BRITISH COLUMBIA LABOUR RELATIONS BOARD

PAUL JASPER

("Jasper")

-and-

CONNIE RUSGEN

("Rusgen")

-and-

DOUGLAS LEAF

("Leaf")

-and-

TEAMSTERS, LOCAL 155

(the "Union")

-and-

M.G.M. PRODUCTIONS
(Good Boy! Production c/o Cub Seven Productions Inc.)

(the "Employer")

PANEL:	Ken Saunders, Vice-Chair
APPEARANCES:	Thomas F. Beasley, for the Complainants Sam Black, for the Union Barry Dong, for the Employer
CASE NOS.:	53133, 53304, 53305
DATE OF DECISION:	September 9, 2005

DECISION OF THE BOARD

I. INTRODUCTION

1 Jasper, Leaf and Rusgen (collectively the "Complainants") allege that the Union violated its duty of fair referral and duty of fair representation contrary to Section 12 of the *Labour Relations Code* (the "Code"). In particular, the Complainants contend that the Union failed to take appropriate steps when non-members worked as Animal Handler/Trainers on the Good Boy! Production ("*Good Boy*" or the "*Production*"). The Complainants also quarrel with the Union's general approach to the hiring of non-members to work as Animal Handlers and Trainers ("*AHTs*").

2 The three complaints raise the same issues and are otherwise virtually identical. Accordingly, the complaints have been consolidated for adjudication: Rule 13.

3 This decision is based on the parties' written submissions. Where the material facts are in dispute, I have assumed the facts asserted by the Complainants are true for the purposes of this decision.

II. BACKGROUND

4 Bonnie Judd was the Animal Coordinator on the Production. Among other things, Judd was responsible for hiring AHTs for the Employer.

5 Jasper complained to Union representatives Brad Swannie and Thomas Milne that non-members worked on Good Boy in contravention of the collective agreement and Union dispatch rules. Jasper told Milne and Swannie that Judd hired family and friends. Jasper said he should have been dispatched to the job. Milne told Jasper that the complaint would be handled as a verbal grievance and would be rectified.

6 Milne spoke to Judd and asked her to hire union members to work as AHTs on Good Boy. Milne ended that discussion believing Judd would do so. Subsequently, Union Dispatchers called the Complainants and other members on the dispatch list to see if they were available and interested in the work.

7 The Complainants are AHTs and are members of the Union.

8 A number of AHTs working on the Production were not members of the Union or permittees. Lynne LaChance was one of the persons. Two of the AHTs that worked on the production are directly related to Judd but are members of the Union.

9 In August 2002 a Dispatcher told Jasper to contact Judd if he wanted to obtain work on the Production. Dispatchers also contacted Leaf and Rusgen to ask if they were available and interested to work as AHTs on the Production. Leaf and Rusgen

said they were available and interested to work. Leaf and Rusgen expected to hear back from a dispatcher.

10 The Complainants know Judd from work on previous productions. There is a history of conflict between the Complainants and Judd.

11 Jasper phoned Judd. Judd told Jasper that AHT work was not available to Union members on Good Boy. Judd added that if Jasper accepted work it would be a special arrangement. Jasper responded that he would not work on that basis.

12 Judd immediately contacted the Dispatcher to ask if the job was open to other Union members. The Dispatcher informed Jasper that the job was available to other Union members. Jasper asked the Dispatcher to tell Judd that he would take the job.

13 The Complainants did not receive a call to work on Good Boy. Jasper raised this with Milne. Milne said he would rectify the matter but the Complainants were never called to work on the Production.

14 On November 17, 2002 Jasper objected to Lynne LaChance's application for membership because she worked as an AHT on Good Boy without a work permit. In a letter dated January 16, 2003 Milne advised LaChance, "...that the days accumulated by permittee Animal Handler/Trainers working on "Good Boy", following the Local's July 6, 2002 directive to Bonita Judd to remove same, do not count toward membership in Local 155."

15 Milne pursued the matter with Judd as a Union member in the following letter dated January 16, 2003:

> Re: Good Boy Animal Handlers
>
> First I would like to thank you for your time and input regarding the Show Cause hearing pertaining to Lynne LaChance.
>
> You clearly identified a number of issues regarding your requirements for your division and needs to achieve the look required for the production.
>
> I would have appreciated correspondence from the Production Company requesting those individuals who you viewed had those necessary qualifications for the production's needs and not have you arbitrarily make that decision.
>
> I informed you on the Saturday of the July 1, 2002 long week-end by telephone conversation to place the orders to our Dispatch and, if no members wished the employment, then the Local Union would permittee those individuals. That would have resolved the matter.
>
> Now we have members who missed the employment opportunity considering grieving the Production Company.

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16 The letter continues to identify non-members employed on Good Boy and concludes as follows:

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> The Executive Board Members agree serious violations have occurred due to your lack of following my directive to place the order originally.
>
> This letter shall serve as a reprimand Bonita that any such occurrences of dispatch violation will result in possible suspension from dispatch or charges laid by the Local Union to avoid any such events re-occurring.
>
> The days employed on the "Good Boy" production for the individuals mentioned earlier... will not be credited as eligible days for membership in this Local Union. This is because they were not properly registered with Teamsters Local No. 155 Dispatch.

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17 The Complainants also allege that the Union did not enforce the collective agreement and Union dispatch rules on many productions (other than Good Boy). Consequently, non-members are used as AHTs when members available for dispatch are not contacted for work. No one disputes the Union's submission that Animal Coordinators have hired non-union AHTs as a matter of industry practice going as far back as the early 1980's. Therefore, I accept that factual assertion for the purposes of this decision. The Complainants say this is additional evidence of an historical abuse of the dispatch system and the Union's contravention of Section 12.

18 Judd continues to use her son and daughter to work as AHTs on other productions.

The Grievances

19 In January 2003, the Complainants grieved that the Employer hired non-members to work on Good Boy.

20 In a letter dated January 30, 2003, Milne told Jasper that the Union filed the grievance. The Union did not invite Jasper to attend grievance meetings despite Jasper's requests to attend. In a letter dated February 14, 2003, Milne advised Jasper that the Union met with the Employer where it identified the alleged violations and lost earnings. Milne also said that the Union was waiting for the Employer's reply and would keep him advised as matters progressed.

21 The Complainants asked the Union to adhere to collective agreement deadlines when processing the grievance to arbitration. The Union did not strictly adhere to those

timelines. The Employer did not say it relied on grievance procedure time limits to defend its position. The Union did not withdraw the grievances because they were untimely.

The Decision to Withdraw the Grievances

22 The Complainants met with Linda Dennis (counsel for the Union) to discuss the grievances in the last week of February 2003. Dennis also spoke to a number of other individuals, including Milne and a dispatcher (there is a dispute about whether Dennis spoke to one individual and Leaf quarrels with the absence of Dennis' notes, but nothing turns on those differences for the purposes of this determination).

23 The Complainants believed the grievance would proceed to arbitration the following April after meeting Dennis.

24 Dennis completed her investigation and forwarded a recommendation to the Union Executive. Dennis' recommendation is described in the Union's reply submission to the Jasper complaint. While the Complainants vigorously dispute the merits of Dennis' assessment, the Unions' submission describing Dennis' conclusions remains undisputed. The Union describes Dennis' conclusions as follows:

> ...As a result of Dennis' interviews and analysis, Dennis recommended that the Union withdraw the grievance on the grounds that it was unlikely to succeed. Dennis concluded that the collective agreement did not require employers to hire Union members in the Animal Division ahead of non-members given that Article B1.11(c)(vii) permits name requests for Animal Wranglers and Trainers, Article B1.01 states that the agreement does not apply to Independent Contractors of Dog or Dog Acts, Dog Owners, or Dog Trainers and/or Dog Handlers, and that Article 1.19 permits the subcontracting of bargaining unit work which has historically been subcontracted. The Cast Driver decision required the parties to present evidence on historical practice and even though the Union felt that the historical practice supported their position they lost that grievance. It was Dennis' opinion that if the union was required to present evidence of historical practice on the use of non-members in the positions of Animal Handler, Trainer and Wrangler, the union would not succeed on the grievance. The historical practice in the film industry in BC is that non-members have worked with animals. Thus the Employer would stand a good chance to mounting a successful estoppel argument given that the Union was aware of this practice. (para. 69 of Union's reply to Jasper Complaint)

25 The Union sent Jasper two letters explaining its decision to withdraw the grievance. Before turning to that correspondence, Article 1.19 of the collective agreement is reproduced to provide additional background:

> 1.19 Subcontracting: The Employer will not subcontract bargaining unit work which customarily and historically has been performed by Employees covered by this Master Agreement unless the affected Council-member Union consents thereto; or the Employer lacks the requisite equipment, technology, facilities or personnel to perform the work; or the work of the type being subcontracted has heretofore been subcontracted by a producer engaged in the motion picture and television industry in British Columbia. When practicable, the Employer shall deliver a minimum of one week's advance notice to the Council of its intention to subcontract.

26 In March 2004, Jasper learned that the Union decided to withdraw the grievance. Milne explained that decision in identical letters to the Complainants dated April 2, 2004, as follows:

> Re: Good Boy Grievance
>
> I am writing to advise that the hearing in connection with your grievance will not be proceeding. You will recall that the Union's legal counsel, Linda Dennis, interviewed yourself on this file. She also interviewed the other grievors, as well as other Union members in connection with this particular production and in connection with the animal division's use of non-members historically and currently.
>
> In light of those interviews and the provisions of the collective agreement, she has made recommendations to the Executive Board about the likely outcome of these grievances if they were to proceed to arbitration. The Executive Board has considered those recommendations and determined that the grievances should be withdrawn. The union has achieved a withdrawal "without prejudice". This would protect the membership so that if this issue were to arise in the future and the practice of use of non-union personnel had altered such that a different outcome might be achieved, then the withdrawal of these grievances would not prevent proceeding with a future grievance.
>
> The Union thanks you for your time in assisting legal counsel with her investigation of the grievances and vigilance as a Union member. ...

27 Jasper asked the Union Executive Board to reconsider its decision and asked how he might exhaust his internal remedies. Milne told Jasper to look to the Constitution and Bylaws and in March 2005, told Jasper to look to the charge section of the Constitution and Bylaws. There is no dispute that the Union's constitution and bylaws do not provide an avenue to appeal a decision to withdraw a grievance.

28 In a letter dated December 9, 2004, the Union's Executive Board responded to Jasper's request for reconsideration as follows:

We are in receipt of your letter dated December 2, 2004. The Union Executive Board determined that it was inappropriate to proceed with the grievance against this production. It became apparent that there was little or no likelihood of success after the investigation of the grievance by counsel in preparation for a possible hearing.

The Animal Trainer and Animal Handler Division is not dispatched in the traditional sense. Employers do not obtain employees by any form of seniority. This is a 100% name request division of the Local Union. At no time were you or any of the other grievors *'name requested'* by or on behalf of the production. The Union canvassed the members to see who was not working at the time in order to determine that members would be available to do the work that was being performed by non-members. Further to that exercise, you were contacted by the Animal Coordinator, but were not specifically offered the work. Therefore, it cannot be said that you were *'dispatched'* to the production.

This division has an extensive history of a historical practice by which non-members are employed by members on productions as part of their crew. While this practice is not favoured by the Union, it is a reality that many current members have obtained their membership through this very practice, and continue to engage in this practice regularly.

As you know, from attendance at the General Membership Meetings, shortly before this matter was scheduled for hearing, the Union was engaged in a grievance striving to protect bargaining unit work of cast drivers. The historical practice in the cast driver case was very consistent in the Union's favour, approximately 90% of the time done by bargaining unit members. Yet, the arbitrator seized on those few occasions when the practice was not followed, as justification for free employer discretion.

It is clear that in the instance of the Animal Handler/Trainer Division, the historical practice evidence is the opposite, in that it strongly favours the employer's position of contracting out. In light of the outcome, in the cast driver case where the evidence was strongly in the Union's favour; and still the employer was found to have the discretion, the outcome in this case would be the same.

The Union's experience after the cast driver decision was released by the arbitrator was that the employer's engaged in a new flurry of contracting out of this work; just to show that they could do so, and that detrimentally affected the work opportunities of all of the cast drivers in the Local for some time. The Executive Board determined that to engage in arbitration would clearly result in a loss, and would have the same effect on future work opportunities for members in your division.

> For all of these reasons, the Executive Board determined that the grievance should not proceed further.
>
> I trust this answers your inquiries.

29 This was the first time Jasper learned that the Union considered the Cast Drivers arbitration award when it decided to withdraw the grievances: *Negotiating Producers v. International Brotherhood of Teamsters, Local Union 155* [2003], Ministry No. X005/03, ("*Cast Drivers Award*").

Jasper's Request for Documents

30 In a letter dated February 22, 2005, Jasper asked the Union to give him access to the Union's minutes for meetings of the Animal Handler/Trainer Division from 2002 to 2004, the Lynn LaChance Show Cause hearing, General Meetings between June 2002 and December 2004 and Executive Board meetings from June 2002 to December 2004. The Union met with Jasper to discuss the request, and referred him to two arbitration awards. At that meeting, Jasper noted that Animal Handler/Trainers who were dispatched to productions were not acknowledged on the Union's bulletin board. The Union refuses to provide Jasper with access to the un-redacted copies of the requested minutes. The Union routinely gives other members access to its records (subject to redactions to address privacy concerns).

III. POSITIONS OF THE PARTIES

31 The Complainants argue that the Union breached Sections 12(1)(a) and (b) by dispatching non-member AHTs to work on productions in general, by allowing this to continue (the "*systemic complaint*") and specifically on Good Boy where the Union withdrew its grievance regarding the conduct of Judd. The Complainants argue that Judd acted both as the Employer's representative and the Union's dispatcher on Good Boy, that Judd practiced nepotism, and discriminated against Jasper and other members (the "*Judd*" complaint). The Complainants submit that while the collective agreement permits the Employer to name request Animal Wranglers/Trainers, persons hired by name request must be members of the Union or non-members with valid permits ("*permittees*").

32 The Complainants submit that the Union acted in an arbitrary, discriminatory and bad faith manner because the Union breached the duty of natural justice and administrative fairness when processing the grievances. There are three principal grounds advanced in support of this submission: 1) Jasper was not told that the Case Drivers arbitration and other arbitration decisions would be part of the case he would have to meet when he met Dennis to prepare for arbitration and prepared his appeal of the Union's decision; 2) the Union refused to provide records that show how it dealt with the use of non-members in the animal handler/trainer division; and, 3) the Union did not disclose the historical practice it relied on to support the Employer's right to contract out the work at issue.

33 The Complainants argue that the Union acted in an arbitrary, discriminatory and bad faith manner because it delayed the investigation of the grievance, told Jasper he need not file a written grievance, and failed to comply with grievance procedure timelines.

34 The Complainants contend that the Union acted in an arbitrary, discriminatory and bad faith manner because it withdrew the grievance after acknowledging that Judd violated the collective agreement in its January 16, 2003 letter to her.

35 The Union submits that its investigation revealed that Judd was retained as the Animal Coordinator on Good Boy. The Union concluded that Judd acted on the Employer's behalf in that capacity. Judd chose to directly hire Animal Handler/Trainers by name request contrary to Milne's request (rather than have them dispatched from the hiring hall). The Union concluded this is consistent with industry practice and gives rise to circumstances where the Union would likely be estopped from insisting on the strict application of the collective agreement provisions relied on by the Complainants. Further, the Union concluded that the Employer would successfully argue that it contracted out the work at issue as permitted under Article 1.19. In doing so, the Employer may bypass the Union's hiring hall and seniority list. Thus, Judd did not dispatch employees to the Production and the collective agreement or Union dispatch rules do not apply. In particular, the Union says it concluded on the basis of previous arbitration awards, that it was not entitled to enforce its internal dispatch rules against the Employer. For these reasons, the Union submits it did not owe a duty of fair representation or fair referral to the Complainants.

36 The Union argues that it did not act in an arbitrary, discriminatory or bad faith manner conduct in handling the grievances. The Union submits that the Union pursued the grievances with the Employer, its legal counsel met with the Complainants, and reviewed the circumstances, including prior arbitration awards and the collective agreement. The Union says it came to the conclusion, on the basis of that review, that the grievances would likely fail on any one of the three following grounds: 1) that Article B1.11(c)(vii) of the collective agreement permits the Employer to hire Animal Wrangler and Trainers by name request and that Judd acted in accordance with past practice in doing so; 2) Article B1.01 provides that the collective agreement does not apply to Independent Contractors of Dogs or Dog Acts, Dog Owners or Dog Trainers and/or Dog Handlers; and, 3) that Article 1.19 allows the sub-contracting of bargaining unit work that has been historically subcontracted.

37 Further, the Union submits that it came to the view that non-union members have historically performed work as Animal Handlers/Trainers and or Dog Handlers—a fact that is not in dispute in the present proceeding. The Union concluded that if called upon, the Employer would rely on that practice to argue that the Union was estopped from claiming that the Employer must hire members from the dispatch list or permittees to do that work.

38 The Complainants submit in reply that the Union's position that it does not owe them the duty of fair representation or fair referral is contrary to positions advanced by

the Union in *Members of Teamsters Local Union No. 155*, IRC No. C117/91 ("*Teamsters*"). The Complainants assert that this is further evidence of arbitrary, bad faith or discriminatory conduct. Moreover, the Complainants ask for an order compelling the Union to produce documents that show how the Union's position has changed over time.

39 Further, the Complainants argue that the Union's conclusion that Judd hired Animal Handlers/Trainers on behalf of the Employer contradicts Milne's January 16 letter to Judd. In that letter, Milne records a July 1 conversation with Judd as follows: "...I informed you on the Saturday of July 1, 2002 long week-end by telephone conversation to place the orders to our dispatch and, if no member wished the employment, then the Local Union would permittee those individuals. That would have resolved the matter. "

40 The Complainants also submit an affidavit by Brad Swannie, a former Field Steward, to dispute the Union's submission about how the dispatch system works. Specifically, the Complainants rely on that affidavit to argue that the collective agreement only allows members or permittees to be dispatched. In addition, the Complainants say that Swannie regularly investigated the hiring of non-members.

IV. ANALYSIS AND DECISION

41 Before turning to the disposition of the complaints I will set out Section 12 and a number of established principles governing the application of that provision. In doing so, I will narrow the issues in dispute before turning to the complaints.

42 Section 12(1) and (2) provide:

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

43 I begin with the Union's jurisdictional objection to the Section 12(1)(a) complaint. It is well established that Section 12(1)(a) only applies to persons actually employed in the bargaining unit; it does not impose a duty of fair representation regarding persons waiting for dispatch by a union hiring hall established under a collective agreement: *Linda Karpowitch*, BCLRB No. B370/98 at paras. 24-27 and cases cited therein.

44 The Complainants attempt to overcome this objection by arguing they were employees in the "film industry". This submission is flawed because it is inconsistent with a central premise of the complaints; namely, that the Complainants were not dispatched to work when they should have been. At best the Complainants were potential employees and members of the Union. The Complainants have not shown that they were "...employees in an appropriate bargaining unit..." at the material times: Section 12(1)(a).

45 As noted above, Section 12(1)(a) imposes a standard of conduct aimed at protecting persons as employees in the unit, not as union members. Accordingly, the Board has no jurisdiction to review the Union's conduct under Section 12(1)(a).

46 There is another complaint to address in relation to Section 12(1)(a). The Complainants also argue that the Union acted in an arbitrary, discriminatory or bad faith manner by taking inconsistent positions in regarding its Section 12 obligations to persons awaiting dispatch. This submission primarily hinges on the assertion that the Union took a different position about the application of Section 12(1)(a) (then Section 7) in *Teamsters*. There are two independent answers to the Complainant's submissions in this regard.

47 As a statutory tribunal the Board is confined to the jurisdiction conferred to it under the Code. The fact (assuming for present purposes it is a fact), that the Union said in *Teamsters* that Section 12(1)(a) applies to its conduct in relation to persons awaiting dispatch, is of no consequence to the jurisdictional question. Put differently, the parties are not free to confer jurisdiction to the Board by agreement or acquiescence. Thus the fact the Union did not advance this jurisdictional objection in previous proceedings, does not necessarily mean it cannot be invoked at present.

48 The Complainants argue that the fact the Union raised this objection shows that it acted in a bad faith, arbitrary, or discriminatory manner. No additional particulars are advanced to impugn the Union's decision to raise this objection. Having said that it cannot be forgotten that the Union and the Complainants are opposing litigants. Viewed from that standpoint, the Union is entitled to raise all available defences, including jurisdictional objections—the mere fact the Union has taken a position contrary to the Complainants in this proceeding is not a violation of Section 12. I add that the Complainants have not shown how the Union's conduct in defending itself against a member in Section 12 proceedings, constitutes representation within the Union's

exclusive bargaining agency under Section 12(1)(a) or referral of persons to employment under Section 12(1)(b): *Tom Smith*, BCLRB No. B15/2004 (Leave for Reconsideration of BCLRB No. B218/2003) ("*Smith*"). For these reasons, the complaint under Section 12(1)(a) is dismissed.

49 I now turn to the Section 12(1)(b) complaint. Section 12 (1)(b) requires a Union to act in a manner that is not arbitrary, discriminatory or in bad faith in the referral of persons to employment. It is not a violation of Section 12(1) for a Union to agree that an employer may hire members by name.

50 The Union argues that Judd hired the AHDs directly by name and in accordance with longstanding practice. Hence, there was no dispatch and the Union owes no duty of fair referral to the Complainants. In essence, the Union says it came to the conclusion that it is estopped from asserting the interpretation advanced by the Complainants and the Employer effectively contracted out the work in question, thereby bypassing its collective agreement obligations altogether. The narrow issue before me is whether those decisions fall within the ambit of Section 12(1)(b).

51 Section 12(1)(b) extends the duty of fair referral to decisions made in connection with the referral of persons to employment. That duty extends to dispatching decisions but it does not necessarily end there. The referral of persons to employment includes decisions not to dispatch as much as it includes decisions to dispatch. It equally follows that referral includes decisions about whether members have an enforceable right to be referred.

52 Accordingly, decisions about whether a collective agreement obligates an employer to hire employees through dispatch are subject to review under the duty of fair referral. In sum, the Union was required to act in a manner that was not arbitrary, discriminatory or in bad faith when it decided that the Employer was not obligated to hire members from dispatch. That duty extends to the Union's handling of the grievances at issue. In making those decisions, the Union's conduct was tied to a decision about whether the Complainants were entitled to be referred to employment.

53 I now pause to identify a number of fundamental principles that inform the Board's review of a union's conclusions about the interpretation of a collective agreement under Section 12. The Board canvassed the law and policy of the Code in this regard in *James W.D. Judd*, BCRLB No. B63/2003 ("*Judd*"). The following reasons reproduced from *Judd* are lengthy, but bear repeating due to the force they carry in the present case:

> ..., although the Board has explained that it has no jurisdiction to overturn a union's decision simply because an employee thinks it was wrong, the Board receives a large number of Section 12 complaints which essentially ask the Board to do just that. While these complaints may use the phrases "arbitrary, discriminatory and bad faith", the essence of the complaint is often that the union was wrong. However, it is not the Board's role to decide if a union

was right or wrong as long as the union has not acted in an arbitrary, discriminatory, or bad faith manner. (para. 30)

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Once employees have chosen a union as their exclusive bargaining agent, any decisions regarding the negotiation and administration of the collective agreement are the union's to make. Thus, for example, if an employee feels he was denied a promotion in violation of the collective agreement, or disciplined or dismissed without just and reasonable cause, it is up to the union to decide what to do about that. Generally, it is up to the union to decide whether to file a grievance against the employer on behalf of an employee. Once a grievance is under way, it is up to the union to then decide whether to abandon the grievance, try to negotiate a settlement with the employer, or take the grievance to arbitration. Such decisions are not up to the employee. However, the employee is responsible for making the union aware of potential grievances and asking the union to act on his or her behalf.

The Code gives unions this exclusive control because it is necessary in order for a union to be effective in representing the employees as a whole. The power of a union comes from the fact that it represents all the employees as a single entity. A union must speak with one voice in order to negotiate effectively with the employer. A union must be able to make commitments that the employer can rely upon if the union expects to receive anything in return. It would be unable to make such commitments if, in the future, it was required to act in whatever manner it was directed to by various, individual employees.

A union must also be able to direct its resources so that they achieve maximum effect. Union resources are limited. If, for example, an employee could insist that his or her dismissal grievance go to arbitration even where on a reasonable assessment there is no case, this could waste tens of thousands of dollars of the union's resources, which come from employees' dues.

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As well, a union must be in charge of making decisions given the reality that what is good for one employee in the bargaining unit may be bad for others. An obvious example is where there is a job vacancy and the collective agreement language is unclear. On one interpretation, one member of the bargaining unit should get the job; on another interpretation, a different member of the bargaining unit should get it. The union cannot represent both members by arguing both interpretations. It must be free to argue the interpretation it feels is in the best interests of the bargaining unit as a whole.

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Employees choose whether or not to unionize, and typically choose the leadership of their union local. Thus, unions are an exercise in workplace democracy. Like all democracies, they are not expected to be perfect, nor to be free from disagreement. In fact, when one considers the type of decisions unions must routinely make -- e.g., whether to expend union resources on a particular employee's grievance, or which position to take when some employees' interests differ from others -- it is inevitable that some employees will disagree. Employees as a group may nonetheless decide to continue with their union and its current leadership. If they do, it is not because the employees believe the union has been perfect or right in all cases. It is because they believe it is, overall, the best option available.

2. The Scope of Section 12

As noted earlier, the restrictions which Section 12 imposes on a union's representation are "arbitrary, discriminatory and bad faith". All three of these concepts are abstract in nature. However, considered in the context of the exclusive bargaining agency of the union, they can be better understood.

When a union decides not to proceed with a grievance because of relevant workplace considerations—for instance, its interpretation of the collective agreement, the effect on other employees, or because in its assessment the grievance does not have sufficient merit—*it is doing its job of representing the employees*. The particular employee whose grievance was dropped may feel the union is not "representing" him or her. But deciding not to proceed with a grievance based on these kinds of factors is an essential part of the union's job of representing the employees as a whole. When a union acts based on considerations that are relevant to the workplace, or to its job of representing employees, it is free to decide what is the best course of action and such a decision will not amount to a violation of Section 12.

The situation is different if a union's decision is not based on these kinds of relevant considerations. A union would breach Section 12 if it misused its exclusive bargaining agency by making decisions based on improper factors, or by making random or unreasoned decisions. For instance, if a union official dropped a termination grievance because the employee opposed his election, or decided the same issue by flipping a coin, the union would no longer be making decisions about the employee's representation based on considerations that are relevant to that task.

Section 12 is not an avenue of "appeal" of the merits of union decisions. Rather it is designed to ensure the union

> *exercises its judgment and acts based on proper considerations. If it does, it has done what it is required to do by Section 12 and the Board has no jurisdiction to overturn or change the union's decision.* (emphasis added) (paras.34-44)
>
> ***
>
> Once it has the relevant information, the union must "put its mind to the case and come to a reasoned decision whether to proceed." In other words, the union's decision must be based on reason. A reasoned judgment is demonstrated by a reasonable and rational connection between relevant considerations and the decision made. It may include considering collective agreement language, the practice in an industry or the workplace, taking into account how similar grievances have been handled in the past, and supplying reasons for a decision. A union may weigh the credibility of the grievor and potential witnesses in reaching its decision. In cases of discipline or dismissal, a union should consider mitigating circumstances and whether the punishment fit the crime. A legal opinion is not required but, if obtained, may be considered as some evidence that the union took a reasoned view of the grievance.
>
> Typically where a union gives reasons for its decision it will not be arbitrary. Although it is possible for a union to consider a matter and give "reasons" for rejecting a grievor's position that are so unresponsive to the topic or so divorced from reason that they amount to arbitrariness, it is rare. (paras. 65-66)

54 Applying these principles, the question before me is not whether the Union or the Complainants are correct in their interpretation of the collective agreement, their interpretation of arbitration awards, the weight to be attributed to recommendations in the Report of the Industrial Inquiry Commissioner Mr. Justice Tysoe; or even their conclusions about questions of mixed fact and law, including the scope and weight to be attributed to industry practice, whether Judd hired AHTs on behalf of the Employer, or whether Judd acted as a Dispatcher. I note that the Complainants added a statutory declaration by a former field steward and a letter from an Executive Board member to bolster their arguments that the Union's conclusions are incorrect. The parties provided extensive written submissions, advancing objections and criticisms about these and a number of other subjects, all going to a debate about the merits of the Union's position. These submissions are largely misplaced. The Board's focus is not on whether the Union was correct. Rather it is on the Union's overall conduct in making its decisions—was the Union's decision-making arbitrary, discriminatory or in bad faith?

55 The Complainants contend that Judd acted as a Union Dispatcher for the purposes of the collective agreement and dispatch rules. The Union reached an opposite conclusion after its investigation. Specifically, the Union concluded that the Employer is entitled to hire an Animal Coordinator who may then hire by name request. The Union also concluded that as a matter of practice, Animal Coordinators hire Animal Handler/Trainers directly, thus bypassing the collective agreement, the hiring hall and