal authority to negotiate and administer a collective agreement setting terms and conditions of employment for the unit and the employer does not have the right to strike a separate bargain with groups of employees directly (see *MacMillan Bloedel Industries* [1974] 1 Canadian LRBR 313. This legal position expresses the rationale of the Labour Code as a whole that the bargaining power of each individual em-

ployee must be combined with that of all the others to provide a sufficient countervailing force to the employer so as to secure the best overall bargain for the group.

Some time after the enactment in this form of the Wagner Act — which was the model for all subsequent North American labour legislation — American courts drew the inference that the granting of this legal authority to the union bargaining agent must carry with it some regulation of the manner in which these powers were exercised in order to protect individual employees from abuse at the hands of the majority. This came to be known as the duty of fair representation. Beginning with the decision in *Steele* v. *Louisville* (1944) 323 U.S. 192, which struck down a negotiated seniority clause that placed all black employees at the bottom of the list, the duty has been extended to all forms of union decisions. An enormous body of judicial decisions and academic comment has been spawned. This culminated in the U.S. Supreme Court decision of *Vaca* v. *Sipes* (1967) 55 L.C. 11,731, which is the leading American precedent in this area of the law. This initiative by the United States judiciary was emulated by one Canadian judge, in the case of *Fisher* v. *Pemberton* (1969), 8 D.L.R. (3d) 521 (B.C.S.C.), where he concluded that the same duty must bind British Columbia unions certified under the old Labour Relations Act (at pp. 540-541). But Canadian legislatures have not waited for the evolution of a common law principle to run its course. Instead, they have uniformly moved to write the obligation explicitly into the statute and entrust its administration to the Labour Relations Board which is responsible for the remainder of the legislation. (For the Ontario history, see *Gebbie* v. *U.A.W. and Ford Motor Co.* (1973) OLRB 519.) The B.C. legislature followed suit when it enacted s. 7 in late 1973.

What is the content of the duty of fair representation imposed on a union? Section 7(1) requires that a trade-union not "act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees" in the unit. The relevance of the American background can best be appreciated by these quotations from *Vaca* v. *Sipes* which defined the scope of [its] judicially developed obligation:

> "Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or *discrimination* toward any, to exercise its discretion with complete *good faith* and honesty, and to avoid *arbitrary* conduct . . . (at p. 18, 294).
>
> A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is *arbitrary, discriminatory, or in bad faith* . . . (at p. 18, 299)".

Under this language, which has been directly imported into our legislation, it is apparent that a union is prohibited from engaging in any one of three distinct forms of misconduct in the representation of the employees. The union must not be actuated by bad faith in the sense of personal hostility, political revenge, or dishonesty. There can be no discrimination, treatment of particular employees unequally whether on account of such factors as race and sex (which are illegal under the Human Rights Code) or simple, personal favouritism. Finally, a union cannot act arbitrarily, disregarding the interests of one of the employees in a perfunctory matter. Instead, it must take a reasonable view of the problem before it and arrive at a thoughtful

judgment about what to do after considering the various relevant and conflicting considerations.

These phrases express the duty imposed on the union in general and abstract terms. The case before us (as also *Vaca* v. *Sipes*) typifies the most intractable and the most litigated specific issue raised in the fair representation area. Does the union have the authority to settle, or to refuse to press, a grievance which the affected individual employee wants to have proceeded with? It is argued that a collective agreement is a contract establishing the law of the plant. As such, it entitles the individual employee to certain rights and engenders the expectation that these will be secured. If the employee feels that his rights have not been respected by the employer, then he should have access to some neutral forum to obtain a binding adjudication of his claim. The preferred mode of adjudication under a collective agreement is arbitration, and customarily the union controls access to that forum through its authority over the grievance procedure. But it has been vigorously argued that if an employee wants to have his claim to some contract benefit established in arbitration, the union acts arbitrarily, and thus in violation of its duty of fair representation, in denying him that right. The leading exponent of this view expressed its rationale in these terms:

> ". . . the collective parties can change the general rules governing the terms and conditions of employment, either by negotiating a new agreement or by formally amending the old. The individual has no right to have the contract remain unchanged; his right is only to have it followed until it is changed by proper procedures. Although contract making (or amending) and contract administration are not neatly severable, they are procedurally distinct processes. Most union constitutions prescribe the method of contract ratification, and it is distinct from grievance settlement; the power to make and amend contracts is not placed in the same hands as the power to adjust grievances. Indeed, many union constitutions expressly bar any officer from ratifying any action which constitutes a breach of any contract. Through the ability to change the agreement, the collective parties retain a measure of flexibility. They are not free, however, to set aside general rules for particular cases, nor are they free by informal processes to replace one general rule with a contrary one."
>
> Summers, C. W. *"Individual Rights in Collective Agreements and Arbitration"*, (1962) 37 N.Y.U. Law Rev. 362, at pp. 396-397.

Most courts, labour boards, and commentators have rejected this individual rights position. The contrary view — that the union retains control over grievances subject to a duty of fair representation — derived originally from a law review article by Cox, *"Rights under a Labour Agreement"*, (1956) 69 Harvard Law Review 601, and his analysis was accepted by the Supreme Court majority in *Vaca* v. *Sipes*:

> "In providing for a grievance and arbritration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. Through this settlement process, frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedures. Moreover, both sides are assured that similar complaints will be treated consistently, and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved. And finally, the settlement process furthers the interest of the union as statutory agent and as co-author of the bargaining agreement in representing the employees in the enforcement of that agreement. See Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601 (1956)." (at p. 18, 299).

In turn, that conclusion was followed by the Ontario Labour Relations Board in the *Gebbie* decision cited earlier, interpreting an Ontario provision with language almost identical to our own:

> "One of the most difficult areas in applying the duty is in the settlement of grievances. We think it clear that the union's obligation to administer the collective agreement gives it the right to settle grievances. An employee does not have an absolute right to have his grievances arbitrated . . ." (at p. 526).

In our judgment, that same view should be taken of the authority permitted to the union under s. 7 of the Labour Code in handling individual grievances.

Because of the novelty of the s. 7 duty and the very general terms in which it is expressed, we consider it useful to expand somewhat on the reasons for this judgment in order to give some guidance about the scope of the authority which unions may legitimately exercise. The basic theme is that the administration of a collective agreement is not simply the enforcement of individual contract claims: it is also an extension of the collective bargaining process. As such, it involves significant group interests which the union may represent even against the wishes of particular employees. There are at least two lines of argument to this effect.

First, while arbitration is the ultimate mode of settlement of grievances, it is expensive, takes time, and consumes the energy and attention of the parties. For that reason, it is preceded by a grievance procedure which is designed to clear up as many claims as possible without need for arbitration. The grievance as it is taken through the various stages is carefully considered by representatives of union and management at ascending levels of authority. Experience shows that this procedure resolves informally the vast majority of disputes arising under the agreement and in doing so plays a major role in securing the benefits of collective bargaining for the employees. But the institution can function successfully only if the union has the power to settle or drop those cases which it believes have little merit even if the individual claimant disagrees. This permits the union to ration its own limited resources by arbitrating only those cases which have a reasonable prospect of success. But even if the employee were willing to finance the union's share of arbitration himself, this would not protect management from the cost of having to defend against frivolous grievances. Such a protection for the employer is a necessary *quid pro quo* from the union if the latter expects management to be reasonable in conceding those other claims which are well-founded, rather than attempt to wear down the union by making it take every case to arbitration to get relief. It is important as a matter of industrial relations policy that a union must be able to assume the responsibility of saying to an employee that his grievance has no merit and will be dropped.

There is a second group interest in the settlement of grievances which applies even to cases which might succeed in arbitration. While a grievance may originally be brought by one individual, it is not unusual for it to involve a conflict with other employees as well as with the employer. Occasionally, this is true even in the facts of a particular case, but more often it arises from the implications of the general interpretation of the agreement upon which the particular grievor is relying. By necessity, a collective agreement speaks obliquely to many new and unforeseen prob-

lems arising during the course of its administration. Rather than relying on the arbitrator's interpretation of the vague language of the agreement drafted a long time ago, it is normally more sensible for the parties to settle that type of current problem by face-to-face discussions in the grievance procedure, with the participation of those individuals who are familiar with the objectives of the agreement and the needs of the operation and are thus best able to improvise a satisfactory solution. Again, if the employees are to have the benefit of this process and of the willing participation of the employer in it, the law must allow the parties to make the settlement binding, rather than allowing a dissenting employee to finesse it by pressing his grievance to arbitration. As Archibald Cox put it:

> "Allowing an individual to carry a claim to arbitration whenever he is dissatisfied with the adjustment worked out by the company and the union treats issues that arise in the administration of a contract as if there were always a 'right' interpretation to be divined from the instrument. It discourages the kind of day-to-day co-operation between company and union which is normally the mark of sound industrial relations — a dynamic human relationship in which grievances are treated as problems to be solved and contract clauses serve as guideposts. Because management and employees are involved in continuing relationships, their disposition of grievances and the arbitrator's rulings may become a body of subordinate rules for the future conduct of the enterprise. . . When the interests of several groups conflict, or future needs run contrary to present desires, or when the individual's claim endangers group interests, the union's function is to resolve the competition by reaching an accommodation or striking a balance. The process is political. It involves a melange of power, numerical strength, mutual aid, reason, prejudice, and emotion. Limits must be placed on the authority of the group, but within the zone of fairness and rationality this method of self-government probably works better than the edicts of any outside tribunal." Cox, *Law and the National Labor Policy*, (1960) at pp. 83-84.

It is for these reasons that we interpret s. 7 of the Code as conferring on the union bargaining agent considerable latitude in deciding whether to drop or to settle grievances brought under the standard collective agreement even though the individual employee wishes them pursued through to arbitration. But a more flexible interpretation of the s. 7 duty of fair representation still affords substantial protection to the individual grievor to ensure that his interests are not simply disregarded in favour of the collective will of the majority. There is an ample body of experience, both in the American cases and also under the Ontario Labour Relations Act, defining the kinds of situations in which it is proper and those in which it is wrong for the union to deny a grievor access to the arbitration process. The judgment in particular cases depends on the cumulative effect of several relevant features: how critical is the subject matter of the grievance to the interest of the employee concerned? How much validity does his claim appear to have, either under the language of the agreement or the available evidence of what has occurred, and how carefully has the union investigated these? What has been the previous practice respecting this type of case and what expectations does the employee reasonably have from the treatment of earlier grievances? What contrary interests of other employees or of the bargaining unit as a whole have led the union to take a position against the grievor and how much weight should be attached to them? In the next section of this decision, we will canvass these factors insofar as they appeared in the case before us. But we will reiterate what we said earlier about the relationship

of the union's duty of fair representation to individual grievances against the employer. If the union has satisfied the requirements of s. 7 in the evaluation of a particular grievance, then the Board will not treat the employee as having a right to force the matter on to arbitration. On the other hand, if a grievance has been dropped as a result of a union decision in violation of s. 7, then the Board will not allow such illegal behaviour to insulate the employer from having to respond to the employee's grievance. The Board may adjudicate the matter itself pursuant to s. 65 of the Code or perhaps make an order under s. 28 that the matter must be taken to neutral arbitration with appropriate safeguards. (A good example of this latter type of order was made by the Ontario Labour Relations Board in *Ward Shellington* [1975] 1 Canadian LRBR 1.)

With these observations about the general character of the duty of fair representation in the grievance procedure, we can examine the particular complaint before us. Our judgment may be summed up quite simply. This is almost a textbook example of a situation in which it was perfectly proper for the union to drop an individual grievance.

Recall first that Anderson was objecting to the workings of the practice adopted by the Union and the Employer for short-term intermittent recalls during a lengthy layoff. Normally, when employees are laid off for an appreciable period of time, they will seek steady employment elsewhere to preserve their earnings throughout the layoff by Marpole, their principal employer. But sometimes Marpole will have sporadic periods of work, especially for the tradesmen, in maintenance or installations during a production shutdown. The Company, respecting the seniority clause, phones up the men on layoff in order of their seniority, tells them of the job, and invites them to return to work. However, a senior employee with a steady job for the whole layoff will be reluctant to leave it and return to work at Marpole for a few days, for fear his alternative employment will be gone on his return. It is a significant benefit to the bargaining unit, one which is wholly compatible with the principle of seniority, to allow the employee the option of returning to work for just that period or asking his supervisor to try someone else. On the other hand, there is some imposition on Marpole if its supervisors are forced to continue down the seniority list until they finally locate someone who wishes the job. As well, the employee they find will have less experience, and perhaps be less qualified, than the most senior employee whom they called first. Despite this, Marpole has been willing to adopt the practice in the interests of good employee relations, even going to the extent of finding work in the adjoining silvichemical plant for some of its sawmill employees, and letting them remain for the length of the sawmill layoff. Unquestionably, the continuance of the practice, one which Anderson was challenging, was in the interests of the unit as a whole represented by the I.W.A. Local.

Nasato had an even more dramatic interest in conflict with Anderson's position. Anderson claimed that he should have been retained at work on November 22nd and until December 5th in preference to Nasato. This was not on the basis that Anderson was entitled to longer seniority himself. Rather, it was because Nasato had allegedly lost all his seniority on the theory that his employment should have been treated as terminated in August. Instead of seniority dating back to 1957, Nasato's current seniority

standing would begin running on November 15, 1974. Accordingly, while by the time his grievance was underway, Anderson was back at work and seeking only compensation for lost wages, his case was based on an interpretation of the agreement which would permit — indeed, would require — Marpole to treat Nasato as a brand new employee, on probation, and the junior person on the tradesmen's seniority list. Again unquestionably, the impact of an unfavourable decision about the case would fall much more heavily on Nasato than on Anderson. Because of its implications for the position of both Nasato as an individual and the employees in the unit as a whole, we can understand why the I.W.A. would be reluctant to have Anderson succeed on his grievance.

But was the I.W.A. deliberately sacrificing Anderson's firmly-established rights under the collective agreement? Article XIX of the Master Agreement establishes the seniority system and it begins with s. 1 which states that "the Company recognizes the principle of seniority, competency considered". The meaning of this principle in cases of reduction and recall of the work force is set out in s. 2(a):

> (i) In the event of a reduction of the forces, the last person hired shall be the first released subject to the competency of the person involved and the provisions of Sec. 1. Where a reduction of forces is caused by emergency conditions the application of plant seniority may be postponed for such period as may be necessary but not exceeding five (5) working days. If the Company decides to exercise its right under this provision it shall notify the Shop Committee as soon as possible.
> (ii) When recalling forces after a period of layoff following a reduction of forces, an employee shall be recalled in order of his plant seniority subject to the competency of the person involved and the provisions of Sec. 1."

The basic policy is that, subject to competency, the junior person is the first laid off and the senior person is first recalled. The parties agreed that Anderson and Nasato were essentially equal in competence. The position of counsel for Anderson was that when s. 2(a)(i) says that "an employee shall be *recalled* in order of his plant seniority", this placed an obligation on Marpole to recall Nasato in the sense of *requiring* him to report back to work. When he did not report back to work, he must be taken to be absent without leave under s. 8 of the agreement:

> "Any employee who is absent without leave for a period of more than three (3) consecutive working days shall forfeit all seniority rights. This shall not interfere with the employer's right to discharge for proper cause."

He could not be said to be absent with leave because under s. 3 of Article XX, this required permission in writing from the Company and this Nasato did not have:

> "Any employee desiring leave of absence must obtain permission in writing from the Company for such leave, except in cases of illness or injury covered by Sec. 1 above."

As a result, Nasato automatically forfeited his seniority in August and when he returned to work on November 15th, he was junior to Anderson (and to everyone else). Thus the Company violated s. 2(a)(ii) when it laid off Anderson on November 22nd and retained Nasato.

A number of arguments against this interpretation were advanced by counsel for both Marpole and the I.W.A. First of all, it is a rather strained

interpretation of the term "recall" in s. 2(a)(ii) to say that it means a Company must *require* an employee to return to work in order of seniority rather than simply *inviting* him to return to work. Secondly, it does not reflect the factual sense of the situation to say that Nasato was "absent without leave" under s. 8 when he was explicitly given permission by his Foreman, and this arrangement was approved by the Personnel Supervisor and the Plant Chairman. Nor does the above quoted requirement of a written permission necessarily affect the matter, since this arises in the context of Article XX which defines when an employee has a *right* to a leave of absence (e.g. for maternity, bereavement, jury duty, or union business). The Company may still retain its general management right to extend leave to an employee voluntarily and thus preserve him during an absence from the automatic forfeiture of his seniority rights by s. 8. Finally, it was argued that the practice developed by Marpole and the Union to deal with intermittent recalls during a lengthy layoff falls squarely within the discretion offered by s. 2(d) of Article XIX:

> "Details of the application of this Section shall be worked out by the Local Union and the Company."

We have sketched the opposing arguments in this case but we do not believe we should go further and adopt one of them as the correct reading of the agreement. Under Article XXX, there is a special procedure for interpretation of this agreement, one which should not be pre-empted by this Board unless this is necessary for the performance of our statutory obligations. It is not necessary in this case, for the reason expressed in an earlier quotation of Professor Cox. One must not lightly assume that there is a "right" interpretation to be divined in the collective agreement of this issue. Rather, the parties to this agreement have been faced with the industrial relations problem of minimizing the impact of a layoff on the employees and they dealt with it in a spirit of co-operation, using the clauses of the contract as guideposts. While the balance struck by the parties in this case over-rode the immediate claim of Anderson, it did so for the quite legitimate reason of advancing the more pressing needs of the other employees. Under the language of this agreement, read in the history of its application, one could not argue that Anderson had any contrary rights clearly conferred by the collective agreement nor that he had any firm expectation that he would be treated as more senior than Nasato. The "method of self-government" of these parties operated in this case "within the zone of fairness and rationality" and should not be reversed by "the edicts of any outside tribunal".

Notwithstanding its judgment that the validity of the recall practice at Marpole must remain unimpaired under this collective agreement, the Plant Committee did process the grievance through the second and third steps of the grievance procedure in an attempt to ascertain whether there was any avenue for relief for Anderson personally. However, it should have been quickly apparent to everyone that there was no chance that Anderson's individual claim would be upheld in arbitration. Irrespective of what might be held to be the proper interpretation of the agreement for the future, both Marpole and Nasato would have a conclusive defence of equitable estoppel to the application of any new ruling to the events in the recent past. The whole matter was reviewed once more by the officers of the Local Union

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who might be expected to take a more detached view than the Plant Committee which had been involved with the problem for some time. The officers were unanimously of the view that Anderson's grievance was without merit and had to be dropped. Throughout this entire process, we see no basis for holding that the trade-union acted in a manner which was arbitrary, discriminatory, or in bad faith in the representation of Anderson. The complaint against the IWA of a violation of s. 7 of the Labour Code is dismissed. In these circumstances, we do not consider it advisable to enquire into and render an adjudication concerning Marpole's alleged violation of the collective agreement and s. 65(1) of the Code.

SWIFT CANADIAN CO. LIMITED AND CANADIAN FOOD AND ALLIED WORKERS, LOCAL P-280

Before: C. Brian Williams, Acting Chairman.
Alberta, June 18, 1975.

Arbitrability of grievances — whether collective agreement in effect at previous time — jurisdiction of Board.

The employer requested the Board to determine whether a collective agreement was in effect during a previous lockout. The union had already filed grievances arising from the lockout pursuant to the provisions of the collective agreement which grievances were before an arbitration board.

Held: In the opinion of the Board the question before it was one of establishing the arbitrability of the grievances, a matter over which the Board had no jurisdiction. The arbitration board established by the parties was the proper avenue for the requested determination.

Reasons for Decision:

This is the matter of an application received by the Board of Industrial Relations on March 27, 1975 from Swift Canadian Co. Limited, Edmonton, Alberta, pursuant to s. 50(1)(k) and s. 51 of The Alberta Labour Act, 1973 as amended, for the Board to make a determination as to whether a Collective Agreement was in effect between the applicant Company and the Respondent Trade Union in respect to the Company's Edmonton plant, during the time period June 6, 1974 to July 18, 1974 inclusive. Letter from counsel for the Applicant in part reads:

> "We herewith make application to the Board of Industrial Relations, pursuant to Section 50(1)(k), Section 51(1), and any other Section of the Labour Act that may properly apply, for a declaration and determination as to whether a Collective Agreement was in effect between the Company and the Union in respect to the Edmonton, Alberta plant, during the period June 6th, 1974 to July 18th, 1974 inclusive."

Section 50(1)(k) of the Act states:

> 50. (1) The Board is empowered to decide for the purposes of this Part whether:
> (k) a collective agreement is in effect;