BRITISH COLUMBIA LABOUR RELATIONS BOARD

NICK BRANDSTAETTER

("Brandstaetter")

-and-

UNITE HERE, LOCAL 40

(the "Union")

-and-

NANAIMO GOLF & COUNTRY CLUB

(the "Employer")

PANEL:	Jennifer Glougie, Vice-Chair
APPEARANCES:	Nick Brandstaetter, for himself
CASE NO.:	71491
DATE OF DECISION:	February 15, 2018

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 Brandstaetter applies under Sections 99 and 100 of the *Labour Relations Code* (the "Code") for review of an arbitration award by Arbitrator Mark J. Brown (the "Arbitrator") dated December 29, 2017 (Ministry No. A-104/17) (the "Award"). The Union grieved the Employer's refusal to deduct from Brandstaetter's wages a fine the Union levied against him for crossing a lawful picket (the "Grievance"). The Arbitrator allowed the Grievance and ordered the Employer to deduct the monies from Brandstaetter's wages as directed by the Union.

2 Brandstaetter says the Award is inconsistent with the *Employment Standards Act*, R.S.B.C. 1996, c. 113 (the "Act"), with the British Columbia Labour Relations Board, and with the Supreme Court of Canada's jurisprudence.

II. THE AWARD

3 The material facts giving rise to the Grievance were not in dispute. The Union is certified to represent a unit of the Employer's employees. Brandstaetter has been an employee of the Employer and a member of the Union's bargaining unit since June 30, 2014. On April 25, 2015, the Employer locked its employees out during collective bargaining for the current collective agreement. The renewal collective agreement was ultimately concluded by way of an interest arbitration award dated April 26, 2016 (Award, p. 1) and was signed on July 22, 2016 (the "Collective Agreement").

4 On October 31, 2016, Brandstaetter was tried on charges under the Union's constitution and by-laws (the "Constitution and By-laws") for repeatedly crossing a legal picket line during the lockout. On December 20, 2016, the Union Trial Board expelled him from the Union and fined him $5,000 (the "Fine"). The Union Executive Board confirmed the Fine on March 27, 2017 but deleted the expulsion order. The Fine was further confirmed by the Union's general membership at the General Meeting on April 26, 2017 (Award, p. 4).

5 Brandstaetter refused to pay the Fine. In response, the Union requested that the Employer deduct the Fine from his wages in installments of 30% and filed the Grievance when the Employer refused to do so (Award, p. 4).

6 The Arbitrator reviewed the Collective Agreement, which provides, in part:

> 3.02 The union will provide the employer with a supply of Union Membership Application forms and Authorization for the Deduction of Union Dues forms. The employer will give one of each to each new employee when starting work. The employee shall complete and sign the forms and give them to the employer who shall forward them to the union without delay.

7 The bottom portion of the Authorization for the Deduction of Union Dues form (the "Form") is completed by the employee and retained by the Employer. That portion of the Form authorizes the Employer to deduct from the employee's salary or wages and pay to the Union "any fees, or other assessments/monies, etc. owing pursuant to the aforementioned Constitution and/or By-Laws". It also authorizes the Employer to deduct from the employee's salary or wages and pay to the Union "such further increased fees, dues or assessments and/or levies assessed in accordance with the aforementioned Constitution and/or By-Laws". The Constitution and By-laws set out provisions for charges, suspensions, expulsions, fines, or other discipline and the processes involved in trials and appeals (Award, p. 2). Brandstaetter completed and signed the Form when he began his employment (Award, p. 2).

8 There was no dispute the Employer attempted to negotiate a "no reprisal" clause as one of its bargaining demands during collective bargaining. The interest arbitrator rejected the Employer's proposal and, as a result, the Collective Agreement does not contain the "no reprisal" clause the Employer sought (Award, pp. 2-4).

9 The Union's Constitution and By-laws are specifically referenced in the Form (Award, p. 7). The Arbitrator found Article 3 of the Collective Agreement references and incorporates all of the forms an employee is required to sign when they start their employment, including the Form. Thus, the Arbitrator found the Employer had an obligation to pay to the Union any fees, or other assessments/monies owing pursuant to the Constitution and By-laws (Award, p. 7).

10 The Arbitrator acknowledged the Employer's position that it was not authorized to deduce a fine levied against an employee for crossing a legal picket line, but found that argument was inconsistent with the Employer's attempts to secure a "no reprisal" clause in bargaining and then at interest arbitration. He concluded, at p. 8:

> The Union's Constitution and By Laws and the Forms refer to the collective of "fees, or other assessments/monies, etc". A fine, levied by the proper process under the Union's Constitution and By Laws falls within the scope of other monies. The Forms are incorporated into the Collective Agreement in Article 3; and, therefore, the Employer is required to make the deductions as requested by the Union.
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> In order to enforce rules that are incorporated into its Constitution and By Laws, organizations such as stratas, associations and clubs, have to have methods to collect dues, membership fees and in some cases fines. Unions are no different. It is not unusual, and in fact the norm, for collective agreements to include provisions such as the case at hand so that the union can enforce the provisions of its Constitution and By Laws.

11 The Arbitrator noted that "matters could have been worse if the Union had not deleted the expulsion order. If Brandstaetter was not a member in good standing as a result of the initial expulsion order, this case might have been about a loss of employment and not only a fine" (Award, p. 8). He allowed the Grievance and ordered the Employer to deduct the monies from Brandstaetter's wages as directed by the Union.

III. GROUNDS FOR REVIEW

12 Brandstaetter says the amount of the Fine is too large, the amount of the deduction is too significant, and both will affect his livelihood. In any event, he says, the Union is not permitted to deduct his wages. First, Brandstaetter says the Act does not permit the deduction of fines or other levies unless the employee agrees in writing. He says the card he signed on his first day of work does not authorize the Employer to deduct a fine from his wages. Second, Brandstaetter says the Award is inconsistent with and contradictory to the Supreme Court of Canada. He relies specifically on the decisions in *Telecommunications Workers Union Local 202 v. MacMillan*, 2008 ABPC 38 ("*MacMillan*") and *Birch et al. v. Union of Taxation Employees, Local 70030*, 93 O.R. (3d) 1 (O.C.A.) ("*Birch*"), which he says have refused to allow unions to impose and collect fines for crossing picket lines. Brandstaetter asks for an order that the fine is unenforceable and an order that the Union cannot collect such a fine from him.

IV. ANALYSIS AND DECISION

13 As a preliminary matter, I note that Brandstaetter applies under both Sections 99 and 100 of the Code. Section 100 concerns the appeal jurisdiction of the Court of Appeal, which is set out as follows:

> 100 On application by a party affected by a decision or award of an arbitration board, the Court of Appeal may review the decision or award if the basis of the decision or award is a matter or issue of the general law not included in Section 99(1).

Where an arbitration award concerns a matter of general law not within the Board's appeal jurisdiction, Section 100 allows a person affected by the arbitration award to appeal directly to the Court of Appeal. Applications under Section 100 must be filed at the Court of Appeal, not the Board. I find Brandstaetter's application under Section 100 is not properly filed with the Board and is dismissed on that basis.

14 In any event, I am satisfied the issue raised in Brandstaetter's application falls within the Board's appeal jurisdiction in Section 99 of the Code, which provides as follows:

> 99(1) On application by a party affected by the decision or award of an arbitration board, the board may set aside the award, remit the matters referred to it back to the arbitration board,

> stay the proceedings before the arbitration board, or substitute the decision or award of the board for the decision or award of the arbitration board, on the ground that:
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> (a) a party to the arbitration has been or is likely to be denied a fair hearing, or
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> (b) the decision or award of the arbitration board is inconsistent with the principles expressed or implied in this Code or another Act dealing with labour relations.

15 Being that the Arbitrator directed the Employer to deduct money from his wages, I am satisfied that Brandstaetter is a party affected by the decision and that he has standing to bring the present application.

16 Section 99 does not provide a full-fledged avenue of appeal of arbitration decisions: *Simon Fraser University*, BCLRB No. 16/76, [1976] 2 Canadian LRBR 54. Rather, it authorizes the Board to review arbitration awards for consistency with Code principles and to ensure fair hearing requirements are met. As the Board held in *British Columbia Public School Employers' Association*, BCLRB No. B73/99:

> The Board does not review an award to determine whether it agrees with the arbitrator's interpretation or not. Rather, the Board will give an award a sympathetic reading and will review an arbitrator's interpretation of a collective agreement on the basis of whether the arbitrator made a genuine effort to interpret the collective agreement provision in dispute: *Lornex Mining Corporation Limited*, BCLRB No. 96/76, [1977] 1 Can LRBR 377.
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> To proceed beyond the Board's narrow scope of review would be at odds with one of the purposes of the Code set out in Section 2(1)(d), which is "to promote conditions favourable to the orderly, constructive and expeditious settlement of disputes between employers and trade unions". The Board's limited review process does not allow parties to re-argue their case in order to achieve a more desirable result. The arbitration process in a collective agreement is a self-governing dispute resolution mechanism. The Board will defer to an arbitrator's decision as long as it does not violate the narrow grounds for review under Section 99. (paras. 7-8)

17 In the present case, the Arbitrator reviewed Article 3.02, the Form, the interest arbitrator's reasons for rejecting the "no reprisal" clause, the cases cited to him by the parties, and Section 16 of the Code, which provides for the assignment of fees and dues. He concluded that the language of the Form was incorporated into the Collective Agreement in Article 3 and, therefore, the Employer was required to deduct the fees and assessments owed to the Union under the Constitution and By-laws. The Arbitrator found the Fine was such a fee or assessment and the Employer was obliged to deduct it

from Brandstaetter's wages when he refused to pay. I find the Arbitrator made a genuine effort to interpret the Collective Agreement in the circumstances and, accordingly, find no basis on which to interfere with the Award under Section 99 of the Code.

18 Brandstaetter says the Award will result in an unauthorized deduction from his wages, contrary to the Act. This argument does not appear to have been raised before the Arbitrator. In any event, while Section 22 of the Act applies to the assignment of wages, including the assignment of wages to a trade union (Section 22(1)(a)) or under a collective agreement (Section 22(3)), Section 3 of the Act limits its scope where a collective agreement is in force. Section 3(4) of the Act specifically restricts the application of Section 22 where an employee is governed by a collective agreement. As long as the collective agreement provides for the deduction or assignment of wages, then the collective agreement provision applies, not Section 22 of the Act. The Arbitrator found that Article 3 of the Collective Agreement provides for employee deductions. Therefore, I am not persuaded the Act applies in the circumstances or that the Award contravenes the Act.

19 Brandstaetter relies on *MacMillan* and *Birch* to argue a union cannot collect fines from members for crossing picket lines and says the Arbitrator erred in concluding otherwise. Again, it does not appear this argument was raised before the Arbitrator. In any event, I note *MacMillan* and *Birch* are not decisions of the Supreme Court of Canada as Brandstaetter suggests. Rather, *MacMillan* is a decision of the Alberta Provincial Court and *Birch* is a decision of the Ontario Court of Appeal. Brandstaetter has not identified any authorities from British Columbia or the Supreme Court of Canada to support his position.

20 In *MacMillan*, the Court found a union could not sue its members to enforce payment of the fines because the union's claims were not an action in either debt or damages. Therefore, it concluded no cause of action arose at common law or by statute that would entitle the union to enforce its disciplinary penalties in a court of law. The Court also held the union's constitution and by-laws did not authorize it to seek redress in the courts for internal disciplinary matters. *MacMillan* is distinguishable from the present case because, here, the Union did not attempt to enforce payment of the Fine using court processes; rather, it used the provisions of the Collective Agreement to collect when Brandstaetter refused to pay. As indicated, I find no basis on which to interfere with the Arbitrator's conclusion that the Constitution and By-laws were incorporated into the Collective Agreement by virtue of Article 3. As such, *MacMillan* is of no assistance to Brandstaetter.

21 As with *MacMillan*, *Birch* concerned the question of whether a union could use court processes to collect on a fine levied under its constitution and by-laws. However, the thrust of *Birch* was that the fine was imposed under a specific provision of the union's constitution and by-laws that the Court found unconscionable. Specifically, the union's constitution and by-laws provided that any discipline imposed on a worker for crossing a legal picket line "shall include the imposition of a fine that equals the amount of daily remuneration earned by the member, multiplied by the number of days that the

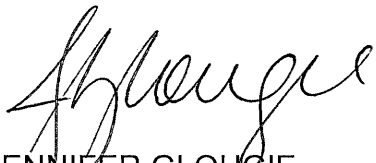
member crossed the picket line": *Birch*, para. 5. The Court concluded the provision amounted to a penalty clause and was therefore unconscionable and the majority of the court of appeal agreed in *Birch*. The fine in the present case was not imposed as a result of a provision like the one the Court found problematic in *Birch*. Rather, it was a fine assessed by the Trial Board in its discretion after hearing the charges against Brandstaetter. I am not persuaded that the Award is inconsistent with *MacMillan*, *Birch*, or any British Columbia or Supreme Court of Canada jurisprudence, as Brandstaetter suggests.

22 I am satisfied that the Arbitrator made a genuine effort to interpret the Collective Agreement and I see no basis on which to interfere with the Award under Section 99 of the Code.

V. CONCLUSION

23 For the reasons given above, Brandstaetter's application is dismissed.

LABOUR RELATIONS BOARD



JENNIFER GLOUGIE
VICE-CHAIR