

Case Name:
Muniandy (Re)

**Kalidasen Muniandy (the "Complainant"), and
Teamsters Local Union No. 155, (the "Union")**

[2015] B.C.L.R.B.D. No. 15

255 C.L.R.B.R. (2d) 182

BCLRB No. B15/2015

Case No.: 67745

British Columbia Labour Relations Board

Panel: Jacquie de Aguayo, Vice-Chair

Decision: February 2, 2015.

(72 paras.)

Appearances:

Sebastien Anderson, for the Complainant.

G. James Baugh, for the Union.

DECISION OF THE BOARD

I. **NATURE OF APPLICATION**

1 The Complainant alleges the Union breached the principles of natural justice in violation of Section 10(1)(c) of the *Labour Relations Code* (the "Code") when it stopped dispatching him for work, removed him from the dispatch list, and refused him membership in the Union. The Complainant further alleges he was refused membership in the Union in a discriminatory manner in violation of Section 10(2)(a) of the Code.

2 Both parties filed written submissions. The majority of the facts are not in dispute. Where material facts are in dispute, I have assumed the Complainant's version of events is true for the purposes of this decision.

II. BACKGROUND

3 The following summary is not intended to be a complete recitation of the evidence submitted and considered.

4 The Union dispatches its members to perform work for various employer production companies operating in British Columbia. Among others, the Union has a security division through which it dispatches security guards to various productions. The process for dispatch to job sites is set out in the Union's dispatch procedures ("Dispatch Procedures").

5 The Union also maintains a list of non-members who may be assigned temporary work. These non-members are referred to as Permittees. The Complainant is a Permittee in the security division. The Dispatch Procedures require Permittees to sign a waiver acknowledging they understand the terms under which they may be referred for work. The most recent waiver signed by the Complainant is dated April 9, 2013. Waivers set out the following standard terms and conditions:

I, [the Complainant] have been offered temporary work through the Dispatch office of [the Union] on the following terms:

1. The work offered to me, a non-member of [the Union], is temporary employment and comes with no guarantee that future work will be available. The Union shall retain the right to make the final determination of any/all work offered.
2. I am not being offered membership in [the Union].
3. The offer and acceptance of such work does not entitle me to any work in the future, but if further work is offered, it shall be on the same terms.
4. Should I accept and perform the work presently offered and which may be offered from time to time, that work does not create any retroactive seniority, should I be granted membership in [the Union] at any time in the future.
5. This waiver must be signed before I am entitled to accept the work offered.
6. I understand that the terms of the Master Collective Agreement and the Internal Rules of the Local Union will govern my employment. In addition, I understand I will be required to pay to [the Union] an amount equal to the field dues provided for by that Collective Agreement.

I have read and understand the terms of this waiver. By my signature I accept these terms as applicable to this offer to work and to any work offered in the future unless and until I should be granted membership in [the Union].

6 Permittees in the security division may apply for membership in the Union upon meeting the preconditions set out in Section 3(B) of the Dispatch Procedures. One of the main purposes of the rules for Permittees is to enable the Union to evaluate their suitability for membership in the Union. The preconditions relevant to the present case are set out below:

B) For Membership

1. Must be a Union accepted permittee.
2. Minimum of one hundred and eight (180) working days in applicable division.
3. Minimum of ten (10) positive evaluations from ten (10) different Security Captains. Each evaluation must have cheque stubs attached showing five (5) days worked on the production. All evaluations are to be submitted to the Union by the Security Captain.

[...]

6. Permittees receiving four (4) or more unfavourable evaluations shall be ineligible for membership.
7. For permittees receiving unfavourable evaluations eligibility for membership will be at the discretion of the Executive Board and or the Security Committee, judged on an individual basis. The permittee in question may be required to appear before the Executive Board and or the Security Committee.

[...]

7 The Complainant has been a Permittee for between 8 and 10 years. The parties differ with respect to the length of time. However, I find the difference between them is not material to my decision. Despite the length of time, the Complainant has not worked steadily. For example, in 2008 and 2009 he did not work as a Permittee at all, and in 2007 he worked briefly on one job during the year. At the time of the events giving rise to the complaint, the Complainant had not met any of the preconditions for membership. He had completed approximately 172 shifts and had received no positive evaluations.

8 The present dispute arises as a result of an incident during the Complainant's shift on the night of December 10-11, 2013 (the "December Incident"). He was dispatched by the Union to monitor a set of cables in the back alley of a downtown hotel being used as a movie set location. During his shift, the Complainant does not dispute he left his post and went up to the hotel penthouse. He says he saw something moving on the roof through the corner of his eye, accessed the penthouse and, once inside, he was hit on the head by an evil spirit and fainted.

9 The Complainant was discovered sleeping in the penthouse by someone from the production. Hotel staff also confirmed hearing snoring in the penthouse early on the morning of December 11, 2013. After being found in the penthouse, a hotel staff person reported the Complainant kept asking the front desk manager what he should do about it, stating he had been hit, but asking that the information not be shared. However, the hotel reported the December Incident to the production company the same day.

10 The Complainant maintained he had been struck and claimed workers' compensation benefits. On January 14, 2014, the employing production company filled out a Report of Injury or Occupational Disease in which it stated the Complainant had told conflicting stories "presumably to try to hide the fact that he was caught sleeping". The employer stated it had not been told of any injury or claim until contacted by WorkSafeBC on January 13, 2014. The employer further stated to WorkSafeBC the Complainant was in an unauthorized location, left his post, and ought to have reported any concerns to hotel security.

11 The Complainant says when he was ready to return to work he was told by another person he was not being referred for work. He states he tried to get in touch with the Union to find out why. He states the Union never responded, not even to advise him that it was investigating the December Incident. In reply he confirmed he did have a conversation with the Union soon after the December Incident with respect to obtaining assistance under an employee assistance program. However, he states he was not advised of any negative evaluation arising out of the December Incident. He further states the Union never advised him of any disciplinary proceedings initiated against him by the Union with the consequence he would be removed from the Permittee dispatch list. On March 31, 2014, the Complainant attended the Union's office with a written request for a copy of its Constitution and By-Laws (the "Constitution"), a copy of the Dispatch Procedures, and a copy of any contract between him and the Union with respect to his Permittee status. He states was not provided with the requested information and he maintains he was told he was not to attend at the Union office again.

12 In contrast, the Union states the Complainant apologized to the employer on the day of the December Incident. It further states it advised the Complainant it would investigate the matter and he would not be referred for work in the interim. There is no dispute the Complainant was not dispatched to any further shifts by the Union after the December Incident. The Union further states it took some time to investigate the matter given the employing production company had finished the production and people were difficult to reach. It states it was around the time the Complainant's counsel wrote to the Union on April 10, 2014, that it was advised by the employing production company it had no further information to provide. The Union maintains it did have contact with the Complainant in the interim. The Complainant had asked the Union to come with him to his temple and the penthouse for a purification ceremony to ward off the evil spirit. The Union states it asked the Complainant not to contact the hotel about purifying the room.

13 As of April 10, 2014, the Complainant had retained counsel. Counsel wrote to the Union on the Complainant's behalf on April 10, 2014 requesting the same information the Complainant had requested on March 31, 2014. Counsel maintained the Complainant was only eight shifts from "attaining full membership status". He also requested disclosure of any personal information in the Union's possession pursuant to Section 27 of the *Personal Information Protection Act*, S.B.C. 2003, c. 63 ("*PIPA*"). The Complainant maintained he was entitled to natural justice with respect to the

Union's decision not to dispatch him for work. Finally, the Complainant requested a meeting with the Executive Board as follows:

Request for Meeting with the Executive Board/Appeal to Teamsters Joint Council 36

3.4 If [the Union] has in fact imposed a disciplinary penalty against [the Complainant], please accept this correspondence as [the Complainant's] request for either a meeting with [the Union's] Executive Board and/or an Appeal to the Teamsters Joint Council, as the case may require.

14 Counsel for the Union responded by letter dated April 25, 2014. That letter included copies of the Dispatch Procedures, information on two negative evaluations, and a copy of the waiver signed by the Complainant in 2013. It also included a separate letter to the Complainant from the Union dated April 24, 2014.

15 These letters outlined the Union's Dispatch Procedures and set out the background to the two negative evaluations. The Union further stated the waiver he signed makes clear that dispatch is within the Union's discretion. Moreover, it pointed out the Complainant had not received any positive evaluations and was far short of the requirement to provide ten of them. The Union stated that four negative evaluations rendered a Permittee ineligible for membership. However, it also stated that Section 3(B)(7) of the Dispatch Procedures provides that eligibility is discretionary for Permittees receiving unfavourable evaluations. The Union stated it had received two negative evaluations and summarized them. One was the December Incident. The other was a negative evaluation for a shift on November 26, 2013, noting the Complainant was found asleep on the job and should have known his duties and responsibilities better. Finally, the Complainant was advised he would be given an opportunity to respond to the negative evaluations at a May 8, 2014 Executive Board meeting as provided for in Section 3(B)(7) of the Dispatch Procedures. The Union characterized the meeting as an administrative procedure and not a disciplinary hearing under the Constitution.

16 The Complainant met with the Union's Executive Board on May 8, 2014. Two of its members recused themselves as they had been involved in the Union's investigation of the December Incident. The Union wrote to the Complainant on May 12, 2014, informing him of the Executive Board's decision to remove him from the Permittee dispatch list for abandoning his assigned job duties. The Union noted the Complainant had confirmed his assigned job duties were to watch the cables outside the hotel. It also noted the Complainant had stated at the Executive Board meeting for the first time he had actually entered the hotel on three occasions, not once as he had originally reported.

17 By letter dated August 25, 2014, the Complainant's counsel wrote to the Union alleging it had failed to disclose information contrary to *PIPA*. The letter focuses on the Complainant's understanding the Union had said it was gathering positive evaluations and failed to disclose them in advance of the May 8, 2014 Executive Board meeting. Absent disclosure as requested, the Complainant advised he intended to file a formal complaint under *PIPA*. In response, by letter dated September 4, 2014, counsel for the Union provided copies of seven negative evaluations and two positive evaluations. Those evaluations related to shifts worked between August and December 2013. It disputes it ever committed to solicit and provide positive evaluations in advance of the May 8, 2014

meeting. The Union states the Minutes of the Executive Board meeting show its decision was based only on the two evaluations provided in advance of the meeting.

III. POSITIONS OF THE PARTIES

THE COMPLAINANT

18 The Complainant submits the Union's decision not to dispatch him for work and to remove him from the dispatch list was disciplinary as it affected his ability to work and was based on unsatisfactory conduct. He further states the fact he is not a member of the Union does not preclude him from filing this complaint as Section 10(1)(c) of the Code applies to "persons", not just members. He cites arbitral definitions in the employer-employee relationship in support of his argument. He further states the prejudicial effect of the Union's decision is especially significant because it denied him the opportunity to attain Union membership at a time when he was only 8 shifts short of meeting the required 180-shift threshold. Accordingly, as a person subject to disciplinary action by the Union, the Complainant maintains the present case falls within the scope of Section 10(1)(c) of the Code.

19 The Complainant distinguishes two previous decisions in which the Board found Section 10(1) of the Code does not apply to non-member Permittees: *Parmjeet Koonar*, BCLRB No. B229/2002, [2002] B.C.L.R.B.D. No. 229 ("*Koonar*") and *Geoffrey White*, BCLRB No. B152/2010, 183 C.L.R.B.R. (2d) 229 ("*White*"). Unlike Section 10(1)(c), the Complainant argues these cases deal with Sections 10(1)(a) and (b) which are member specific. The present case is, therefore, distinguishable on this basis alone.

20 The Complainant further submits the facts in *White* and *Koonar* are distinguishable as the complainants in those cases had failed to identify how the unions violated their right to natural justice. The Complainant submits the decision in *Koonar* confirms the complaint was dismissed for this reason, not because he was not entitled to natural justice as a non-member Permittee. In that case, the Board ultimately determined the Union had not violated his right to natural justice in refusing him membership. This is so because it had advised him in advance of its decision and had considered his conduct against specific membership criteria. The complainant was a driver Permittee with the same union as in the present case.

21 *White* dealt with a complaint by a non-member of a different union with a similar permittee program. The Board dismissed the complaint in *White* on the basis he was removed from the list in accordance with the waiver and permittee program requirements. These confirmed he would be required to work a minimum number of shifts within a specific time period. There was no dispute he had failed to meet that requirement. The Board concluded his failure to fulfill the permittee program requirements meant his removal from the dispatch list was justified.

22 The Complainant alleges he did not breach any contractual terms with the Union in the present case. He states there is no specific provision allowing the Union to remove him from the dispatch list after two negative evaluations. He also points out the Board noted the complainant's failure in *White* to identify how the union had breached natural justice.

23 The Complainant maintains Section 10(1)(c) of the Code required the Union to accord him natural justice when removing him from the dispatch list. The content of the duty is as set out in *Mark Gould*, BCLRB No. B3/2010, 175 C.L.R.B.R. (2d) 116 ("*Gould*") and *Marilyn Coleman*, BCLRB No. B282/95, 28 C.L.R.B.R. (2d) 1 ("*Coleman*"). The Complainant notes in *Gould* the

complainant was a member of the Union, not a Permittee. However, he submits the natural justice requirements are equally applicable in the present case given that Section 10(1)(c) also applies to "persons". In *Gould*, the Board concluded the Union had violated Section 10(1)(c) by failing to provide him with an opportunity to be heard prior to issuing a disciplinary suspension from the dispatch list.

24 In the present case, the Complainant submits he had no notice and no opportunity to address any adverse information prior to being removed from the dispatch list. He states the Union unreasonably delayed informing him of its decision until his counsel wrote in April 2014. Even after the meeting of May 8, 2014, the Complainant alleges he was not provided copies of additional negative evaluations or provided with an opportunity to answer those allegations.

25 The Complainant also relies on the Board's decision in *Guy Brusciano*, BCLRB No. B238/2000, [2000] B.C.L.R.B.D. No. 238 ("*Brusciano*"), in support of his position he was treated in a different manner in like circumstances. In *Brusciano*, the complainant had received two unfavourable evaluations for allegedly sleeping while on duty. He was also a Permittee dispatched by the Union in its security division. However, he was made aware of the poor evaluation and given an opportunity to explain.

26 For these reasons, the Complainant submits the Union's decision was disciplinary and the Union failed to accord him natural justice in violation of Section 10(1)(c) of the Code.

27 With respect to Section 10(2)(a) of the Code, the Complainant submits the Union's conduct amounts to a refusal to admit him to membership. He states the Union's decision effectively precluded him from satisfying the 180-shift eligibility requirement. The Complainant states the different outcome in *Brusciano* demonstrates this point. In that case, the Union allowed him to remain on the Permittee dispatch list and he ultimately did obtain membership in the Union. The Complainant states the Dispatch Procedures expressly provide a Permittee is disqualified from membership after four negative evaluations. The Complainant alleges the Union's decision was not based on any general rule or policy and, accordingly, he was arbitrarily removed from the dispatch list after only two negative evaluations.

28 The remedies requested by the Complainant include reinstatement to the Permittee dispatch list, damages, and an order awarding him membership status upon obtaining the required 180 shifts.

THE UNION

29 The Union does not deny Section 10(1) of the Code refers to "persons" and, as such, may apply to non-members of the Union. However, it states he was not "disciplined" within the meaning of Section 10(1)(c) of the Code. The Union submits if removal from a dispatch list does not constitute a "penalty" within the meaning of Section 10(2)(a) of the Code, it is not "discipline" under Section 10(1)(c): *Charles Scorgie*, IRC No. C39/92, [1993] B.C.L.R.B.D. No. 103 ("*Scorgie*").

30 The Union maintains Section 10(1)(c) deals with discipline by a trade union for alleged contraventions by members of its governing constitution and by-laws. In *White*, the Board concluded the union's waivers and dispatch procedures were not matters falling within the union's constitution. In *Gould*, the complainant was a member of the union. In *Mary O'Rourke*, BCLRB No. B111/2002, [2002] B.C.L.R.B.D. No. 111 ("*O'Rourke*") (Leave for Reconsideration Denied, BCLRB No. B369/2002, [2002] B.C.L.R.B.D. No. 369), the Board found that the mere fact a decision is based

on powers in the union's by-laws and constitution does not render an internal review or appeal process a "dispute" within the meaning of Section 10(1) of the Code.

31 On the facts, the Union states the Complainant was simply removed from the dispatch list in accordance with the waiver and Dispatch Procedures. The Complainant's status as a Permittee did not guarantee future work, dispatch was in the Union's discretion, evaluations of performance were a clear part of its procedures, and his status did not guarantee membership in the Union. Accordingly, the Union states it acted within its rights when it decided not to dispatch him for work and to remove him from the Permittee dispatch list.

32 The Union submits the complaint is properly brought under the duty of fair referral in Section 12(1)(b) of the Code: *O'Rourke*. It further submits the evidence demonstrates the Union did not act in an arbitrary, discriminatory or bad faith manner: *Eric K. Donaldson*, BCLRB No. B337/99, [1999] B.C.L.R.B.D. No. 337. It states the Board will not interfere with the legitimate exercise of a union's discretion with respect to dispatch and neither the presence of discretion nor its exercise will alone violate the duty of fair referral.

33 In the alternative, the Union submits that if the Complainant's removal from the dispatch list constitutes discipline within the meaning of Section 10(1)(c) of the Code, it acted in accordance with natural justice.

34 After requesting and being granted a meeting with its Executive Board, the Union states the Complainant was provided with the necessary information two weeks in advance and was given an opportunity to be heard. The Union further states the Complainant admitted he had left his post not once, but three times. He also admitted to sleeping on the job, noting he felt no one would believe his story. He addressed the other negative evaluation indicating he had fallen asleep because he had taken a co-worker's medication. Accordingly, he had an opportunity to present his version of events. Two members of the Executive Board who had been involved in its internal investigation recused themselves. The Executive Board's decision was rendered on the basis of the evaluations provided to him in advance. The Union states its process accorded with natural justice and the Complainant has failed to establish a breach of Section 10(1)(c) of the Code: *Bill Fahel*, BCLRB No. B70/2007, [2007] B.C.L.R.B.D. No. 90.

35 With respect to the additional negative evaluations, the Union states they were disclosed to him in September 2014 pursuant to a request under *PIPA* in August 2014. With respect to the Union's decision to remove him from the dispatch list as a Permittee, the Union states it was based only on the December Incident and the evaluation arising out of his November 26, 2013 shift.

36 With respect to the outcome in the present case, the Union submits the Board has no authority under Section 10 of the Code to determine whether the Union correctly interpreted and applied its Dispatch Procedures and member eligibility requirements: *Ben Speckling and Walter Speckling*, BCLRB No. B333/2003 at paras. 58-62, [2003] B.C.L.R.B.D. No. 333 ((Leave for Reconsideration Denied, BCLRB No. B31/2004, [2004] B.C.L.R.B.D. No. 31); application for judicial review dismissed, 2007 BCSC 945; appeal dismissed, 2008 BCCA 155).

37 With respect to Section 10(2)(a) of the Code, the Union submits the Complainant had not met the eligibility requirements for membership at the time of the events in question. He had no guarantee of work and the Union rejects the Complainant's claim he could have easily obtained the required 180 shifts. The Complainant had no positive evaluations. It further states Section 3(B)(7) of the Dispatch Procedures makes it clear that eligibility for membership of Permittees receiving

unfavourable evaluations is at the discretion of the Union. As such, the Union was entitled to remove him from the dispatch list once it found he was unsuitable for membership. In contrast, there is no discretion in Section 3(B)(6) which provides that four unfavourable evaluations results in ineligibility for membership.

38 The Union states *Brusciano* only stands for the proposition that those in like situations ought not to be treated differently. The dispatch rules in *Brusciano* were those in place 16 years ago. They required only 90 days of work and 6 positive evaluations. The rules have changed and, as such, any comparison should be between Permittees during the same time frame as the Complainant. Moreover, the Union states the complainant in *Brusciano* had submitted sufficient positive evaluations. The Complainant had none. It states the effect of the Complainant's reliance on *Brusciano* in this context is akin to finding the Union is bound, in perpetuity, to allow all future Permittees to seek membership despite engaging in admitted misconduct and failing to meet the minimum requirements. It submits the Complainant was removed from the dispatch list in accordance with the waiver and the Dispatch Procedures. It further submits there is no evidence or assertion the Union treated the Complainant in a differential manner in comparison to other Permittees subject to the same requirements. Accordingly, the Union submits the Complainant was not treated in an arbitrary manner contrary to Section 10(2)(a) of the Code as alleged.

REPLY

39 The Complainant maintains there is a distinction between denial of membership based on negative evaluations and removal from the dispatch list. He states the Union had no positive right to remove him from the dispatch list for Permittees on the basis of a negative evaluation. He further states he did not present positive evaluations because he believed the Union was collecting them in advance of the Executive Board meeting. Finally, the Complainant states the rules are ambiguous as to who is responsible for producing the positive evaluations.

40 The Complainant reiterates the Union did not provide him with notice of its intention not to dispatch him for work pending an investigation. It only told him once he was fit to work, he should get in touch with the Union. He states the Union only provided information to him when his counsel wrote to the Union in April 2014.

41 The Complainant provided no response to the Union's submission the circumstances complained of properly fall under Section 12(1)(b) of the Code.

IV. ANALYSIS AND DECISION

42 Section 10 of the Code provides, in part:

10 (1) Every person has a right to the application of the principles of natural justice in respect of all disputes relating to

- (a) matters in the constitution of the trade union,
- (b) the person's membership in a trade union, or
- (c) discipline by a trade union.

- (2) A trade union must not expel, suspend or impose a penalty on a member or refuse membership in the trade union to a person, or impose any penalty or make any special levy on a person as a condition of admission to membership in the trade union or council of trade unions
 - (a) if in doing so the trade union acts in a discriminatory manner, or
 - (b) because that member or person has refused or failed to participate in activity prohibited by this Code.

43 Section 12 of the Code provides, in part:

12 (1) A trade union or council of trade unions must not act in a manner that is arbitrary, discriminatory or in bad faith

- (a) in representing any of the employees in an appropriate bargaining unit, or
- (b) in the referral of persons to employment

whether or not the employees or persons are members of the trade union or a constituent union of the council of trade unions.

- (2) It is not a violation of subsection (1) for a trade union to enter into an agreement under which
 - (a) an employer is permitted to hire by name certain trade union members,
 - (b) a hiring preference is provided to trade union members resident in a particular geographic area, or
 - (c) an employer is permitted to hire by name persons to be engaged to perform supervisory duties.

44 As the Board stated in *Coleman*, the constitution and by-laws of a union regulate the relationship between the union and its members:

[...] The constitution and by-laws contain the rights and obligations of the members to one another and towards the union; it contains the different levels of decision making, as well as the powers and duties of the officers involved in that decision making; it includes provisions outlining the relationship of the local to the parent; and it sets out the requirements for the elections of officers and for the setting of conventions. (para. 101)

45 The courts continue to have jurisdiction over internal union disputes relating to the interpretation and application of union constitutions and by-laws. However, Section 10(1) of the Code gives the Board jurisdiction to determine whether natural justice has been respected where a dispute relates to the union's constitution and by-laws, a person's membership in the union or discipline by the union: *Coleman* at para. 118.

46 Accordingly, the Board will not engage in an exercise of interpreting or applying a union's constitution. Nor will it determine whether it agrees with the union's decision: *Brusciano* at para. 54. The requirements of natural justice are context dependent, the Board's emphasis is procedural, and the focus is on the underlying value of fairness: *Coleman* at paras. 116 and 120.

47 Section 10(2)(a) of the Code prohibits a union from applying its membership rules in a manner that distinguishes between individuals or groups on grounds that are illegal, arbitrary or unreasonable. Arbitrariness arises where a distinction is not based on any general rule, policy or rationale: *Coleman* at paras. 192-193.

48 The fact that the basis of a union's authority to make a decision is based in its constitution or by-laws is not determinative of whether the dispute in issue comes within the scope of Section 10 of the Code. Section 10 is focused on ensuring fairness in the union's decision-making where it involves the rights and obligations of the members to one another and towards the union: *Coleman*. Accordingly, the removal of a person from a permittee program that is not in the union's constitution is not a matter falling under Section 10 of the Code: *White* at paras. 29-30.

49 Section 12 of the Code applies whether a person is a member or non-member of the union. Under Section 12(1)(a) of the Code, the Board has jurisdiction to determine whether, in representing the interests of employees *vis-à-vis* the employer, a union has acted in an arbitrary, discriminatory or bad faith manner. Section 12(1)(b) of the Code further prohibits a union from acting in an arbitrary, discriminatory or bad faith manner in the referral of persons to employment. As such, the duty of fair referral under Section 12(1)(b) of the Code applies to the union's administration of its dispatch system regardless of membership status, including decisions not to dispatch and questions of whether there is an enforceable right to be referred to employment: *Paul Jasper*, BCLRB No. B233/2005 at para. 51, [2005] B.C.L.R.B.D. No. 233.

50 Natural justice principles may play a role in the Board's review under Section 12(1)(b) of the Code: *O'Rourke*. However, where a union conforms with its own policy and practice with respect to its established dispatch rules, it will not breach Section 12(1)(b) of the Code when it removes a person from its dispatch list: *Scorgie*; *Michael McLaughlin*, BCLRB No. L112/81; *Ronald James Stone*, BCLRB No. B164/96, [1996] B.C.L.R.B.D. No. 164.

SECTION 10(2)(A) OF THE CODE

51 I turn first to the Complainant's allegation he was refused membership in the Union in an arbitrary manner in violation of Section 10(2)(a) of the Code. Under Section 10(2)(a), it is not my role to determine whether I agree with the Union's interpretation of its Permittee program, its Dispatch Procedures, or its decision the Complainant was not suitable for membership. The issue in the present case is whether the Union refused the Complainant membership and, if so, whether its decision was arbitrary.

52 There is no dispute the Complainant did not make a formal request for admission to membership. The letter from the Complainant's counsel of April 10, 2014, is based on the Union's failure to dispatch him and his alleged removal from the Permittee dispatch list. He expressly sought a meeting with the Union with respect to these issues. The Union's response of April 25, 2014, is similarly limited to these issues.

53 The Union agreed to provide the Complainant with the opportunity to address the issue of his status on the Permittee dispatch list. The facts show the Complainant did not meet the minimum

requirements to request admission to membership. After hearing from the Complainant, the Union's decision of May 12, 2014, determined the issue of the Complainant's "continued suitability" as a Permittee. Based on the December Incident, and noting the Complainant's admission he abandoned his job duties on not one, but three, occasions, the Union decided to remove him from the Permittee dispatch list.

54 The Complainant maintains the effect of the Union's decision precludes him from achieving the preconditions for membership. Thus, it is a decision falling within Section 10(2)(a) of the Code. I find the Complainant's position is inconsistent with the express terms of the waiver and Dispatch Procedures in the present case. To find otherwise would mean the waiver and Dispatch Procedures require the Union to maintain persons on the Permittee dispatch list until such time as they are eligible to request membership in the Union. As a Permittee, the Complainant was neither guaranteed work, nor was he guaranteed admission to membership. It is evident on the face of the Dispatch Procedures that evaluations are a means to assess suitability. That assessment may occur at the time a Permittee has met the minimum requirements, or is close to doing so. However, I find the terms of the waiver signed by the Complainant, and the Dispatch Procedures, also entitle the Union to make an independent determination of suitability for ongoing dispatch as a Permittee.

55 Accordingly, it may be that a union's decision to remove a permittee from a dispatch list constitutes a denial of union membership. However, on the facts before me, I find the Complainant was a long way from achieving the minimum requirements necessary for membership. The facts further establish the nature of the Complainant's request of the Union, and the nature of its decision, was with respect to his suitability for dispatch as a Permittee. For all these reasons, I find the Union's decision was not a refusal of membership in the Union as contemplated by Section 10(2)(a) of the Code.

56 In the alternative, if I had found the Union refused the Complainant membership within the meaning of Section 10(2)(a) of the Code, I would have found its decision was not arbitrary as alleged. The Complainant maintains the Union's decision was not based on any general rules or policy. I disagree.

57 The Union pointed to its ability under Section 3(B)(7) of the Dispatch Procedures to rely on negative evaluations in finding a Permittee is not eligible for membership. It states this is distinct from the more prescriptive requirement in Section 3(B)(6) which makes a Permittee with four negative evaluations ineligible for membership. The Union also points to the waiver signed by the Complainant and the Dispatch Procedures which give the Union full discretion on when and whether to dispatch Permittees for work. The Complainant signed the waiver in April 2013. The waiver emphasizes that status as a Permittee is not a guarantee of membership.

58 It is not the role of the Board to agree or disagree with the manner in which the Union interpreted its Dispatch Procedures and the waiver, or whether it agrees with the decision the Union made. For the purposes of the complaint, I find these circumstances establish the Union's decision was one that was open to it based on its general rules and policies and, as such, was not arbitrary as alleged: *Coleman*.

59 I further find the Complainant's allegation he was treated arbitrarily having regard to the facts in the *Brusciano* case cannot be sustained. There is no evidence before me to show the Complainant was treated in an arbitrary differential manner in relation to other Permittees. Even if I accept a previous decision of the Board is an appropriate comparator to make a finding in the present

case with respect to arbitrary treatment, the facts in *Brusciano* can be distinguished. He was not similarly situated as he had submitted several positive evaluations and the dispatch procedures were different.

60 Based on all the foregoing, I find the Union's decision to remove the Complainant from the Permittee dispatch list was not a refusal of membership within the meaning of Section 10(2)(a) of the Code. Even if I had found it was, I find the evidence does not establish the Union acted in an arbitrary manner as alleged. Accordingly, I dismiss this aspect of the complaint.

SECTION 12(1)(B) OF THE CODE

61 The Union ceased to dispatch the Complainant for work and ultimately concluded his name should be removed from the dispatch list. The Union found he was unsuitable based on the two negative evaluations, including the December Incident. The waiver and Dispatch Procedures make clear the Complainant had no ongoing right to be dispatched, nor was his status as a Permittee a guarantee of membership. I find the material issue raised by the complaint is the Union's decision to cease dispatching him for work in his capacity as a Permittee and, ultimately, removing him from the dispatch list: *Koonar*; *White*. For these reasons, I agree with the Union the material issue in dispute falls under the duty of fair referral in Section 12(1)(b) of the Code.

62 Had the Complainant filed his complaint under Section 12(1)(b) of the Code, I would have found the evidence before me fails to establish arbitrary, discriminatory or bad faith conduct on the part of the Union. The Union had regard to its Dispatch Procedures and the terms of the waiver signed by the Complainant. It made a determination of suitability that was within its discretion. In making its finding, it relied on the two negative evaluations it received and the fact the Complainant admitted to actually leaving his post three times during the December Incident, not once as he originally claimed. The Union accorded him with an opportunity to address the negative evaluations in its possession and it provided him reasons in writing for its decision. Those reasons were relevant to the objectives of the Permittee program to assess suitability. Accordingly, I would have found the Union's decision was not arbitrary within the meaning of Section 12(1)(b) of the Code: *Scorgie*.

63 In the alternative, however, I have considered the Complainant's allegation the Union violated Section 10(1)(c) of the Code.

SECTION 10(1)(C) OF THE CODE

64 There is a dispute about whether Section 10(1)(c) of the Code applies in the present case. The Complainant alleges the Union acted contrary to Section 10(1)(c) of the Code. He states the Union's decision to remove him from the dispatch list was disciplinary in nature. In rendering its decision, he alleges the Union violated his right to natural justice. He states the fact he is not a member of the Union is not relevant. Accordingly, he submits the Union violated Section 10(1)(c) of the Code. The Union states Section 10(1)(c) does not apply to non-member Permittees and its decision was not disciplinary.

65 I find I need not resolve this dispute as the evidence does not establish the Union violated the Complainant's right to natural justice as alleged.

66 For the purposes of this decision, I accept the Complainant's allegation the Union did not formally advise him prior to its April 2014 letter of its investigation into the December Incident or of its intention not to dispatch him pending that investigation. However, the Union did ultimately respond. I address its delay in responding separately, below. For the reasons that follow, I find the

totality of the circumstances shows the Union acted in accordance with natural justice when it made its decision to remove the Complainant from the Permittee dispatch list: *Coleman*.

67 The Union provided the Complainant and/or his counsel with information that included an explanation for its delay due to its investigation of the matter. It provided written particulars and copies of two negative evaluations, copies of the Dispatch Procedures, and a copy of the waiver the Complainant signed in April 2013. The Union set out its position with respect to its discretion to dispatch Permittees. It gave the Complainant two weeks' notice of a meeting with the Executive Board scheduled for May 8, 2014. He was advised the meeting was convened under Section 3(B)(7) of the Dispatch Procedures in light of the negative evaluations. Two members of the Union Executive who had been involved in the Union's investigation recused themselves from the process. The Complainant attended and stated his case. The reasons for the Union's decision were then communicated to him by letter dated May 12, 2014.

68 My reasons should not be interpreted as condoning the Union's delay in communicating with the Complainant. I note the evidence is unclear as to the time frame between when the Complainant states he was ready to work after the December Incident and the exchange of correspondence in April 2014. I find nothing material turns on whether it was three or four months. It is generally advisable for a union to communicate with individuals in a timely and clear way. Such communication can often avoid disputes and misunderstandings. However, having regard to the totality of the Union's response, I have nevertheless concluded its process met the requirements in Section 10(1)(c) of the Code.

69 The Complainant further alleges a Union representative verbally told him the Union would provide him with copies of other evaluations prior to the hearing. The Union disputes this allegation. Even if I accept the Union had made a commitment to produce additional evaluations, there is no evidence or allegation the Complainant raised the issue when he met with the Executive Board on May 8, 2014. There is similarly no evidence or allegation that, if he did raise it, the Executive Board denied him access to this information. Finally, the Complainant does not dispute the Union's evidence the only information before the Executive Board when it rendered its May 12, 2014 decision was the two evaluations disclosed to the Complainant in advance.

70 The Complainant does not indicate how the existence of a series of additional negative evaluations would be material to the decision in issue in this complaint. For these reasons, I find the disclosure of additional negative evaluations further to a request under *PIPA* made three months later does not constitute a breach of natural justice in the context of the decision of May 12, 2014.

71 In all these circumstances, I find the evidence demonstrates the Complainant was accorded natural justice in a manner consistent with Section 10(1)(c) of the Code: *Coleman*. It is not my role to agree with the outcome in the present case, or to determine whether the Union's interpretation of its authority under the Dispatch Procedures or the waiver was the right one. Accordingly, I dismiss this allegation.

V. CONCLUSION

72 For all the reasons set out, I find the Complainant has not established a violation of Sections 10(1)(c) or 10(2)(a) of the Code. Accordingly, the complaint is dismissed.

LABOUR RELATIONS BOARD

JACQUIE DE AGUAYO
VICE-CHAIR