BCLRB No. B154/93

BRITISH COLUMBIA LABOUR RELATIONS BOARD

BRIAN ROSIE

(the "Complainant")

-and-

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL No. 2736

(the "Union")

PANEL: Kate Young, Vice-Chair

COUNSEL: David Moonje and Brian Rosie, for the Complainant
Casey McCabe, for the Union

CASE NO.: 11360

DATES OF HEARING: December 15, 16, 1992
March 30, 31, 1993

DATE OF DECISION: May 26, 1993

DECISION OF THE BOARD

I. THE APPLICATION

Brian Rosie complains that the Millwrights, Machine Erectors and Maintenance Union, Local 2736 of the United Brotherhood of Carpenters and Joiners of America, violated Section 7 of the *Industrial Relations Act* when it refused to dispatch him to a job. The Union, under the terms of its standard collective agreement, dispatches its members to all positions covered by its agreements.

In October 1991, Canadian Mill Industrial Services, an employer signatory to a collective agreement with the Union, name requested Rosie for a position as foreman. The Union refused to dispatch Rosie. Rosie alleges that the Union acted arbitrarily, discriminatorily, and in bad faith when it refused to dispatch him, and when it failed to adequately address his complaint that he was improperly refused the dispatch.

Initially Rosie also complained that the Union wrongly refused to dispatch him to a job at another employer, Babcock and Wilcox. At the conclusion of his case, Rosie abandoned this aspect of his complaint.

II. TRANSITIONAL

Rosie's complaint was filed May 21, 1992. The hearing commenced in December 1992 before the Industrial Relations Council. On January 18, 1993 almost all of the provisions of the *Labour Relations Code* came into force. Section 115(1) of the Code continues the Industrial Relations Council as the Labour Relations Board. In *Speed-Erect Foundations and Framing Systems Ltd.*, BCLRB No. B1/93 (reconsideration of IRC No. C132/92), the Board held that proceedings commenced under the *Industrial Relations Act* continue substantively pursuant to the Act while adopting, where possible, the procedural requirements of the Code. As this matter was heard and argued under the former legislation, all references will be to the sections of the *Industrial Relations Act*.

III. THE FACTS

The Union has rules respecting the dispatch of its members to work for employers signatory to its collective agreement. Employers are permitted to name request all foreman, and fifty percent of all millwrights it hires. All members must be dispatched by the Union before starting work. The by-laws and trade rules of the Union (the "rules") provide: "Members who do not register in person or by phone will be considered unavailable for work and will not be called for jobs"; and "no member can be on the out-of-work board while working or employed elsewhere".

Although the rules state that a person will not be dispatched to a job if they are working at another job when the dispatch request is received, the Union has in the past been flexible when applying this rule. If the Union knows a member will be laid off from his or her current job prior to the commencement of the second job, the Union has, during periods of high employment, dispatched the member to the second job, even though the member is employed, and not on the out-of-work board when the request is received.

The Union policy is that members should not quit one Union job in order to make themselves available to take another Union job. The Union's interest is to ensure that employers are serviced by Union members and are not left without employees during a close down period at the end of a job. The rules state that "a member who quits his/her job to take advantage of the dispatch system shall go to the bottom of the board".

On October 1, 1991 Rosie was contacted by Stu Cathgart of Canadian Mill Industrial Services ("CMIS") and asked to accept a job as foreman at Port Mellon starting Monday October 7, 1991.

Later the same day, Frank Nolan, then business manager of the Union, phoned Rosie and asked him to accept a dispatch from the Union. The proposed job was at Canadian Energy starting the next day Wednesday, October 2, 1991, in Port Alberni. Rosie was not entitled to be dispatched to the job by reason of his position on the out of work board. Rosie was at the bottom of the list of available members, as he is frequently name requested for work. Nolan skipped

over the names of other union members who had been waiting for work for a longer time than Rosie. He did this because he needed to fill the job quickly and he knew that Rosie was always eager to accept work.

When Nolan asked Rosie if he would accept the dispatch Rosie hesitated and told Nolan he had another job starting Monday October 7. Nolan said the job with Canadian Energy would finish by Saturday or Sunday, and that Rosie could then go to the other job. Rosie agreed to take the position with Canadian Energy because he predicted it would end in time for him to be in Port Mellon on October 7. Nevertheless, Rosie did take a risk by accepting the Canadian Energy job. He knew, as did Nolan, that sometimes jobs take longer to complete than originally anticipated.

Cathgart of CMIS phoned the Union on Thursday October 3rd to confirm Rosie's availability to take the position at Port Mellon on October 7th. Nolan spoke to Cathgart and said "If Brian [Rosie] is available there will be no problem, he will be on the site for you."

Rosie felt comfortable that the job with Canadian Energy would finish no later than early Sunday morning. He had been hired to remove asbestos from inside a boiler. He concluded he would finish this job by the weekend. This was confirmed when the foreman told Rosie on Thursday that he would be laid off on Saturday or at the latest Sunday.

On Friday October 4th Cathgart phoned the Union to formally name request Rosie for the position of foreman. Cathgart spoke to Brian Zdrilic, the president of the Union. Zdrilic was normally in charge of dispatching Union members. Zdrilic knew Rosie was working at Canadian Energy and told Cathgart he could not dispatch Rosie to the job at CMIS as "according to the by-laws I can't dispatch someone if they are working".

Nolan was in the office that day and listened on the speaker phone to Zdrilic's conversation with Cathgart. I heard no evidence as to what, if any, conversation took place between Nolan and Zdrilic at that time. It appears Nolan did not tell Zdrilic of his conversation with Rosie on October 1st, of his assurance to Rosie that the Canadian Energy job would likely finish on Saturday or Sunday, and that Rosie could in all probability take the CMIS job starting October 7.

Zdrilic then phoned Rosie. Zdrilic testified that he phoned to ascertain whether Rosie's job at Canadian Energy would finish in time for Rosie to go to the Port Mellon job. Zdrilic says he asked Rosie when he would be laid off and Rosie responded that he wasn't sure. For the reasons outlined below I reject Zdrilic's testimony on this point.

Rosie told Zdrilic that Nolan had told him he could take the CMIS job. Nolan, then on the speaker phone, agreed that he told Rosie he could have the CMIS job if he finished the Canadian Energy job in time.

Zdrilic testified he asked Rosie if he knew when he would be laid off and Rosie said no. I also reject this aspect of Zdrilic's testimony. I find that Zdrilic did not ask Rosie when he would be laid off. If he had Rosie would have told him when this was expected to occur. Having considered the evidence of Zdrilic, Rosie and Nolan, I find that Zdrilic phoned Rosie to inform him of the Union's decision. Zdrilic, once having made his decision to deny the dispatch to Rosie, was unprepared or unwilling to consider the new information about Nolan's commitment to Rosie. Zdrilic decided he would apply the rigid letter of the rules, even after being informed by Nolan of his telephone conversation with Rosie.

Both Zdrilic and Rosie agree that they there was a heated debate about the proper interpretation and application of the rules of the Union during the telephone conversation. Rosie took the position that the rules did not apply to the position of foreman, and that he did not need a dispatch from the Union.

This conversation concluded with Rosie telling Zdrilic and Nolan that he would quit the job at Canadian Energy in order to be available to be dispatched to the CMIS job. Rosie was familiar with the rules of the Union and knew that the stated penalty for quitting his job at Canadian Energy was a loss of position on the out-of-work board. He was prepared to accept this penalty to obtain the CMIS dispatch. Zdrilic told Rosie that he would not dispatch him even if he quit the Canadian Energy job.

Zdrilic was also aware that the rules did not expressly prohibit a member who quit one job from being dispatched on a name request basis to a second job. Zdrilic did not wish to permit

Rosie to obtain the CMIS dispatch. Zdrilic decided to fill the CMIS dispatch as quickly as possible with another member in order to prevent Rosie from obtaining the CMIS job.

Zdrilic phoned Cathgart and explained to him that the by-laws prohibited Rosie from taking the dispatch to the CMIS job. Cathgart said he wanted a foreman and an apprentice dispatched. Zdrilic looked at the board and recommended to Cathgart that he name request Van Oene, a qualified foreman, who would be available to take the position on short notice. Cathgart agreed to accept this dispatch. Van Oene was a member low on the out of work list and not entitled to be dispatched on the basis of his position on the board. He, like Rosie, is a sought after member who works principally from name requests.

In the meantime, Rosie quit his job with Canadian Energy and called the Union to say he was now available to be dispatched to the CMIS job. Zdrilic told him "you aren't going to the job, I've dispatched someone else, and you have violated the rules, and you know better than that". Zdrilic and Rosie then had a further discussion on the appropriate interpretation and application of the rules.

Another member of the Union, Ed Storey, who had also been dispatched to the Canadian Energy job with Rosie, was laid off early Sunday morning, after the Saturday night shift. He called in to the Union and was put on the dispatch list for call out effective Sunday, October 6th. I find that if Rosie had not quit his job at Canadian Energy in an effort to get the dispatch to CMIS, he would have completed his work at Canadian Energy early Sunday morning, in time to drive to Port Mellon for the job starting Monday morning.

On October 10th Rosie wrote a letter addressed to the dispatch committee, complaining about Zdrilic's refusal to dispatch him to the CMIS job. When Rosie heard nothing in response to his letter, he wrote to the International Brotherhood of Carpenters and Joiners of America on November 18, 1991. Rosie gave a copy of his letter to the International to Zdrilic. On November 26th the International responded to Rosie's letter and appointed Patrick Mattei, the District 10 representative, to look into the dispute. Rosie still heard nothing from the Union.

On December 2, 1991 Rosie asked Zdrilic what had happened with his complaint to the dispatch committee. Zdrilic told Rosie that the executive board of the Union had met, and had

concluded that Zdrilic had handled the matter properly. Rosie received no letter from the executive committee, and again asked Zdrilic what was happening. Zdrilic said he would follow it up, but nothing was ever received by Rosie from the executive board.

In early January 1992, Rosie received a call from Nolan who informed him he was on the dispatch committee and said "I guess we'll have to look into your grievance, are you available next week?" Rosie said he was, but thought the conversation strange as he believed his complaint had been rejected already by the executive board. The dispatch committee met on January 16, 1992 to consider Rosie's complaint. Frank Nolan and Brian Vapnais were the presiding members of the dispatch committee. Nolan expressed his concern at the outset to hearing the complaint as he was personally involved with the issue. Rosie agreed that he was uncomfortable but said he wanted a hearing and wanted something to be done. Rosie was asked to explain his case, which he did. Nolan and Vapnais then said that they would hear Zdrilic's side of the story. Rosie left, or was asked to leave, and Zdrilic came in.

On March 17, 1992 Rosie heard that his complaint would be turned over to a new dispatch committee. This information was apparently incorrect. In fact, Nolan and Vapnais had issued a decision rejecting Rosie's complaint. For some reason this decision never reached Rosie, and because of a theft at the Union office a copy of the decision was not preserved by the Union. When nothing was received from the dispatch committee Rosie filed this complaint.

There exists some personal animosity between Rosie and the current members of the executive. Rosie was on the executive in 1987 and 1988, holding the position of trustee. He ran for a position on the executive board in 1989 and was defeated, along with all other members of the former executive, except Zdrilic who was elected president. Zdrilic testified that the former executive had left the new executive "high and dry" and had not provided any assistance. Rosie said that the former executive was accused of fraud and theft by the current executive.

In February 1991 the dispatch rules were significantly overhauled and all of the current rules were put in place. Rosie objected at the meetings to some specific elements of the new rules, and he also filed a formal objection with the International office of the United Brotherhood of Carpenters and Joiners of America challenging the legality of the rules. A dispute continues between Rosie and the Union as to the legality of the rules, and as to their appropriate application

and interpretation.

Rosie works more hours than most other Union members, and earns one of the highest incomes. This disparity appears to have caused some friction between Rosie and the current executive. Zdrilic suspects Rosie's opposition to the rules is because they now equalize job opportunities, and that Rosie is not interested in sharing the available work with other Union members.

IV. THE ISSUES

1. Did Nolan's conversation with Rosie on October 1st impose an obligation upon the Union to ascertain whether Rosie's job with Canadian Energy would end in time for him to work for CMIS on Monday October 7th, before it denied him the dispatch? Did the Union's failure to ascertain Rosie's availability amount to arbitrary, discriminatory or bad faith treatment contrary to the *Industrial Relations Act*?

2. Did the Union breach the *Industrial Relations Act* when it dispatched Van Oene to the CMIS job on October 4th, in order to ensure that the job was filled before Rosie quit his job at Canadian Energy to make himself available for the dispatch?

3. Did the Union violate Section 7 of the *Industrial Relations Act* in its review of Zdrilic's decision not to dispatch Rosie?

V. THE LEGAL FRAMEWORK

There are two distinct elements to Section 7(1) of the Act. One is referred to as the duty of fair representation, the second is the duty of fair referral. A useful discussion of the scope of the duty of fair representation in a dispatch situation is found in *Steve Mohr et al*, IRC No. C257/89 (reconsideration of IRC No. C53/89):

> Since 1973 the Board and now the Council have administered that part of Section 7(1) which addresses the duty of fair representation. Over the years, the scope of the duty of fair representation has been defined in many awards; however, the

principles relevant to this case may be summarized as follows:

1. A duty of fair representation is owed to employees in an appropriate bargaining unit, whether or not the employees are members of the Union;

2. A person awaiting dispatch pursuant to the terms of the collective agreement is not an employee for the purpose of the duty of fair representation (see, *John McNeilly,* BCLRB No. 39/82 and *Brian Garrett, Steven Haydu and Randall Janzen*, IRC No. C281/88);

3. Because the duty of fair representation is designed to protect individuals as employees rather than as union members, the alleged violation must affect a complainant in his capacity as an employee (see, *Vancouver General Hospital, supra, and Jack C. Vlohovic,* IRC No. C222/88).

In 1987, the Legislature amended Section 7(1) by adding a duty of fair referral. The duty of fair referral has a broader application than the duty of fair representation; the duty of fair referral applies to "persons," it is not restricted to employees. Section 1(1) of the Act defines "person" as including:

> an employee, an employers' organizations, a trade union and council of trade unions but does not include a person in respect of whom collective bargaining is regulated by the Canada Labour Code;

It is clear from the Legislature's use of the word "person" that the duty of fair referral applies to individuals who have not yet become employees in an appropriate union. (p. 12)

Rosie was not an employee of CMIS when the Union refused to dispatch him to the foreman position. Rosie had received only a tentative offer of a job with CMIS which was conditional

upon his obtaining a dispatch from the Union. The duty of fair representation is not relevant to my determination in this matter.

Rosie's complaint arises under the fair referral provision of Section 7(1) which reads as follows:

> …where pursuant to a collective agreement a trade union is engaged in the selection, referral, assignment, designation or scheduling of persons to employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith towards those persons.

In the context of the duty of fair representation "arbitrary" is defined in the Board's Statement of Policy, June 28, 1985, as follows:

> A trade union acts in an arbitrary way when it handles an employee's problems in a manner that is perfunctory, superficial or indifferent. When a trade union acts capriciously, gives only superficial attention to a matter or acts with a reckless disregard for an employee's interests, it is acting in a manner which is arbitrary and in violation of Section 7(1). (p. 3)

This definition is applicable where the "duty of fair referral" is before the Board.

The duty of fair representation requires that a union investigate the merits of an employee grievance prior to abandoning it. A union which does not engage in this form of investigation and consideration acts in a perfunctory and arbitrary manner: *George Reid,* IRC No. C199/89. The duty of fair referral does not require the same type of thorough investigation. It is impractical to require a union to engage in a full investigation of all relevant factors prior to making a determination about a dispatch. Dispatch rules and policies frequently involve the exercise of some discretion, some judgment by the dispatcher. This discretion must frequently be exercised quickly. Jobs must be filled expeditiously in order to meet the needs of employers which rely upon the union to hire on their behalf. The time available to make these judgments is short, and the same kind of procedural safeguards will not be imposed upon unions when making these decisions, as are imposed when grievances are assessed.

What is required is an honest effort to fairly assess the circumstances in order to make the

best decision given the available information. There is latitude for mistakes to be made where such judgments are required. I adopt here the words of the Ontario Labour Relations Board in *John Cooper,* [1984] O.L.R.B. Rep. Jan. 6:

> …The business manager must balance a number of factors in determining which of the available out-of-work members should be sent to a particular job at a particular time. In so doing, he may well make an honest mistake. But the question is not whether the business manager (and, vicariously, through him the union) may have erred in some way or made a decision of which this Board, with hindsight disapproves. Business agents, being human, will make mistakes or errors in judgment and may even appear to be inconsistent from time to time as they respond to the circumstances of the moment, and perhaps, subjective pleas for special consideration. The question is whether that discretion has been abused - for example, to benefit family or friends, or to punish political enemies (see *Joe Portiss, supra*). Obviously nepotism and patronage have no place in the hiring hall system, nor should the Board condone reliance upon obviously extraneous factors. But where a union official honestly turns his mind to the circumstances at hand, and without malice or any improper intent makes a sincere effort to assess the situation and balance competing claims before dispatching employees, we do not think we should readily infer that the decision was "arbitrary" and illegal. The term "arbitrary" in section 69 was intended to connote a decision-making process that is reckless, cursory, consistent with a non-caring attitude or influenced by totally extraneous and irrelevant considerations. The facts of this case do not fall within those parameters at all. (pp. 17-18).

The standard of conduct required of a union under Section 7 has never required that a union's actions can never be mistaken or incorrect: *Charles Morgan*, BCLRB No. 89/79, [1980] 1 Can LRBR 441. In *Daniel Piotrowski,* IRC No. C92/87, the Council adopted the Board's approach in *Brian E. Davies,* BCLRB No. L61/83, as follows:

> …it is also necessary to distinguish arbitrariness from mere errors in judgment, mistakes, simple negligence and unbecoming laxness….However, the wording of Section 7(1) of the Labour Code is not sufficient to protect union members from a union's

> inadvertent errors, its poor judgment or mere negligence -- union officials are entitled to make honest mistakes. In order to breach Section 7(1), the union's shortcomings in processing the grievance must be so blatant as to demonstrate that the grievor's interests were pursued in an indifferent or perfunctory manner…. To substantiate a charge of arbitrariness, there must be convincing evidence that there was blatant disregard for the rights of the union member. (pp. 8-9; emphasis in original)

The term discriminatory in the context of a fair referral case was addressed by the Council in *Mark Angus,* IRC No. C64/90 (affirmed IRC No. C170/90), as follows:

> In Rayonier Canada (B.C.) Ltd., BCLRB No. 40/75, [1975] 2 Can LRBR 196 the Board described discrimination as follows:
>
> > …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…
> >
> > (at 201)
>
> An elaboration of what is meant by discriminatory is contained in Daniel Joseph McCarthy and International Brotherhood of Electrical Workers, Local 625, [1978] 2 Can LRBR 105, a decision of the Nova Scotia Labour Relations Board:
>
> > 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 most clearly illegal where it is based on considerations prohibited by the Human Rights Act, S.N.S., 1969, c.11, as amended; 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…
>
> (at 108)
>
> The definition of discriminatory contained in McCarthy, supra, is followed by the Canada, Ontario, and Alberta Boards. Applying this definition to the case at hand, the Panel finds Local 155 discriminated against Angus by excluding him from the Golden Sixty list on an arbitrary basis; that is, on grounds which are not based on any general rule, policy or rationale. (pp. 39-40)

Rosie says that the Union was motivated by personal animosity in its decision to refuse the dispatch to him. An allegation that a union has acted in "bad faith" is a serious one. The proof required when such an allegation is made is set out in *Gloria Cain et al,* IRC No. C50/87, as follows:

> The test imposed to determine if there has been a violation of this branch of the duty of fair representation is a stringent one. Mere speculation of bad faith will not suffice. The Council, like the Labour Relations Board, requires objective evidence that the Union handled the grievances in the way it did because of political revenge or personal animosity, or, at the very least, that there is no other reasonable explanation for the way in which the Union handled the complaint, see Ross Kulak, BCLRB No. 18/86.
>
> As the Labour Relations Board stated in Brian Davies, BCLRB No. L81/83, the duty of fair representation is not violated simply because the Union member has a reasonable apprehension of bias on the part of the union officers; it must be shown that union representatives actually acted in bad faith. (pp.10-11)

A person alleging bad faith must establish that as a result of personal animosity or hostility a decision was made which otherwise would not have been made.

V. ANALYSIS AND DECISION

What I must decide here is whether the decision of the Union to refuse to dispatch Rosie

on October 4th was as a result of an honest mistake or misunderstanding, or whether the decision was arbitrary, and made in a perfunctory, superficial, indifferent, or capricious manner.

I find that Nolan's conversation with Rosie on October 1, 1991 imposed an obligation upon the Union which it would not be under in the normal course. Normally, the Union could legitimately refuse a dispatch to a member on the basis that he or she was working when the dispatch request was received. But Nolan represented to Rosie, in the telephone conversation of October 1st, that if Rosie finished the Canadian Energy job on the weekend of October 5-6, the Union would waive its usual requirement that Rosie be unemployed at the time the dispatch request was received (expected to come October 2-4) from CMIS. This conversation required the Union to ascertain whether Rosie's position with Canadian Energy would end on or before October 6, before it made its decision to deny the CMIS request for his dispatch.

This understanding was clearly in Nolan's mind when he received the call from Cathgart on October 3rd. He said Rosie would be on site if he was available.

When Cathgart phoned and formally name requested Rosie, Nolan was on the speaker phone with Zdrilic. Nolan heard Zdrilic tell Cathgart that the Union would apply its standard rule that a member must be on the out of work board before a dispatch will be granted. Nolan apparently did not tell Zdrilic at this point that he had agreed to waive this normal requirement of the Union for Rosie's dispatch to CMIS (as long as the Canadian Energy job ended in time). Nolan did not interject and confirm that he had also told Cathgart, just the day before, that CMIS could have Rosie "if he is available". Nolan allowed Zdrilic to advise CMIS that the Union would not dispatch Rosie because he was working when the request was received.

The Union provided no explanation for Nolan's failure to inform Zdrilic of all of the facts, or if Nolan told Zdrilic, for Zdrilic's refusal to take this new information into account. In the absence of an explanation, I am drawn to the conclusion that Nolan and/or Zdrilic acted "arbitrarily" as that term has been interpreted in the context of a Section 7 complaint.

On October 4th, Zdrilic phoned Rosie to tell him that he could not get the dispatch to CMIS. When Rosie informed Zdrilic of his conversation with Nolan, and Nolan confirmed essentially what was said on October 1st, Zdrilic appeared to place no weight on this new

information. He also did not give consideration to Rosie's clear statement to him that he would be available for the CMIS job.

Zdrilic sought at the hearing to lay the blame upon Rosie for failing to tell him that he would be free to take the CMIS job because the Canadian Energy job was near completion. I find that in fact Rosie did tell Zdrilic he would be available to take the CMIS job, but that Zdrilic did not take this information into account in his decision to refuse the dispatch to Rosie.

I find that Zdrilic did not make an honest or innocent mistake when he refused to dispatch Rosie to the CMIS job. He acted in a perfunctory manner, indifferent to the interests of Rosie.

Rosie alleges that the Union has acted in bad faith. There is certainly some foundation for this allegation found both in the evidence of the Union witnesses, and in the final argument of counsel for the Union. Zdrilic's decision to dispatch Van Oene quickly, so as to ensure Rosie did not obtain the dispatch, taints the Union's original decision to refuse the dispatch.

The conversation of Friday, October 4th between Zdrilic and Rosie concluded with Rosie telling Zdrilic he would quit his job at Canadian Energy. Zdrilic knew that it could not refuse the name request dispatch to Rosie if he quit his job at Canadian Energy. The Union's recourse under the rules was to place him at the bottom of the "out of work" board. In order to impose a greater penalty on Rosie, Zdrilic took the unusual step of telling Cathgart the CMIS could not have Rosie, offered Cathgart the name of another member, and invited Cathgart to name request this individual.

The review process confirms the Union's indifferent and superficial consideration of Rosie's concerns. The Union has an internal review process in place. The dispatch committee has authority to review decisions made by the dispatcher, and to make recommendations to the executive board and the general membership. The deliberations by the dispatch committee and/or the executive board revealed no fresh information which might lead to a conclusion that the actions of the Union were caused by an innocent or honest mistake or mis-communication. Instead, the review process confirms that the Union acted in a high-handed and perfunctory manner when it denied Rosie the dispatch.

VI. CONCLUSION

I find that the Union breached Section 7 of the *Industrial Relations Act* when it refused to dispatch Brian Rosie to the position of foreman at CMIS on October 4, 1991.

VII. COSTS

Rosie seeks legal costs and disbursements, arguing that any damages will be consumed by the legal costs incurred in pursuing this matter.

I possess a broad discretion to award all reasonable legal costs and disbursements to a successful Section 7 complainant. As was noted by the *Industrial Relations Council* in *Stephen Brewer*, IRC No. C5/88 and *Jeff Jensen*, IRC No. C99/88, legal costs will be awarded in circumstances where a make whole order is justified. In *Jensen, supra*, the Council noted two grounds to award costs in successful Section 7 complaints. The first is that the complainant must "wage a legal campaign against the formidable resources of his union" as well as that of the employer, which usually requires the complainant to engage a lawyer and secondly, without recovery of legal costs the complainant will not be placed in the same position he would have occupied but for the breach.

Having considered the cases on this issue, and considering all of the circumstances, I exercise my discretion to refuse to award to Rosie the legal costs he incurred during the first days of the hearing, before he took over the presentation of his complaint. This is a complaint under the second branch of Section 7, and is distinct from one alleging a breach of the duty of fair representation. Rosie was not faced by two respondents, and it was not clearly a case which required Rosie to retain the services of a lawyer. In addition, the actions of the Union here were not of such an extraordinary or egregious nature that costs should be awarded. I am satisfied that the remedy of damages is sufficient and appropriate in all the circumstances to redress the Union's violation of the *Industrial Relations Act*.

VIII. REMEDY

The Complainant seeks a declaration that the Union has contravened Section 7 of the

Industrial Relations Act, and I make such a declaration.

The Complainant asks for damages for failure to dispatch him to the job at CMIS. Rosie filed as an exhibit a cheque from CMIS to an unnamed member who worked the shifts at CMIS he would have been employed for. The gross amount is $1974.65. At the end of the hearing no objection was taken by the Union to this statement of Rosie's loss.

The Union argues that the amount Rosie would have been paid by Canadian Energy if he had completed his employment there, should be deducted from the $1974.65. I disagree. Rosie only left his employment at Canadian Energy in an effort to fulfil a commitment he made to CMIS, a commitment which was frustrated by the Union's violation of the Act.

I order the Union to pay Rosie damages in the amount of $1974.65, plus interest calculated under the provisions of the *Court Order Interest Act*, RSBC 1979, c.76, minus any deductions required by law.

As noted above I make no order requiring the Union to pay Rosie his legal costs and disbursements incurred pursuing this complaint.

LABOUR RELATIONS BOARD

KATE YOUNG
VICE-CHAIR