BRITISH COLUMBIA LABOUR RELATIONS BOARD

CHUCK GREIG

("Greig")

-and-

TEAMSTERS LOCAL UNION NO. 155

(the "Union" or "Local 155")

PANEL:	Bruce R. Wilkins, Vice-Chair
APPEARANCES:	Peter A. Gall, Q.C., for Greig Leo McGrady, Q.C., for the Union
CASE NO.:	60725
DATE OF DECISION:	February 17, 2011

DECISION OF THE BOARD

I. NATURE OF THE APPLICATION

1 Greig applies under Sections 10(2) and 12(1)(b) of the *Labour Relations Code* (the "Code"), claiming the Union has violated those provisions by excluding him from a pool from which employers may name-request driver referrals.

II. BACKGROUND FACTS

2 Greig is a professional special equipment driver in the British Columbia film industry.

3 Local 155 operates a hiring hall for professional drivers in the B.C. film industry. Local 155's hiring hall historically worked upon a seniority-based dispatch system. Under this system, drivers who became members of Local 155 were placed into one of three groups: Group A, B or C, with the most senior drivers in Group A. Drivers were dispatched to jobs from these groups based upon seniority. Another group of non-member permittees (the "Permittees") also existed. The Permittees were drivers who sought to be members of Local 155, and could do so by completing 180 days of good service in the industry.

4 In February 2004, Mr. Justice Tysoe released recommendations (the "Tysoe Report") as an Industrial Inquiry Commissioner ("IIC") which, in part, recommended seniority dispatch should be abolished in the B.C. film industry. Local 155 rejected this recommendation. Ultimately, Vincent Ready was appointed as an IIC and was given the authority to issue a binding decision concerning seniority dispatch. He rendered his decision on September 20, 2006, Ministry No. A-164/06 (the "Ready Award"), and a clarification on January 5, 2007, Ministry No. A-164/06(a) (the "Clarification").

5 The effect of the Ready Award was to collapse the former Groups A, B and C into what he called Group 1. He also created Group 2, which was where Permittees were placed. Ready held that the order of dispatch would work as follows:

> I find that an appropriate structure will consist of two groups. Group 1 will be comprised of all existing members in the current Group A and B. Group 2 will be comprised of the existing permittees now in Group C. The system in Los Angeles involving movement through the groups should be incorporated. Members must belong to Group 2 for ten years prior to becoming eligible for inclusion in Group 1. Taking into account the relativities of the available members in both jurisdictions, employers may name request any member in Group 1, until only 4% of the Group 1 members remain. Then employers may name request any member in Group 2, until only 4% of the Group 2 members remain. In that case, employers may choose any individual, provided that those

individuals must them [sic] become members of Teamsters 155 within 30 days.

The order of dispatch of Teamsters 155 members with respect to those departments where the seniority system currently applies shall proceed as follows:

1. Teamsters 155 shall dispatch or the Employer may directly employ persons for employment in the following order:

   First: Persons in Group 1 who have been selected by an Employer and who accept dispatch.

   Second: Persons in Group 1...who are available and qualified for dispatch according to Teamsters 155's dispatch procedure.

   Third: Persons who are in Group 2 who have been selected by an Employer and who accept the dispatch.

   Fourth: Persons who are in Group 2 and who are available and qualified for dispatch according to Teamsters 155's dispatch procedure. (Ready Award, pp. 23-24)

6 Ready also made the following remarks:

> The model of dispatch described above addresses the concerns of Teamsters 155 in several ways. The model is based on the Los Angeles structure of dispatch, as described by Mr. Cousimano during the evidence adduced by Teamsters 155. It is consistent with the evidence and the submissions made by Teamsters 155 during these proceedings. The system retains seniority between Group A and Group B. Further, the system is similar to the system being implemented for IATSE 891 which, in my view, will be beneficial from the perspective of the Council. In effect, there will be no seniority within the groups, as in the Los Angeles system, but the seniority will be between the groups. I find that this more limited seniority system will address the concerns of Teamsters 155 in relation to changes to the current seniority system. (Ready Award, p. 25)

7 In the Clarification, Ready said the following:

> **1. Dispatch System for Teamsters 155**
>
> I confirm that the evidence adduced by Teamsters 155 at the hearing, through Mr. Terry Newton, was that there were three groups of drivers within Teamsters 155, A, B, and C. In addition,

> and separate from these three groups, was a group of permittees, who were not members of Teamsters 155.
>
> At page 23 of my Award dated September 20, 2006...I collapsed Groups A and B into a new "Group 1", and placed the existing permittees "now in Group C" into a new "Group 2". What I meant, and what I fully intended, was to place all of Groups A, B, and C into the new Group 1, and for the remaining group of permittees to be placed into Group 2.
>
> For clarity, the former Groups A, B and C are now the new Group 1. The former group of permittees are now the new Group 2.
>
> **2. Becoming a Member of Teamsters 155**
>
> At page 23 of the Award, by placing the existing group of permittees in Teamsters 155 into the new Group 2, I intended for them to become members of Teamsters 155, in Group 2, subject to having the required qualifications.
>
> With respect to the portion of the Award that stated that those individuals who are not Teamsters 155 members and are hired once only 4% of Teamsters 155 members in Group 2 remain, what I intended was that those individuals become members of Teamsters 155 upon working for 30 days in the industry. In other words, once an individual who is not a member of Teamsters 155 is hired, that person will become a member of Teamsters 155, in Group 2, after working 30 days in the industry.
>
> This provision shall be applied on a go-forward basis, from September 20, 2006, the date of the Award, and will not have retroactive application. (pp. 2-3)

8 The Union did not agree with the Ready Award and proceeded with its legal rights to reconsider and appeal it. While it appealed, the Union refused to implement the Ready Award. The Union continued to dispatch members according to the old Groups A, B and C.

9 At the time of the Ready Award, Greig was a Permittee. On or about May 1, 2008, Greig became a member of Local 155 when it was certified for the production "Space Buddies". Newly certified workers were promised full membership in Local 155. In April 2008, Greig received a letter from Local 155 explaining the conditions for membership which contained the following paragraph:

> We will provide you with copies of the IBT Constitution and the Teamsters Local 155 By-laws and Dispatch Rules once we receive your completed Application Form. We would normally provide you with the British Columbia and Yukon Council of Film Unions (BCCFU) Master Collective Agreement (MCA) but it has not been

> printed or finalized due to ongoing issues surrounding Teamsters seniority and dispatch. ...

10 When he became a member of Local 155, Greig was placed in Group C under the old seniority dispatch system which the Union retained while it pursued its various appeals.

11 On December 18, 2009, Local 155 sent a letter to its members informing them it had exhausted its appeals and would implement the Ready Award. The letter stated the following, in part:

> **Re: Formation of Groupings within the Driver and Security Divisions**
>
> With all of our legal challenges advanced and exhausted it is not news that Teamsters Union Local 155 was unsuccessful in reversing the effect of the September 20, 2006 Vince Ready decision. The wheels of progress turned very slowly in our effort to overturn Ready's decision and while waiting for a final outcome, the formation of Group 1 and Group 2 was delayed in excess of 2 years. As many will recall the printing of the 2006 – 2009 B.C. Film Councils Master Collective Agreement did not take place as the final B1.11 dispatch language was contingent on the outcome of the litigation.
>
> With the realization that there are no new angles to pursue, members of Local 155 have now requested the Union address the issue of implementing the Groupings as set out in the September 20, 2006 Vince Ready decision.
>
> After considering the membership's concerns the Local Union Executive Board passed a motion to begin the process to formulate the Groupings within the seniority divisions (Security and Driver). This action was reported at a subsequent General Membership meeting where a consensus of the attendees supported the decision to formulate the groups effective January 1, 2010.
>
> **Determining Group 1 status and Group 2 status shall be as follows;**
>
> **Group One (1) status requirement**
>
> - Any Security or Driver Permittee who has completed both his/her qualifying workdays and performance evaluations for membership prior to September 20, 2006
> - Any Security or Driver Individual receiving membership via certification having paid his/her Membership Initiation fee prior to September 20, 2006

- The newly formed ***Group One (1)*** will come into effect January 1, 2010

Group Two (2) status requirement

- Any Security or Driver Permittee who has completed both his/her qualifying workdays and performance evaluations for membership September 20, 2006 or later
- Any Security or Driver Individual receiving membership via certification having paid his/her Membership Initiation fee September 20, 2006 or later
- The newly formed ***Group Two (2)*** will come into effect January 1, 2010

Please note the dispatch and lay off procedure for the two Groups is defined under Article B1.11 in the Master Collective Agreement... (emphasis in original)

12 As can be seen from its letter above, Local 155 decided to implement the Ready Award as of the date of its release on September 20, 2006 (the "Release Date"). Accordingly, as of the Release Date, all Local 155 drivers who were in Groups A, B and C were collapsed into Group 1. Any drivers who were Permittees as of the Release Date, were placed into Group 2, including Greig. In February 2010, approximately 75% of the persons on the Group C list were placed into Group 1. Those drivers were qualified and had been on the Group C list as of the Release Date. Approximately 25% of the drivers who were not on the Group C list as of the Release Date were moved into Group 2.

13 On January 15, 2010, Greig received a letter from the Union informing him he would be placed in Group 2.

14 Prior to filing his Section 10 and Section 12 complaint, Greig wrote to Ready on December 17, 2009 for clarification of the Ready Award. Greig explained to Ready how the Union was implementing the Ready Award, and how he thought it should be implemented. Ready did not reply to Greig's letter.

III. POSITIONS OF THE PARTIES

15 Greig says he has been arbitrarily robbed of the benefit of his membership in Local 155 and has lost many valuable work opportunities that he would have otherwise had if Local 155 had not arbitrarily and in bad faith excluded him from Group 1. Greig says Local 155's actions serve to continue the seniority-based dispatch system under the guise of compliance with the Ready Award. Greig says Local 155 has simply refused membership in Group 1 to its former Group C members.

16 Greig says a union breaches Section 12(1)(b) of the Code where it refuses a referral on the basis of distinctions that are illegal, arbitrary or unreasonable. Further, Greig says a union will also breach Section 12(1)(b) by refusing a referral on the basis of a policy that bears no rational relationship with the decision made: *Jim Ringrose*, BCLRB No. B299/2005 ("*Ringrose*"); *Eric K. Donaldson*, BCLRB No. B337/99. Greig says Local 155's actions meet the threshold under Section 12(1)(b).

17 Greig says Local 155 is refusing to place him in its own Group 1 despite being required to do so by the Ready Award, and is thereby unlawfully refusing to refer him to jobs on the basis of name-request hiring. Greig says this is illegal, arbitrary and unreasonable, and in clear breach of the Ready Award, which created a binding legal obligation on Local 155 to place all former Group C members into Group 1.

18 Greig says Local 155 has acted in a high-handed and perfunctory manner in responding to the concerns of himself and others presently excluded from Group 1: *Brian Rosie*, BCLRB No. B154/93. Greig says the Union's actions have no basis in the collective agreement or the Ready Award, and Local 155 is acting unlawfully and in a discriminatory and unreasonable fashion.

19 Greig argues Local 155's failure to comply with the Ready Award is simply a continuation of its stubborn refusal to accept the Tysoe Report recommendations. Greig argues Local 155's conduct is disingenuous, highly egregious and demonstrates a cavalier disregard to himself and his interests.

20 Greig alleges a representative of the Union said during a March 14, 2010 meeting that the Ready Award was not binding because Ready had exceeded his jurisdiction by ruling on layoff and membership rules, and that the Ready Award was not binding because there was a new collective agreement. The Union denies its representatives made this statement at that meeting.

21 Greig seeks various declarations and orders as remedies for the asserted breaches of Sections 10 and 12.

22 The Union explains its conduct in the following manner: as a result of the Ready Award, which was subsequently upheld by the Board and the Courts, seniority was only retained between Groups 1 and 2, and there was no seniority within Groups 1 and 2. The Union says that, at the time the Ready Award was legally effective, Greig was a Permittee with no membership in the Union.

23 The Union says Greig was placed in Group C when he was admitted to membership in May 2008 as a result of a certification. Local 155 says this was an interim measure while it was deliberating and litigating the impact of the loss of its seniority. The Union says once the decision was made that the Ready Award was required to be implemented, those in Group C with the requisite qualifications as of the Release Date were placed into Group 1. The Union explains Greig and others who obtained membership after the Release Date were placed into Group 2. It says there were several factual issues with respect to membership dates, but where mistakes were

made, they were corrected. The Union says it used identical criteria in conducting itself with respect to Greig and others, and did not single Greig out in any way.

24 The Union says this complaint is the first it has heard from Greig and that he has not utilized any of the appeal procedures available to him under Local 155's Constitution.

25 Local 155 says it exhausted all of its legal avenues, acting in the same manner any union would which had lost virtually all of its seniority rights. Local 155 says the worst that can be said of its actions was it delayed the implementation of the Ready Award while it sought relief.

26 Local 155 says Greig and the remaining Group C members were placed in Group 2 with other Permittees as ordered by Ready because they were not on the Group C list as of the Release Date.

27 Local 155 says it is noteworthy that throughout this time, there was not a single complaint to the Court or to the Board, nor a single grievance filed by the employers concerning the implementation of the Ready Award.

28 In his final reply, Greig takes issue with Local 155's interpretation of the Ready Award, saying Ready made no such order to do what Local 155 has done by placing him in Group 2. Greig says he was not a Permittee when Local 155 arbitrarily and unlawfully placed him and other Group C members into Group 2; he was a full member of Local 155 with all of the rights and privileges of a Group C member. The Union granted him membership on May 1, 2008 and continued to treat him the same as all of the other Group C members.

29 Also in his final reply, Greig alleges further facts. He alleges Bruce Scott, the Union's Secretary-Treasurer at the time, told him when he applied for membership that Group C would be rolled into Group 1 "if Group 1 were ever formed." In his final reply, Greig also alleges a number of remarks made by Scott at a Union membership meeting of October 4, 2009 were to the effect that everyone in Groups A, B and C would be included in Group 1. Greig argues these remarks appear to demonstrate there was a motion passed by the Union Executive that recognized Greig and other Group C members as of October 2009 should have been placed into Group 1. Greig further alleges in his final reply that Scott made other remarks at the same Union membership meeting to the effect that the Union had been warned by its legal counsel that if it did not roll all Group C members into Group 1, it would be subject to "lots of lawsuits". Greig says this statement seems to indicate the Union proceeded with its course of action contrary to the advice of counsel, and says this is further evidence of bad faith and arbitrariness on the part of the Union.

30 On the basis of these alleged facts in his final reply, Greig asks the Board to order disclosure of all tapes of Union Executive meetings and general membership meetings since September 20, 2006. Greig says this disclosure would assist the Board in dealing with these disputed facts.

31 Greig also notes that a similar application before the Board could and should be consolidated with his own.

IV. ANALYSIS AND DECISION

32 I have decided not to consolidate this matter with the similar application because that complaint involves numerous other provisions of the Code in addition to Sections 10 and 12, and is best dealt with separately.

33 With respect to the statements alleged by Greig to have been made on March 14, 2010 and denied by the Union in its reply, I have determined it is not necessary to resolve this dispute in order to render my decision in this matter. What is disputed is whether the Union's decision not to place Greig in Group 1 as of January 1, 2010 was in violation of Sections 10 or 12 of the Code. The alleged remarks were made months after the Union's decision, and are not helpful in coming to a determination of this matter. The alleged comments had no impact upon the Union's policy with respect to who was included in Group 1 or Group 2.

34 I have decided to dismiss Greig's application for disclosure of the material he seeks in his complaint. The facts alleged in his final reply as a basis for the disclosure request should and could have been included in Greig's initial complaint, and are not proper reply to facts submitted by the Union in its reply. Accordingly, those new factual allegations are not properly before me, as they do not constitute proper final reply: *Gary M. Steuart*, BCLRB No. B3/2002, para. 19; *James W.D. Judd,* BCLRB No. B63/2003, 91 C.L.R.B.R. (2d) 33 ("*Judd*"), paras. 78 and 82; Section 12 Guide, p. 22.

35 I must consider the question of whether the Union's decision to implement the Ready Award in the manner it did constitutes arbitrary, discriminatory or bad faith conduct under Section 12, or discrimination pursuant to Section 10(2).

36 Sections 10(2) and 12 of the Code read, in part, as follows:

> **Internal union affairs**
>
> 10 (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.

Duty of fair representation

> 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.

37 Greig says a union breaches Section 12(1)(b) where it refuses a referral on the basis of distinctions that are illegal, arbitrary or unreasonable.

38 When the Ready Award was rendered, the Union did not immediately implement it. As such, while it appealed the Ready Award, the Union initially refused to fold Groups A, B and C into the new Group 1 and place the Permittees into Group 2. When Local 155 won a certification vote for the production Space Buddies, it promised full membership to the successfully raided group of employees. The drivers that came into the Union through the certification of Space Buddies were granted full membership in Local 155 and were placed into Group C.

39 When it failed to dislodge the Ready Award through the various appeals it undertook, the Union then implemented the Ready Award as of the Release Date; that is, it placed people into Group 1 or Group 2 based on their status as of the Release Date, without regard for their status in the intervening period while it appealed. Consequently, Greig, who was a Permittee when the Ready Award was originally rendered, had become a full member of Local 155 and was dispatched as a Group C member while the Union appealed, but was then placed into Group 2 because of his Permittee status at the Release Date.

40 What is clear from Local 155's actions is that it felt very strongly about the seniority rights of its members—it refused to accept the Tysoe Report recommendations concerning the abolition of seniority dispatch; it fought to retain its seniority rights in front of Ready; and it then fought the Ready Award through the appeal avenues it had access to until it had exhausted them. Only when its legal avenues were exhausted did Local 155 choose to implement the Ready Award.

41 I draw the conclusion that the Union chose to protect the seniority rights of its Group A and B members by having as few Group C members in Group 1 as possible, thereby increasing the likelihood that its more senior members would be hired to work.

42 Had Local 155 immediately implemented the Ready Award upon its release, Greig would have been placed in Group 2 because he was a Permittee at the time. There is no evidence which would establish as a fact that, had the Union immediately implemented the Ready Award in 2006, Greig would later have been put into Group 1 when he became a full member of Local 155 in 2008. Neither the Ready Award nor the Clarification stipulated that future full Union members would automatically be placed into Group 1. In fact, the Ready Award specifically says that Permittees who were placed in Group 2 would become members of the Union. I conclude therefore, that under the Ready Award, full membership in the Union does not necessarily mean inclusion in Group 1.

43 Consequently, I find that Section 10 of the Code does not apply to this matter because the Union has not expelled, suspended or imposed a penalty, or refused membership to Greig. Nor has any penalty or special levy been imposed upon him as a condition of membership in Local 155. As was contemplated in the Ready Award, Greig is currently a full member of Local 155 in Group 2.

44 Turning to Greig's Section 12 application, in *Judd*, the Board said the following with respect to arbitrariness:

> The word "arbitrary" has been defined as conduct that is "not [based] upon any course of reason [and] exercise of judgment" (*Black's Law Dictionary*, 6th ed., St. Paul: West Publishing Co.) or "based on ... uninformed opinion or random choice" (The Concise Oxford Dictionary, 9th ed., Oxford: Clarendon Press). (para. 58, added text in original)

45 The Union has chosen to place drivers into Group 1 or Group 2 according to their status as of the Release Date. I find this is not arbitrary because it is based upon a specific date which is objectively set by the Ready Award itself. The Union's decision to implement the Ready Award as of the Release Date was not based on an arbitrary or unreasoned criterion. I consequently conclude the Union's actions were not arbitrary pursuant to Section 12(1)(b) of the Code.

46 Representation in bad faith will typically involve either representation with an improper purpose or representation with an intention to deceive the employee: *Judd*. With respect to discrimination, the Board said the following:

> However, the prohibition against discriminatory representation in Section 12 is not restricted to discrimination on grounds that contravene the *Human Rights Code*. As noted in *Rayonier*, it also includes discrimination based on personal favouritism. ... Thus, it is not discrimination to arbitrate one employee's grievance but not another's where there are relevant considerations supporting that distinction (e.g., the other employee's case is weaker). (*Judd*, para. 56)

47 I find the Union's decision to place Greig in Group 2 was not discriminatory or in bad faith because the Release Date is one which the Union used to differentiate between drivers based upon a driver's status on a particular date, not based on personal characteristics or personal biases towards any particular driver. I find this is demonstrated in the fact that not all Group C members were put into Group 2, but only those who were Permittees as of the Release Date. The fact that Greig and others who became Local 155 members after the Ready Award was rendered were not placed in Group 1 is not a prohibited ground of discrimination, but is a distinction based upon a neutral criterion—membership status as of the Release Date. Lastly, while the date of the Ready Award provided a means of differentiating between drivers, it did so on the basis of that person's objective membership status at that point in time, and did not do so upon any discriminatory ground which is prohibited.

48 While seniority-based rights make distinctions between people, the criteria used to make the distinctions between Greig and other drivers for placement in Group 1 or Group 2 are not prohibited discrimination under the Code. In *Judd*, the Board said:

> Of course, not every instance where people are treated differently amounts to discrimination. The different treatment may be due to some relevant difference in their circumstances. (para. 56)

The status of the drivers as of the Release Date is not a difference I find to be irrelevant.

49 In *Judd*, the Board further said:

> ...the union is not guilty of discriminatory representation merely because it may reach an agreement with the employer which leaves some employees in a better position and others in a worse position than they were before. This is generally recognized as part of the give-and-take of collective bargaining and the union-employer relationship in the union's representation of the employees. The Board does not substitute its judgment for the union's and the employer's as to what adjustments should be made at their workplace. (para. 57)

While the decision made in this case was not reached in agreement between Local 155 and an employer, I find the same principle applies—there are some situations where a union's decision will anger a certain group of its members and will please another group. In cases such as the one before me, a union cannot avoid making a decision between conflicting interests of portions of its membership.

50 It is abundantly clear from the text of the Ready Award that Ready did not abolish seniority from the dispatch system altogether; elements of seniority were retained as between the two newly formed groups, if not within those groups. The Board has addressed the significance of seniority rights in the case of *Health Employers Association of British Columbia*, BCLRB No. B232/2002 as follows:

> We observe that while seniority is not a statutory right, it is nonetheless one of the most important, if not the most important, right that the trade union movement has been able to win for its members in its modern day history. The importance of seniority and the concerns that a threat to seniority unleashes cannot be overstated. The importance of seniority has been repeatedly noted by this Board in its jurisprudence: *Group of Seagrams Employees*, BCLRB No. 85/77, [1978] 1 Can LRBR 375; *Kelly Douglas and Company Limited*, BCLRB No. 8/74, [1974] 1 Can LRBR 77...*Granville Island Brewing Company Ltd.*, BCLRB No. B418/95... (para. 9)

51 It is clear to me the Union chose the course of action it did to protect the seniority rights of its more senior members. Had the Union let all of Group C members into Group 1, the benefit of seniority of its most senior members would be compromised by the fact there would be a greater number of members in Group 1 who could then be name-requested. This decision had, for the purposes of Section 12 of the Code, a rational and reasoned basis, and was made using the objective criteria contained in the Ready Award.

52 I find that the Union's interpretation and implementation of the Ready Award was not arbitrary, discriminatory or in bad faith. I also find it was not discriminatory for the purposes of Section 10 of the Code.

53 There is a final issue that must be addressed. The terms in the paragraph above set out the scope of my jurisdiction under the sections of the Code that are the subject of Greig's complaint. However, Greig argues the Union's conduct also violates these sections because it is "illegal"—i.e., it is not in compliance with Greig's interpretation of the Ready Award. Greig does not assert that any Court or tribunal has ever determined that the Union is not, in fact, in compliance with the Ready Award. The Union's position is that it is in compliance.

54 In support of the position that I have jurisdiction under Section 12 to decide the correctness of Greig's interpretation of the Ready Award (and thus that the Union's contrary interpretation is "illegal"), Greig argues as follows:

> In *Ringrose*...the Board stated the threshold test under section 12(1)(b):
>
> > The test applied by the Board under Section 12 in the context of the duty of fair referral has been articulated by the Board as follows in *Mark Angus*, IRC No. C64/90 (affirmed IRC No C 170/90) quoting

> from *Daniel Joseph McCarthy*, [1978] 2 Can LRBR 105 ["*McCarthy*"]:
>
> In our opinion, the word "discriminatory" in this context means the application of membership rules to distinguish between individuals or groups on grounds that are illegal, arbitrary or unreasonable ... a distinction is arbitrary where it is not based on any general rule, policy or rationale; and a distinction may be said to be unreasonable where, although it is made in accordance with a general rule or policy, the rule or policy itself is one that bears no fair and rational relationship with the decision being made. (p. 108) (emphasis added by Greig)

55 The term "discriminatory" in Section 12, which applies to both the duty of fair representation in subsection 12(1)(a) and the duty of fair referral in subsection 12(1)(b), has been interpreted more specifically in the Board's leading cases *Rayonier Canada (B.C.) Ltd.*, BCLRB No. 40/75, [1975] 2 Canadian LRBR 196 ("*Rayonier*"), and *Judd*. In *Rayonier*, the Board held:

> ...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 [manner]. 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. (pp. 201-202)

56 In *Judd*, the Board held:

> *Rayonier* gives examples of grounds on which representation could be considered discriminatory; one is unequal treatment on the basis of race or sex or any of the other prohibited grounds set out in the *Human Rights Code*. It is important to note that both the Labour Relations Board and the B.C. Human Rights Tribunal have jurisdiction over discriminatory representation on the basis of the prohibited grounds set out in the *Human Rights Code*. The Board's policy is, if a complaint is filed with both the Board and the Tribunal and is primarily an allegation that the union discriminated on the basis of one of those grounds, the Board will hold its complaint in abeyance until the Tribunal renders its decision provided the Board is satisfied that the Tribunal's decision is likely to resolve any outstanding issues before the Board and the complainant will have access to an effective remedy: *Carol Ilicic*,

BCLRB No. B235/95; *Julie Sutherland*, BCLRB No. B63/99. (para. 55)

57 As noted in *Rayonier* and *Judd*, discrimination on the grounds of race or sex is legally prohibited or "illegal", under the *Human Rights Code*, R.S.B.C. 1996, c. 210. This is an example of an "illegal" basis of discrimination within the meaning of that term in the quote from *McCarthy,* on which Greig relies. While the categories of "discriminatory" conduct in Section 12 are not closed, I am not persuaded that the term is so broad as to require the Board to adjudicate any "legal" dispute on its merits, with a view to determining whether the union's conduct was "illegal" and thus "discriminatory". Put more simply, discrimination on the grounds of race or sex is illegal. Discrimination on the grounds of disagreement with Greig's interpretation of the Ready Award is not illegal.

58 Greig's broad interpretation of "discriminatory" in Section 12 would be inconsistent with its statutory context. It is well established that the Board does not decide under Section 12 whether a union is "correct" in its interpretation of an arbitration award. However, that is the result sought by Greig. The fact that the Union has drawn distinctions on the basis of its interpretation—something unions must routinely do—does not change the underlying policy or fundamental meaning of Section 12.

59 Greig's interpretation would also risk conflict between the Board's decisions under Section 12 and the decisions of other bodies charged with deciding the legal issues in question on their merits. An example would be decisions of the Courts under a union's constitution. While issues concerning a union's constitution may form part of a Section 12 complaint, if the Board were to decide that the union's interpretation was incorrect and thus "illegal", it would be straying into the jurisdiction of the Courts: *Ben Speckling and Walter Speckling*, BCLRB No. B333/2003 ("*Speckling*") (Leave for Reconsideration Denied, BCLRB No. B31/2004; application for judicial review dismissed, *Speckling v. British Columbia (Labour Relations Board)*, 2007 BCSC 945; *Speckling v. Communications, Energy and Paperworkers' Union of Canada, Local 76*, 2009 BCCA 258, paras. 58-62).

60 Finally, Greig's interpretation would be inconsistent with the legislative history of Section 12, which formerly contained a provision giving the Board jurisdiction to determine whether the Union's representation was carried out in a "fair and lawful manner". That provision was removed by the Legislature following a recommendation that it was "unwarranted": *Gordon Charles Langston*, BCLRB No. B7/2009 (Leave for Reconsideration of BCLRB Nos. B38/2007, B119/2007 and B52/2008), 163 C.L.R.B.R. (2d) 164, paras. 37 and 56; application for judicial review dismissed, *Langston v. Teamsters Local 155*, 2010 BCSC 534; *Langston v. Teamsters Local 155*, 2010 BCCA 310; *Langston v. Teamsters Local 155*, 2010 BCCA 481.

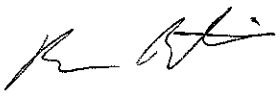
61 The parties have not made submissions before me on the appropriate body to determine whether the Union's interpretation of the Ready Award is correct. That is not an issue before me, and my reasons in this decision are not in any way binding upon any body that does determine that issue. My jurisdiction under Section 12 is limited to

determining whether the Union's interpretation (and resulting treatment of Greig) is arbitrary, discriminatory or in bad faith. I have considered the merits of the Union's interpretation to the extent necessary to decide those issues: *Speckling*, paras. 100-110. Having done so, I find the Union's interpretation of the Ready Award is not so unreasonable that it would support a finding of any such conduct. Greig has not established that it is arbitrary, discriminatory or in bad faith.

V. CONCLUSION

62 Greig's application is dismissed.

LABOUR RELATIONS BOARD



BRUCE R. WILKINS
VICE-CHAIR