BRITISH COLUMBIA LABOUR RELATIONS BOARD

ERIC K. DONALDSON

("Donaldson")

-and-

CONSTRUCTION AND SPECIALIZED WORKERS' UNION,
LOCAL 1611

(the "Union")

PANEL:	John B. Hall, Vice-Chair
COUNSEL:	Eric Donaldson, for himself Mark N. Olsen, for the Union
CASE NO.:	34732
DATE OF HEARING:	March 3 and 4, May 6, 7, 10, 11 and 12, 1999
DATE OF DECISION:	August 24, 1999

DECISION OF THE BOARD

I. INTRODUCTION

1 Donaldson filed a complaint with the Board in August 1997 alleging the Union had breached Section 12 of the *Labour Relations Code* by not referring him to jobs for which he was qualified. He alleged the Union had instead dispatched employees who were registered behind him on the out-of-work list. Donaldson later provided additional information which resulted in his complaint being processed. In December 1997 another panel of the Board determined that a *prima facie* case had been established under Section 13(1)(a) and invited written submissions.

2 The complaint was subsequently assigned to me for adjudication. The parties' submissions immediately raised a host of preliminary issues. With the assistance of Special Investigating Officer Patricia Garland, those issues were largely addressed through a lengthy process of further submissions, full disclosure of documents and other "case management" initiatives. Attempts were made to settle the complaint, but any basis for compromise proved elusive. The matter eventually required seven days of oral evidence and submissions, in addition to the extensive written materials filed by both Donaldson and the Union.

3 By way of overview, Donaldson alleges the Union failed to refer him to some 64 jobs between October 11, 1995 and July 15, 1997 (the "period"). He asserts he was qualified for all of these jobs, but the Union arbitrarily dispatched other members who were lower on the list. Donaldson also alleges bad faith. While admitting there is no objective evidence to support this allegation, Donaldson suggests the Union may have been influenced by his past internal "political involvement". He also challenges the dispatch rules being followed by the Union during the period in question. He says that the rules were contrary to directives issued by the Labourer's International Union of North America ("LIUNA"). In any event, Donaldson alleges the rules were discriminatory because certain classes of members were favoured under unwritten exceptions. He argues that these exceptions were improperly used at the discretion of a dispatcher and were arbitrary.

4 The Union submits the complaint should be dismissed as untimely. It notes Donaldson's qualification as a lawyer (he has practiced in both British Columbia and Ontario) and his willingness to pursue other issues in the past. Donaldson admits he had "suspicions" about the dispatch system in the Spring of 1996 but did not apply to the Board until 16 months later. With respect to the merits of the complaint, the Union argues it has always applied the proper dispatch rules. Further, there are longstanding practices which allow for certain exceptions. The Union submits that all of the dispatches disputed by Donaldson were made in accordance with the rules and established practices. There is accordingly no basis for finding a violation of the Code.

5 In addition to the written materials filed by the parties (which were specifically made part of the record), I heard extensive evidence during the hearing regarding each of the dispatches in dispute, about the various dispatch rules and practices followed by the Union, and about the practices of other Labourer's locals. I also heard evidence about other matters which do not materially affect the outcome of Donaldson's complaint (e.g., the alleged shredding of Union documents by unsuccessful candidates following a local election in 1995). I have considered all of the information submitted by the parties. My findings of fact relevant to the central issues in dispute are incorporated into the analysis which follows.

II. ANALYSIS

6 There are three central issues: first, whether Donaldson's complaint should be dismissed because of excessive delay; second, whether the Union followed the proper dispatch rules; and third, whether the Union breached Section 12 by not referring Donaldson to employment during the period covered by his complaint. In view of the conclusions I have reached respecting the latter issues, it is not necessary to consider the question of timeliness.

(a) Dispatch Rules

7 As a result of an amalgamation of four Labourers locals in 1997, the Union accepts it is the "successor" to the Construction and General Workers' Union, Local 602 ("Local 602") for purposes of this complaint. Donaldson was a member of Local 602 during the period in question. However, I will simply refer to "the Union" throughout unless the context requires otherwise.

8 Local 602 had written dispatch rules (the "Local 602 Rules") which were initially drafted by a committee of members. They were formally adopted at a General Membership meeting in 1980. The Rules provided in part (as per original text):

> 1. The principle of first in-first out, shall be adhered to.
>
> 2. Local resident Members shall be given preference in employment on projects outside the metro area. Local residents defined per [collective] agreement.
>
> 3. All Members finding their own job must obtain a Clearance and/or a Dispatch Slip from the Union Dispatcher. Any Member found on a job without a Dispatch Clearance, WILL BE REMOVED from the job until cleared by the Union Dispatcher.

9 As part of an agreement with the U.S. Federal Justice Department, LIUNA established what were known as the Job Referral Rules. These were to be adopted and implemented by each LIUNA local union, with certain exceptions:

> 2. Effect of Hiring Hall Rules
>
> All referrals by a Local Union to jobs within its jurisdiction shall be made in accordance with these rules, *except where the existing collective bargaining agreement does not provide for an exclusive hiring hall,* and except to the extent that any rule contained herein conflicts with either the state law or with a term of a collective bargaining agreement. …(emphasis added)

10 It is common ground that the Job Referral Rules became effective in April 1995 but were not adopted by Local 602. Hence this aspect of the dispute between the parties. The Union says there was confusion over whether the Job Referral Rules applied in Canada; more importantly, it believed they did not apply because Local 602 did not have an exclusive hiring hall (i.e., members could obtain their own work in accordance with the Local 602 Rules reproduced above).

11 Donaldson vigorously disputes the Union's assertion that the Job Referral Rules did not apply to Local 602. In April 1996 he wrote to the LIUNA Inspector General requesting clarification of the issue (at the time, he sought an answer because it would affect an imminent delegate nomination procedure). Donaldson referred the Inspector General to the following provision in the 1994-1998 Standard Agreement:

> CLAUSE 11: UNION SHOP
>
> DISPATCH OFFICES
>
> 11.01 The Local Union shall maintain a Dispatch Office or Offices from which the Employer shall hire all Employees.

12 The Inspector General responded in a letter dated July 2, 1996 which read:

> In answer to your inquiries, the International means the Job Referral Rules to be applicable to Local 602. However, you need to be aware of some changes that have been made. The changes have been in progress for many months, and were only approved two weeks ago by the General Executive Board (GEB). The most significant difference between the original rules and the revised rules is that locals can now apply to the GEB Attorney for variances to deal with local customs, locals' by-laws, contract provisions, single job agreements, and so on.
>
> An additional complicating and delaying factor is that in Canada, labour relations are subject, it seems, to provincial law. Thus, as we understand it, what may be acceptable in Ontario may not be so in British Columbia. The International has obtained a legal opinion in Ontario regarding the acceptability of the job referral rules there, but none has been obtained in B.C. That is what I mean when I say that the rules are "meant" to be applicable in B.C. Until a legal opinion is obtained concerning the acceptability of the job referral rules in B.C., their applicability is

> conditional. I hope this clears this matter up for you, though I am sorry it is not a final resolution. Once the revised rules are published to the field, the next move is for the local to request the variance that it wants. If none is requested, and if B.C. law is not in conflict with the rules, then they do apply to Local 602.

13 Donaldson sought further clarification and subsequently received a letter from the Inspector General dated August 22, 1996 which in part advised that "Local 602 is an exclusive hiring [sic] under the terms of the Standard Agreement".

14 The "revised rules" mentioned in the Inspector General's letter of July 22, 1996 are more fully described as the Amended Job Referral Rules (the "Amended Rules") and were effective September 15, 1996. The Amended Rules differed in two critical respects. First, they applied to all locals that dispatched workers to jobs, not just those operating exclusive hiring halls; second, the Rules allowed for locals to apply to the GEB Attorney for variances in order to take account of local practices and needs. Locals had until February 15, 1997 to request a variance. A report of the GEB Attorney published in the January/February 1997 issue of a LIUNA magazine called *The Laborer* indicated:

> …Locals that have filed but not completed their applications for variances must complete them by February 15; after that, any locals with incomplete applications will be expected to apply the Amended Rules as written (*locals with completed applications on file, which are waiting for a ruling from the GEB Attorney, may continue to follow their customary practices on those matters for which a request is on file, pending a ruling from the GEB Attorney.*) (emphasis added)

15 Local 602 submitted its variance request in January 1997. The GEB Attorney's response was received on June 16, 1997. The amalgamation of the four British Columbia Labourers locals took place shortly thereafter, and necessitated a reconciliation of their various dispatch rules. The Union now has its own Dispatch Rules which apparently comply with LIUNA's Amended Rules.

16 The Union argues the Job Referral Rules did not apply to Local 602 because it operated a non-exclusive hiring hall. While the Amended Rules covered non-exclusive arrangements, the Local 602 Rules (with the attendant local practices) continued to apply until a ruling on the variance request was received from the GEB Attorney. Donaldson relies on correspondence received from the Inspector General to argue that Local 602 was in fact an exclusive hiring hall. Thus, the Job Referral Rules should have been followed (among other things, they did not permit an exception for local hires which he says operated to his detriment).

17 During the course of the hearing, I expressed doubt over the Board's jurisdiction to determine which dispatch rules should have been applied by Local 602 during the period. Donaldson's submissions in final argument do not persuade me that the Board has this authority. The question turns on an examination of LIUNA's Constitution and

directives. The Board's jurisdiction under Section 12 does not extend to these types of internal matters: see *Kevin Brown, et al,* BCLRB No. B102/99, at paras. 66-68. While it may be necessary to examine provisions of a constitution, the Board only does so in the course of determining whether a union's conduct has been arbitrary, discriminatory, or in bad faith.

18 A similar approach is taken in Ontario, as summarized by the following passage from *Ontario Labour Relations Board Law and Practice*, 3rd ed., Sack, Mitchell and Price (Butterworths Canada Ltd., 1997):

> Noting that its task in s. 75 [duty of fair referral] cases is not to decide the proper interpretation of the union's constitution or by-laws, the Board has stated that it will only interpret such documents and review the union's internal decision-making process where the determination will be relevant to whether the union's conduct has been arbitrary, discriminatory or in bad faith. However, even if the union's actions are contrary to the by-laws or to its practice, a breach of s. 75 will only be found where the conduct is arbitrary, discriminatory or in bad faith. Similarly, the Board has stated that "while in a given case the Board may well disagree with the union's interpretation of a collective agreement and prefer the interpretation of the applicant, so long as the union's interpretation of the collective agreement cannot be characterized as arbitrary, discriminatory or in bad faith, the Board will be loath to intervene." (para. 8.455; footnotes omitted)

19 The limits on interpreting a union's constitution were specifically addressed by the Ontario Labour Relations Board in *Paul G. Martel* -and- *Labourers' International Union of North America*, *Local 493*, [1996] OLRB 1764. The facts in that case bear a striking resemblance to the circumstances now being discussed, as evidenced by the following passage:

> Martel [the complainant] argued that Local 493 was not in compliance with the LIUNA Ethics and Disciplinary Procedures, passed by the International in January 1995. Adams [the local's business manager] agreed that Local 493 had not adopted the hiring hall rules set out in the LIUNA Ethics and Disciplinary Procedures and that Local 493 had advised the International that Local 493 disagreed with some of those rules. It is not the function of this Board to determine whether Local 493 has breached its obligations under its Constitution, in not adopting the hiring hall rules set out in LIUNA, Ethics and Disciplinary Procedures. That is an internal union matter. As stated previously, it is not the function of the Board to determine *which* hiring hall rules should govern a Local union. That is a matter for the Local, and possibly for the International, to determine. The Board's function is to determine whether the hiring hall practices are arbitrary, discriminatory or applied in bad faith. … (para. 84; emphasis in original)

20 I find further that the Union has advanced a reasonable argument regarding its ability to continue to apply the Local 602 Rules until a response to its variance application was received from the GEB Attorney. In and of itself, continued application of the Local 602 Rules was not contrary to Section 12 of the Code. The real issue – and one which certainly falls within the Board's jurisdiction – is whether the particular rules in place were applied by the Union in a manner which was arbitrary, discriminatory or in bad faith. Thus, aside from being an internal union matter beyond the Board's jurisdiction, a determination of which Rules should have been applied at the time is irrelevant for purposes of Donaldson's complaint.

21 This brings me to perhaps the most difficult question raised by Donaldson's complaint. It concerns application of the Local 602 Rules and, more specifically, the Union's practice of dispatching members in accordance with certain unwritten exceptions. Michael Wittington has been the Union's primary dispatcher since 1990. He testified that when he "sat down" there were various practices in place in addition to the Local 602 Rules (the exceptions no longer exist under the Local 1611 Dispatch Rules). For example, if members were a few days short for unemployment insurance, the Union would try to help by dispatching them ahead of their place on the list. In other cases, where members had come out of rehabilitation, the Union would try and work with contractors to get them back to work as soon as possible. Another exception involved late or "time urgent" calls from a contractor; the Union would dispatch someone who happened to be in the hall or the dispatcher knew could be easily reached by telephone.

22 I accept the Union's submission that there were legitimate reasons underlying each of the exceptions. But not only were the practices unwritten, they were largely unknown to the membership. Moreover, even the dispatchers were not fully aware of their extent. Richard Gordon dispatched for part of the period. He testified in direct examination that he was aware of practices in addition to the Local 602 Rules, and mentioned the UI and "late call" exceptions. When asked if there were any others, he responded "no". Gordon was specifically asked in cross-examination about the rehabilitation exception, and stated "I've never made an exception there". When asked if the exception was fair to the person ahead on the dispatch list, Gordon answered "no".

23 The Union attempts to deflect any criticism over the uncertainty of the exceptions by arguing that there were various ways for members to learn of the practices, such as attending meetings. However, the evidence indicates that typical attendance at Union meetings was about 40 members, as compared to approximately 1,000 names on the out-of-work list. Wittington admitted in cross-examination that the practices appeared to violate the Local 602 Rules. He was asked why members would have reason to believe the practices existed if they saw the Rules. After a long pause he said "I'm stumped". Gordon admitted in cross-examination that members had a right to be told about the practices. He further admitted that they were not told unless they asked. Aside from asking or attending Union meetings, Gordon did not know how members would have learned of the exceptions.

24 In short, the Union had an unwritten and generally unknown policy of dispatching members for work in certain situations where they would not otherwise be entitled under the Local 602 Rules. There is no evidence that the exceptions were approved by the membership, who originally adopted the Rules in 1980. These circumstances give rise to a distinct sense of unfairness, but the question is whether the Union's policy was arbitrary, discriminatory or in bad faith. The question is not unique and was addressed by the Ontario Labour Relations Board in *John Cooper* -and- *International Brotherhood of Painters and Allied Trades*, *Local 1590*, [1984] OLRB Rep. Jan. 6. In that case, there was confusion over how the hiring hall had been run and an absence of detailed written rules. The Ontario Board held as follows in a passage which has since been adopted in numerous decisions (including *Brian Rosie*, BCLRB No. B154/93, a decision of this Board relied upon here by the Union):

> Neither the fact of discretion nor its exercise are, per se, illegal. Discretion is inevitable in the circumstances. 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 circumstance 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. (para. 38; emphasis added)

25 The Board went on to observe that it was not "entirely happy" about the way in which the hiring hall was operated. However, in the circumstances it was satisfied that the dispatcher had not acted improperly. The factors he considered when making the impugned referral had been reasonable and he had acted in good faith. There was no basis for the complainant's assertion that he had been singled out for invidious discrimination or dealt with unfairly.

26 The panel in *Cooper* quoted from the Ontario Board's earlier decision in *Richard Boon et al*. -and- *Labourers International Union of North America*, *Local 247* (unreported). The passages are repeated here because of the parallel to another aspect of Donaldson's complaint. The local Labourers hiring hall in *Boon* was run on a strict "first in, first out" basis, but the union's officers had introduced a discretionary element into the system by taking into account the expiry of members' UIC benefits. This did not violate the duty of fair referral for the following reasons:

> 13. It is clear that the operation of any hiring hall is a complicated matter and undoubtedly must involve various levels of discretion. Presumably a hiring hall is operated correctly if that discretion is exercised in a manner which is demonstrably for the benefit of the members of the union as a whole or even simply the unemployed members of the union. As a consequence, unions frequently make specific rules concerning the operation of the hiring hall and, indeed, the respondent local trade union has in fact formally set out the informal rules which had governed the operation of its hiring hall. Although these rules have been set out in the by-law, it is clear that they nevertheless involve the use of discretion. That discretion, however, cannot be exercised in a manner contrary to section 69 of the Act. However, the mere exercise of discretion does not in of itself constitute a violation of section 69. What gives rise to a complaint under section 69 is the manner in which the discretion is exercised. In point of fact the complainants themselves in this case were all the beneficiaries of the type of discretion which is inherent in the operation of a hiring hall, but because it was for the benefit of certain members as a whole does not constitute a violation of section 69.
>
> 14. The type of discretion referred to relates to the matter of U.I.C. benefits. It is clear that the local from 1979 through 1980 suffered a high level of unemployment. That unemployment was for such a long duration that members started to run out of U.I.C. benefits. Thus, notwithstanding a "first-in-first-out" rule concerning assignments to employment from the hiring hall, the local adopted a policy with respect to the hiring hall, that if a member demonstrated to the local that he had run out of U.I.C. benefits he would be placed in employment as soon as possible in an effort to rebuild benefits from the U.I.C. This is, of course, a discretionary change from the "first-in-first-out" general rule of operation. However, it can be seen that it was adopted as a policy for everyone and that it was exercised in an attempt to benefit the members both individually and as a whole. Indeed, this practice has also helped the complainants. It would be impossible to say that such a discretionary change in the hard and fast rule for operating a hiring hall is in of itself a violation of section 69, notwithstanding the fact that certain members who might have been out of work longer were not referred to jobs because they still had U.I.C. benefits. (para. 37)

27 In other cases, the Ontario Board has likewise been loathe to interfere with the legitimate exercise of discretion, even where it appears inconsistent with established hiring hall rules: see *Roland Parisee* -and- *International Union o*f *Operating Engineers*, *Local 793*, [1995] OLRB 4447, and decisions cited therein.

28 To summarize the above authorities, the Ontario Board has recognized the exigencies of operating a hiring hall necessarily entail an element of discretion. Neither the presence of discretion nor its exercise will alone violate the duty of fair referral. Further, such practices need not be in writing (although this is certainly preferable), and in some cases there may be exceptions which apparently violate written dispatch rules such as a "first in, first out" requirement. The question is whether the discretion has been abused; that is, whether it has been exercised in a manner which was arbitrary, discriminatory or in bad faith. Obvious examples of improper conduct are favouring certain individuals or deliberately failing to dispatch other members because of factors unrelated to the requirements of a job. I see no reason to depart from this approach under the duty of fair referral provision in our jurisdiction.

29 The practices complained of by Donaldson were adopted by the Union for legitimate reasons. The exceptions to the Local 602 Rules either benefited members generally (e.g. being dispatched to qualify for UI benefits) or were understandable given the demands placed upon dispatchers (e.g. the "time urgent" call given to a member in the hiring hall). There is no evidence to refute Wittington's testimony that he tried to apply the exceptions without favouritism. Indeed, an examination of the specific dispatches challenged by Donaldson dispels any suggestion that Wittington or the other dispatchers exercised their discretion to advantage certain members.

30 I am additionally satisfied that the discretion was exercised on a relatively limited basis. During the period in question, the Union made 973 dispatches involving 1364 members. Donaldson alleges that 64 of these members were below him on the seniority list. As will become evident later in this decision, only a small portion of the disputed dispatches involved one of the exceptions to the Local 602 Rules.

31 To conclude on this first issue, the Board is without jurisdiction to determine whether the Union acted improperly when it continued to apply the Local 602 Dispatch Rules during the period of Donaldson's complaint. The Board's authority under Section 12 (1)(b) is limited to examining whether the Rules were applied in a manner which was arbitrary, discriminatory or in bad faith. The dispatches complained by Donaldson will be examined below. I have found, however, that the Union's former practice of following unwritten exceptions to the Local 602 Rules did not in and of itself violate the duty of fair referral. Nonetheless, it is disconcerting that these exceptions were not only unwritten, but were generally unknown to the membership -- and were not even fully known by the Union's dispatchers. The Ontario Board's comments in *John Cooper*, *supra*, bear repeating:

> …Unless the union's hiring hall rules and the factors which [the dispatcher] takes into account are reduced to writing and regularly explained to the membership so that there can be no excuse for

> misunderstanding, suspicions are bound to arise fueling dissention in the Local and potentially costly and unnecessary litigation. … (para. 40)

32 I am satisfied the Union's failure to adequately communicate its dispatch practices contributed in no small measure to the present complaint being filed. To this extent, the Union has only itself to blame for what has undoubtedly been time-consuming litigation. It is equally understandable why Donaldson's suspicions were aroused when he learned members below him on the out-of-work list were being dispatched. Any further comment in this area would be academic, as the practices have now been discontinued under the new Local 1611 Dispatch Rules.

(b) The Disputed Dispatches

33 The magnitude of Donaldson's complaint (i.e., the 64 members who were dispatched from below him on the out-of-work list) initially suggests that he was personally disadvantaged by operation of the Union's hiring hall and lost work on these occasions. But on closer examination, a very critical point emerges: *there is no evidence that for any of the dispatches in question Donaldson was at the top of the out-of-work list, or that he was otherwise next in line for the job.* At most, the evidence shows that he was qualified to perform some (but not all) of the work, and someone below him on the list was dispatched -- however, there were many members above him on the list who would have received preference under a "first in, first out" system.

34 Donaldson argues that his entitlement to the dispatches should be presumed. I do not agree. At the start of the period, he was number 478 on the out-of-work list. In other words, there were 477 members ahead of him. It is simply inconceivable that none of these members would have been qualified for the first disputed dispatch. In fact, the evidence establishes that Donaldson would not have been entitled to the first three dispatches had the list been followed in order. He questioned one of his own witnesses about the dispatch of three members as "general labourers" to a job with TAF Construction on October 11, 1995. The witness agreed Donaldson was qualified as a general labourer and should have been dispatched instead of those who received the work because Donaldson was higher on the list. However, the witness stated further that he himself was "on the way to the top of the list" at the time, likely "less than 100". The witness was also qualified as a general labourer but was not called for the job. The consequence of this evidence is that the witness would have been dispatched well ahead of Donaldson.

35 These circumstances raise a serious question over whether Donaldson can claim a legal interest in many – if not most, or even all – of the disputed dispatches. I agree with the view of the Ontario Board that the statutory duty of fair referral is not a "springboard" enabling complainants to challenge referrals, except those in which they have a legal interest: see *Walter Sladich*, [1985] OLRB Rep. July 1167. Unless a legal interest is demonstrated, the Ontario Board will decline to inquire into a complaint.

36 It is not necessary to decide Donaldson's complaint on the foregoing basis, because the Union has explained why other members were dispatched (as reviewed below). But the absence of evidence establishing that he was “next in line” for any of the dispatches detracts significantly from the initial weight of the complaint. Donaldson was not personally disadvantaged by operation of the dispatch system, beyond having been one of many members who were higher on the out-of-work list than those who received the disputed dispatches. I have already determined that the dispatched members were not improperly favoured. This leaves no room for a finding of either discrimination or bad faith when combined with the lack of evidence regarding any personal disadvantage to Donaldson. His complaint therefore depends on whether the Union was arbitrary in its application of the Local 602 Rules and practices. This standard was explained in *Brian Rosie*, *supra:*

> 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 referral does not require the same type of thorough investigation [as the duty of fair representation]. 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. … (p. 10)

37 As indicated, I have reviewed the extensive evidence regarding each of the dispatches challenged by Donaldson. For purposes of this decision, my conclusions are stated more generally as the various work orders can be grouped under a limited

number of headings. In some cases, more than one dispatch relates to the same work order. For example, the first three dispatches on the list of 64 in dispute resulted from the same request by TAF Construction for workers with experience stripping the underside of concrete.

(i) Local resident hiring

38 This category covers disputed dispatches 4-10, 13, 15, 16, 40-42, 44, 45, 48 and 49. Paragraph 2 of the Local 602 Rules gave preference to "local resident" members as defined in the collective agreement. Thus, members living in Kamloops would be dispatched to a job in that locale even though they were lower on the out-of-work list than members living in Vancouver. Contractors also preferred to use local hires as it avoided travel and other costs.

39 Donaldson's complaint about local hires is based on his assertion that the Job Referral Rules should have applied (they contained no provision for local hires). He conceded in cross-examination that if the Local 602 Rules applied, members in Kamloops would have first call for jobs there. Given my earlier conclusion that the Board is not the proper forum for determining which rules should have been applied, there is no basis for finding that dispatch of local residents violated the Code.

(ii) Skills not listed on Job Registration Card

40 Donaldson transferred into Local 602 and completed a Job Registration Card effective October 27, 1989. The standard Card lists a number of skills which members can indicate they possess by ticking off the applicable box. There is also space for remarks. Donaldson initially ticked only "general labourer". He completed another Card in September 1996. In addition to general labourer, he ticked off approximately 10 other skills. He completed a third Card which was date-stamped July 10, 1997; it listed six additional skills including a Level 3 first aid ticket.

41 Disputed dispatches 1-3, 11, 12, 17, 25, 35, 36, 43, 46, 47, 57-61 and 64 all involved work orders where the contractor sought skills not listed by Donaldson on his Job Registration Card. However, the members were invariably dispatched under category 001 as general labourers. Donaldson relies on this to say he was qualified, and additionally asserts he possessed a wide range of skills expected of any general labourer.

42 The evidence does not allow me to draw a line between the skill level of a general labourer and what might be characterized as "specialty skills" within the trade (assuming such a demarcation exists in some form). I am satisfied that the Union attempted to dispatch members with the required expertise -- especially where a contractor expressly requested a specific skillset, as was the case with many of the dispatches under this heading. That is a legitimate function of operating a successful hiring hall: see *Maurice Berlinguette*, [1986] OLRB Rep. Feb. 194. I find as well that the Union's practice of placing the onus on members to advise the hiring hall of their skills was reasonable: see *Antoine A. Plenne-Vaux -and- Labourers International Union*

of North America, Local 1036, [1990] OLRB Rep. Dec. 1314. There was nothing improper about the Union dispatching members for jobs which required certain expertise when it was not aware that Donaldson regarded himself as qualified for the work.

(iii) Lack of flagging experience

43 Somewhat similarly, the Union sought to dispatch members to flagging jobs who had known experience in addition to formal training. Donaldson fell into the latter category; he had passed the Union's flagging course but had not noted any experience on his Job Registration Card. He says he did not know he had to note his experience, and accordingly challenges dispatches 23, 24, 26-29, 31-34, 37, 38 and 63.

44 I accept the Union's evidence that flagging can be a demanding and stressful job. There are also safety and liability considerations where the work is being done in high traffic areas. The evidence establishes that while a lot of members have taken the flagging course, only a few obtained flagging jobs; those who did had generally gained experience by obtaining their own work. Contractors specifically ask for members with flagging experience. Wittington could not recall any occasion in which he had dispatched someone without experience. The Union's practice in this regard may not have been in accordance with the Local 602 Rules (and I make no determination for reasons given above); however, there was nothing arbitrary about its failure to dispatch Donaldson as a flagger.

(iv) Time urgent dispatches

45 This heading concerns dispatches 18, 19, 39, 53, 54, 56 and 62, and relates to one of the exceptions to the Local 602 Rules discussed earlier. The disputed dispatches all went to different individuals and there is no evidence of favouritism. A trade union does not violate Section 12 where members are referred for work in accordance with established policies and practices: *Ronald James Stone*, BCLRB No. B164/96, at para. 23.

(v) Member worked previously for contractor

46 This relates to dispatch 14. As permitted by the collective agreement, the contractor requested a member who had worked on the same job a few weeks earlier. I accept Wittington's evidence that he made a mistake and recorded "D" for dispatch instead of "R" for rehire.

(vi) Dispatched member ahead of Donaldson

47 The Union's records show that the members referred to jobs under dispatches 50 and 51 were both ahead of Donaldson on the out-of-work list.

(vii) Cancelled orders

48 The orders resulting in dispatches 21, 22 and 30 were subsequently cancelled by the contractor, and are no longer challenged by Donaldson.

(viii) Miscellaneous

49 Of the three remaining dispatches, number 20 was a request by a contractor for someone with first aid qualifications. The dispatch records show that a member went out as a general labourer. I am satisfied this was an "input error" by the dispatcher (to use the Union's expression). The records show the member referred to the job was qualified as a first aid attendant, and Donaldson did not have his ticket at the time.

50 Dispatch 52 involved a job in Mission. Wittington could not say whether he called Donaldson or not. However, he vaguely recalled a conversation at some point wherein Donaldson indicated he was having car troubles. When cross-examining Wittington about this dispatch, Donaldson said "I recall something similar – I'll leave that".

51 Turning finally to dispatch 55, Wittington readily admitted he had no explanation for why Donaldson was not referred to this job. He recalled the contractor was building caissons and that there would have been about 12 labourers per shift. He said the contractor would have name requested one-half of the crew, and he would have started calling other members. Wittington testified further that Donaldson would have been on the list, and said "I don't know why he did not go. [We] did not keep records in those days".

52 I am not prepared to hold that these remaining dispatches (although partially explained) establish a violation of Section 12. Wittington was the dispatcher for all but 12 of the referrals challenged by Donaldson. There is no basis for questioning his credibility. Wittington demonstrated a remarkable ability to recall the circumstances surrounding almost all of the dispatches. I find his inability to offer a complete explanation for dispatches 52 and 55 is more an indication of candor. Even if Wittington did make a mistake, this would not by itself be sufficient to find a violation of the Code: see *Brian Rosie*, *supra*.

53 More generally, my assessment of Wittington's credibility is reinforced through the answer given in cross-examination by one of Donaldson's witnesses. Benny Trombinski was a longtime member of Local 602 and was elected President in 1995. He was asked about his dealings with Wittington. Trombinski responded by saying he had known Wittington for "150 years….He is a terrific guy [and] from what I know he is honest". There is no similar testimonial regarding the honesty of the other dispatchers, but neither is there any valid basis to question their credibility.

54 Additionally, while the individual dispatches have all been grouped under separate headings, Wittington was able in some cases to offer more than one reason for not sending Donaldson. For example, dispatches 46 and 47 resulted from a relatively late afternoon call from a contractor (i.e., a time urgent" dispatch) and

Wittington sent two members for the next morning who he knew had experience with pipe work. In respect of dispatches 57 through 59, Wittington sent members with experience in pipe work to a job in North Delta. This was about the time he recalled Donaldson having car troubles, and Wittington believed he did not consider Donaldson for that reason as well.

55 I turn now to what was initially the most troubling aspect of Donaldson's complaint. This concerns the timing of when he was eventually dispatched for work following the period in question (again, the period runs from October 11, 1995 to July 15, 1997). Donaldson began attending Local 602 membership meetings regularly in early 1995 and became politically active. He says he became a "close ally" of the majority members on the executive board, and drafted charges against the minority group. He subsequently opposed LIUNA's imposition of a trusteeship on the Local (which the minority supported) and further describes himself as a "vociferous" opponent of the trustee.

56 Donaldson became "suspicious" in early 1996 about members behind him on the list being dispatched. He began a lengthy series of correspondence with the LIUNA Inspector General and the LIUNA General Executive Board Attorney. With the assistance of the latter, Donaldson was eventually able to obtain access to the Union's dispatch records and make notes. He reviewed the records in August 1997 and spoke immediately afterwards with Carl Strand, the new business manager for the merged Local 1611. The two have different recollections of their conversation. However, there is no doubt that Donaldson advised Strand of his belief that the records proved he had been improperly passed over for work on a number of occasions. Donaldson was dispatched by the Union to a job shortly thereafter on September 8, 1997.

57 The coincidence of this timing leads Donaldson to submit that the Union deliberately declined to refer his to work throughout the period, and only did so when it became obvious he going to pursue a complaint. While this may be the most compelling element of his complaint, the timing is explained by a number of factors which satisfy me that no impropriety was involved.

58 First, several major contractors who were previously signatory to the Union no longer operate in British Columbia. At the time Donaldson was waiting to be dispatched, the evidence establishes that other members could have their names on the out-of-work list for as long as a year or two before being called. Second, and related, the wait was generally longer for members who had limited expertise. Until September 1996 Donaldson only listed general labourer on his Job Registration Card.

59 Next, Donaldson *was* in fact called for work during the period. He completed a new Job Registration Card on September 23, 1996 and checked the box opposite "airtrac". Wittington called him soon after on October 23, 1996 for work as an airtrac operator. However, Donaldson had only worked as a helper and had no experience as an operator. He was therefore not qualified for the job and Wittington made a note to this effect on the Card. The Union's records also indicate Donaldson was telephoned

for work on July 28, 1997 but said "can't go today". Donaldson does not remember receiving the call, but admits it may have occurred.

60 Donaldson does recall attending the Union hall in early 1996 and asking Wittington what work was available. Dispatchers commonly tell members about sites they know are hiring. Donaldson testified that Wittington told him about an on-going fair wage job at Westview in North Vancouver. He went to the site but was not hired. Donaldson characterizes Wittington's advice as a "bum steer". Wittington does not recall the incident, although he knew there was a job at Westview and passed along that information to any members who inquired. I find Donaldson did speak with Wittington, and that he received the same type of information as was provided to other members.

61 Strand did investigate Donaldson's allegations to some extent after the two spoke in August 1997. However, I find he was not overly concerned if the matter was pursued. He testified he refused to make any settlement, and told Donaldson to proceed "whichever way [he] wanted to go" if he believed there were grounds for complaint. There is no evidence to refute the Union's assertion that it did not learn of the Section 12 complaint until notified by the Board in December 1997.

62 Moreover, there is a persuasive explanation for the timing of Donaldson's dispatch on September 8, 1997. Donaldson obtained his unrestricted Level 3 first aid ticket in March 1997. For personal reasons, he delayed taking the ticket to the Union hall until July 10, 1997. He filed out a Job Registration Card on that date which recorded his new qualification. The referral in September was to a contractor who specifically requested a labourer with a first aid ticket. It was suggested to Donaldson in cross-examination that he got the job because of this qualification. He answered "That's why I took the ticket". He also agreed that he was later dispatched to another contractor because of his first aid qualification.

63 The Union's records indicate that several members below Donaldson on the out-of-work list were dispatched as first aid attendants between March and July 1997 (i.e., between the time Donaldson obtained his Level 3 ticket and updated his Job Registration Card). For example, a member who was number 514 on the list was dispatched on March 10 when Donaldson was number 97. Wittington testified that the Union was down to only two or three members in the Lower Mainland who possessed an unrestricted ticket. I find it more probable than not that Donaldson would have been called on at least one occasion between March and July 1997 had he advised the Union sooner of his qualification.

64 As indicated, I was initially concerned about the timing of Donaldson's September dispatch in relation to his discussion with Strand. The two events were certainly "coincidental" in terms of being proximate in time, and understandably reinforced Donaldson's suspicions that he had been passed over for dispatch. But the other events described above more than adequately explain why he was not dispatched for work during the period, and explain as well the timing of his eventual dispatch. And to

repeat the important point made earlier, Donaldson did not prove that he was otherwise "next in line" for any of the disputed jobs.

III. CONCLUSION

65 I will not attempt to summarize all of the findings and conclusions contained in this decision.

66 In terms of the more significant questions raised by Donaldson's complaint, I have determined that the Labour Relations Board is without jurisdiction to rule on whether the Union properly applied the Local 602 Dispatch Rules during the period in question (October 11, 1995 to July 15, 1997), or whether it should have adopted LIUNA's Job Referral Rules (and later, the Amended Rules).

67 Under the Local 602 Rules, the Union had a practice of making exceptions to the "first in, first out" requirement. These exceptions were made for valid and understandable reasons, but they remained unwritten and were largely unknown to the Union's membership. Donaldson accordingly had good reason to be "suspicious" when he learned that members below him on the out-of-work list were being dispatched through the hiring hall. His concerns were undoubtedly fuelled by the response he received from the Union to his legitimate requests for additional information. Thus, Donaldson should not in any way be criticized for filing a Section 12 complaint with the Board. This proceeding might well have been avoided had the Union reduced its dispatch practices to writing and explained them more openly to the membership.

68 With respect to the merits of Donaldson's complaint, there are no grounds to support his allegations that the Union acted in a manner which was arbitrary, discriminatory or in bad faith. There is no evidence that Donaldson's name was at the top of the out-of-work list, or that he was otherwise "next in line" for any of the disputed dispatches. More critically, the Union has explained why other members were referred for work in virtually every case; in the few remaining cases, the dispatcher may have made a mistake but there is no basis for finding that Donaldson was improperly passed over. I am additionally satisfied that Donaldson was eventually dispatched because he advised the hiring hall of his Level 3 first aid qualification, and not because the Union feared a complaint.

69 I have deliberately minimized any reference to the "political" elements of this proceeding. Nonetheless, I recognize that either or both of the parties might be tempted at a later date to selectively quote from this decision. That would not be appropriate. I accordingly attach the following condition under Section 134(1)(a) of the Code: in any written publication, neither the Union nor Donaldson shall reproduce or refer to portions of this decision without including paragraphs 66, 67 and 68 above in their entirety. I reserve jurisdiction to clarify the scope of this condition if necessary.

70 In the result, Donaldson's complaint under Section 12 of the *Labour Relations Code* alleging that the Union violated its duty of fair referral is dismissed.

LABOUR RELATIONS BOARD

JOHN B. HALL
VICE-CHAIR