BRITISH COLUMBIA LABOUR RELATIONS BOARD

DARYL JENSEN

("Jensen")

-and-

THE BAPTIST HOUSING SOCIETY OF B.C.
(CENTRAL CARE HOME)

("Central Care")

-and-

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL NO. 882

("Local 882")

PANEL:	V. A. Pylypchuk, Vice-Chair David Cox, Member Jan O'Brien, Member
COUNSEL:	Daryl Jensen, for himself Andrea Rayment, for Central Care Linda Dennis, for Local 882
CASE NO.:	33998
DATE OF HEARING:	March 1, 30, 31, 1998; April 1, 2, 3, 4, 15, 16, 17, 1998; May 9, 19, 20, 27, 1998; September 9, 10, 11, 17, 18, 23, 24, 25, 1998; November 12, 1998.
DATE OF DECISION:	October 12, 1999

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 Jensen complains that Local 882 breached its Section 12 *Labour Relations Code* duty of fair representation when it permitted Frank Dresen to attend at the premises of Central Care on April 14, 1997 and to verbally harass Jensen. For the reasons that follow Jensen's complaint is dismissed.

II. BACKGROUND

2 The events underlying this complaint took place against the background of a variance/partial decertification application brought by Certain Employees of Central Care and a series of unfair labour practice allegations arising from a protracted confrontation between the management of Central Care and Local 882 (see BCLRB No. B406/99).

3 In or around mid-April of 1997 Local 882 got wind of a decertification campaign being conducted by Certain Employees at Central Care and decided to launch a campaign of its own to persuade employees not to decertify. In the course of that campaign a small group of Local 882 supporters attended outside of the facility on the evening of April 14, 1997. Saundra Johnson, a member of Local 882's Executive and a steward at Mt. Edwards Court (the sister facility to Central Care) was in attendance that evening. Sherrie Barnes, an employee of Central Care on stress leave, and Local 882 staff representative Gordon Lindsay joined Saundra Johnson at the facility.

4 On the evening prior, April 13th, Johnson had engaged in a confrontation with some decertification supporters in a parking lot in near proximity to Central Care. Following a heated exchange between Johnson and the decertification supporters, the supporters left in a vehicle and Johnson pursued them in a truck. During the course of that pursuit, Johnson became involved in a motor vehicle accident. These events are dealt with in detail in BCLRB No. B406/99.

5 Johnson testified that following the April 13th incident she was afraid to attend at Central Care on her own and, in addition to Barnes and Lindsay, invited Frank Dresen to accompany her. Dresen had left Central Care under an arbitration settlement agreement (the "Agreement") the terms of which required Dresen to stay away from the employees of Central Care and from the facility. The Agreement stated as follows:

> 6. *The Grievor agrees that* in accordance with the terms of the Settlement Agreement *he will not* telephone or contact any employee or representative of the Baptist Housing Society, with the exception of a personal friend of the Grievor who is not working at the time of the contact, or *attend at any [sic] the premises of the*

> *Baptist Housing Society for any reason other than to carry out the terms of the Settlement Agreement.* (Emphasis added)

6 Johnson was a signatory to the Agreement. Dresen had attended on the public sidewalk outside of the facility earlier in the afternoon of the 14th with Johnson at Johnson's invitation. There was no evidence to suggest his attendance then or any other time was for the purpose of "carry[ing] out the terms of the Settlement Agreement". However, no employee seemed to object to his presence in the afternoon, including Jensen, who reported for his shift at or about 3:00 p.m. and simply ignored Dresen when the latter attempted to address him.

7 Jensen is the janitor at Central Care that replaced Dresen in the janitorial position. Among his duties he performs a security function. During the late evening shift change, when employees are entering and exiting the building, he attends at the front of the building near the employee entrance to ensure that no unauthorized persons enter the building and that employees do not encounter any difficulties in going to their vehicles in the parkade. He escorted employees to the parkade on April 14 and 15, 1997 in light of Local 882's presence on the sidewalk.

8 During the evening of April 14, 1997 while the Union supporters congregated outside of the facility on the sidewalk, an unpleasant encounter ensued between Dresen and Jensen. The encounter consisted of Dresen hurling a number of lewd homophobic slurs at Jensen. The offensive remarks need not be repeated in this decision. Jensen testified that they were loud enough to be heard clearly inside the building, a fact confirmed by a fellow employee, Travis Roth, who at the time of the event was doing rounds on the fifth floor of the building. Neither Johnson nor Barnes would confirm Dresen's statements claiming that they were too far removed to hear his remarks. Lindsay testified that he did not hear anything Dresen said because at the critical moment he was absent getting coffee from a local establishment.

9 Based on all of the testimony we are satisfied that Lindsay was not present at the moment the encounter occurred. There was a dispute in the evidence between Jensen, Roth, Johnson and Barnes as to exactly where various individuals had been standing on the sidewalk in front of Central Care at the relevant time. Jensen and Roth put Barnes and Johnson in much closer proximity to Dresen than did Johnson and Barnes in their testimony.

10 Just before Dresen shouted his epithets Jensen emerged from the interior of the facility building through a side door near the front of the building at or about the top of the ramp leading to the parkade located underneath the building. At the time of the offensive remarks Jensen was at the bottom of the ramp at the parkade gate. Following the remarks, Jensen returned to the building, entering through the employees' entrance on the front side of the building near the ramp leading to the parkade. Jensen testified that he did not pay attention to Dresen's exact location as he assumed that Dresen was on the sidewalk at the top of the ramp. Roth testified that from his vantagepoint at a fifth floor window, he observed Dresen standing on Central Care property, on the ramp leading to the parkade, near the top.

11 It is undisputed that Johnson reported that an incident involving Dresen and Jensen had occurred to Maureen Metcalfe, Local 882's business manager. Metcalfe told Johnson that there was a long history between Dresen and Jensen and instructed Johnson to "read the riot act" to Dresen to make sure there was no repeat incident.

12 The evidence revealed that up to April 14th Jensen had been a Local 882 supporter. Following the events of that evening, he called Local 882 officials in Vancouver to lodge a complaint. He was told the matter would be reviewed and someone would call back. However, a considerable time passed before his call was returned. He was very upset by the lack of prompt response and by further events on April 15, 1997.

13 On the evening of April 15, 1997 a similarly sized group of Local 882 supporters attended at the facility of Central Care. It consisted of Metcalfe, Johnson, Gordon Craig and Helen Cooper. At some point during the evening, while Jensen was performing his security duties at the front of the facility, Dresen drove by. According to Jensen the group on the sidewalk shooed Dresen away. According to the testimony of Local 882 witnesses, Johnson had forgotten to tell Dresen that his presence was no longer desired but that when he drove up, he was told to leave and he left. Dresen had been present on the sidewalk outside of the facility earlier that day.

14 As well, on the evening of April 15 Craig engaged Jensen in a shouting match. Craig's comments were directed at Jensen's previous work-related difficulties that had resulted in Jensen's change to a janitorial position. During the course of this encounter Jensen accused Craig of being under the influence of alcohol. The accusation was hotly denied by Craig and by the other Local 882 supporters then present. The group had met for supper prior to attending at the facility and asserted that Craig had only two glasses of wine to drink. Local 882's initial witnesses suggested that no one else consumed any alcoholic beverages, but after the bill for the evening was produced showing that at least $40.00 worth of alcohol was served, subsequent Local 882 witnesses testified they had each had one glass of wine but no more. Craig revealed that he had also consumed a couple of glasses of wine before arriving at the restaurant.

15 On each of the two evenings, employees completing the afternoon shift left the premises of Central Care in an automobile convoy emerging from the underground parking under the building. Jensen had escorted the employees to their cars on each occasion. On the evening of the 14th of April, prior to escorting employees, Jensen had alerted employees to Dresen's presence at the front of the building by an announcement over the public address system.

16 A number of witnesses testified that they had been aware of Jensen's sexual orientation for some time. No one testified that they first became aware as a result of the incident of April 14, 1997. There was no evidence corroborating Jensen's claim that the "outing" had substantially affected his workplace relationships.

17 We conclude that following the events of the 14th and 15th, Jensen ceased to support the Union and became a strong anti-Local 882 proponent.

III. ARGUMENT OF THE PARTIES

A. Jensen

18 Jensen argues that the nub of his complaint is Dresen's presence at Central Care and Local 882's lack of concern and inaction regarding his best interests. Jensen says that Local 882 is responsible for Dresen's conduct because of his known history and because of the Agreement to which the Local was a party. Jensen argues that Johnson was clearly aware of the content of the Agreement as she was one of the signatories to it. He says that her claim that she was not aware of the content but had signed it nonetheless defies belief.

19 Jensen speculates that the motivation for Local 882's conduct in having Dresen present was linked to its suspicion that he supported the decertification campaign and that he had leaked to management that Barnes was collecting statements from employees regarding Stephanie Brown, the kitchen department director.

20 Jensen argues that Johnson and Barnes were obviously within earshot of Dresen and could not have helped but hear his remarks. Jensen says that Local 882 had an obligation to uphold the Agreement and to take action to ensure that Dresen did not attend at the facility. It owed that obligation to bargaining unit members who worked at the premises. If Local 882 had the best interests of the employees and its members at heart, including those of Jensen, it would have ensured that Dresen did not attend at the facility. Instead, Local 882 had actually solicited Dresen's presence. Jensen says that by permitting Dresen's attendance Local 882 breached its obligation by acting in a perfunctory manner when it knew or ought to have known that Dresen's conduct was likely to negatively affect employees, including Jensen.

21 Jensen argues that Dresen's conduct directly harmed him by exposing matters regarding his sexuality to all of his co-workers as well as to residents in the facility. Jensen argues that he is not so naive as to believe that those who heard the remarks would simply ignore them and continue to treat him as they had in the past. Jensen says that gay people have a far more difficult time relating in society. Dresen's remarks can reasonably be expected to foster negative feelings toward Jensen amongst fellow employees and residents, damage friendships, cause discomfort amongst employees and residents, and to cause his workplace relationships to become discomfited and coloured.

22 Jensen relies on video evidence concerning the process and impact of "outing" (which videotape evidence was introduced as part of Jensen's case) and argues that the ripple effect of an outing is ridicule and rejection. Acceptance is very important to gay people because of their experience of difference. Jensen argues that it was easy for Dresen and Local 882 to portray him as a betrayer of fellow employees in part because of his sexual orientation. Because he is different, Jensen says, he is more easily vilified. To put it another way, since society already views him as dysfunctional in one way, then it is very easy to persuade people that he is dysfunctional in other ways.

23 All of this Jensen says goes to the damage he has suffered as a result of Dresen's outburst and therefore attributable to Local 882's failure to represent his interests as required by Section 12 of the Code. Jensen seeks compensation for the verbal assault against him sanctioned by Local 882 and for the consequential harm of having been outed. By permitting and disregarding Dresen's conduct, Jensen argues that Local 882 acted in an arbitrary and perfunctory manner.

B. Local 882

24 Local 882 argues that to determine whether there has been a breach of Section 12, the Board must consider whether the Union was, at the relevant time, representing the employees in the bargaining unit. Local 882 says that means that the statutory duty applies only where the union is representing employees vis-à-vis their employer: George W. Adams, *Canadian Labour Law A Comprehensive Text,* (Aurora: Canada Law Book Inc., 1985) at pages 721-722. Local 882 says that *Rayonier Canada (B.C.) Ltd.*, BCLRB No. 40/75, [1975] 2 Can LRBR 196 similarly states that "the duty of fair representation does not extend to internal union affairs". Local 882 says the duty of fair representations governs those acts of a union which affect the individual as an employee, not as a member: *Lochner v. Canadian Brotherhood of Railway, Transport and General Workers* (1979), 79 CLLC ¶16,209 (CLRB). The duty of fair representation does not apply to the union -- union member relationship, but rather to the union -- bargaining unit member relationship.

25 Local 882 argues that this Board has adopted this approach in *International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, Lodge 359*, BCLRB No. 13/82. Local 882 says that it is insufficient to demonstrate that an employee has somehow been affected adversely in his or her employment rights. Local 882 also relies on *Jack C. Vlahovic,* IRC No. C222/88 for the proposition that only in those cases where a complainant has been affected in his capacity as an employee can a breach of Section 12 be found. Matters falling outside the bargained rights in the collective agreement are beyond the scope of Section 12. Given that Local 882 was not representing Jensen vis-à-vis Central Care at the time the event happened, there was no breach of the duty and the Board need go no further.

26 Alternatively, Local 882 argues that even if the event is measured against the prohibition on arbitrary, discriminatory and bad faith conduct set out in Section 12, there is no evidence that Local 882 breached that prohibition. Local 882 argues that Dresen was not "at the facility" within the meaning of the Agreement, but only on the public sidewalk. Local 882 says that its representatives did not hear the alleged exchange between Jensen and Dresen. Local 882 says that Jensen's own testimony confirms that Barnes and Johnson were quite far away from Dresen at the material time. Johnson testified she was unaware of any prior animosity between Jensen and Dresen prior to that evening. The fact that Johnson was subsequently instructed to read the riot act to Dresen and kept him away the following night demonstrates that Local 882 was not acting arbitrarily. Parenthetically, Local 882 argues that if Johnson's inviting Dresen to attend on the evening of April 14, 1997 was a breach of a duty, then it was a duty which Local

882 owed to Central Care pursuant to the Agreement. If that is the case, Central Care's remedial avenue is in grievance arbitration under the Collective Agreement, and not at the Board.

27 Local 882 says that Jensen does not allege that it bore Jensen any ill will or animosity prior to the night of April 14. There was no prior history of any such animosity. At the time the events took place the decertification application had not yet been filed and nothing that occurred suggested that Jensen had supported or would support the decertification effort. Accordingly, there is no evidence of bad faith.

28 Nor, Local 882 says, can a finding of discrimination be reached. The Section 12 prohibition against discriminatory conduct protects employees by preventing a union from making distinctions irrelevant to legitimate collective bargaining concerns. There can be no unequal treatment of employees on account of factors such as race, sex or simple personal dislike or favouritism. Local 882 submits that Jensen has established nothing of this sort. It argues that it made no decision and denied no grievance; there is no union proceeding or any collective agreement entitlement regarding which Jensen has been differently treated or impacted by reason of his sexual orientation.

29 Local 882 says Central Care employees either knew or suspected that Jensen was gay long before April 1997. Further, Local 882 says that there is no evidence that Jensen had been subjected to different treatment following the events of April 14, 1997. Consequently, Local 882 denies that it has breached the Section 12 requirement not to act in a discriminatory manner vis-à-vis Jensen.

30 Local 882 argues that arbitrariness is usually raised in the context of some decision made by a union. Here, there was no decision made by Local 882. At most there was an error in judgment in having Dresen at the facility but his attendance came about by innocent mistake. Since Johnson was not aware of prior animosity between Jensen and Dresen, she could not have anticipated any outbreak or verbal exchange. Local 882 argues that when Johnson observed the staring match, she did not let it continue. Johnson denies seeing any other untoward behaviour. Moreover Johnson properly reported the interaction to Metcalfe and received appropriate instructions to "dress down" Dresen. Consequently, Local 882 denies having acted in an arbitrary manner.

C. Remedy

31 With regard to remedy, Jensen seeks the reinstatement of those personal vacation days used up in participating in the Board's proceedings. He also seeks compensation for the consequential damage suffered by him. Local 882 argues that Jensen's loss of holidays was as a result of his participation in all of the related proceedings as a result of his choosing to seek to have his Section 12 complaint heard as part of the unfair labour practice hearings. Local 882 had opposed the consolidation of those matters. Local 882 submits that the most telling aspect of the complaint is the absence of any real loss. There is no denied grievance, no loss of collective agreement entitlements, and no loss of

hours, wages, seniority or position. Local 882 contends there is no conduct by Local 882 that was detrimental to Jensen vis-à-vis his employer. As a consequence, Local 882 says there has been no breach of statutory duty and no consequential damages. Local 882 asks that the complaint be dismissed.

IV. ANALYSIS AND DECISION

32 The genesis of the duty of fair representation is discussed in detail in *Rayonier Canada (B.C.) Ltd.,* BCLRB No. 40/75, [1975] 2 Can LRBR 196, at pages 201 - 202:

> Some time after the enactment in this form of the Wagner Act - which was the model for all subsequent North American labour legislation - American courts drew the inference that the granting of this legal authority to the union bargaining agent must carry with it some regulation of the manner in which these powers were exercised in order to protect individual employees from abuse at the hands of the majority. This came to be known as the duty of fair representation. Beginning with the decision in *Steele v. Louisville* (1944) 323 U.S. 192, which struck down a negotiated seniority clause that placed all black employees at the bottom of the list, the duty has been extended to all forms of union decisions. An enormous body of judicial decisions and academic comment has been spawned. This culminated in the U.S. Supreme Court decision of *Vaca v. Sipes* (1967) 55 L.C. 11,731, which is the leading American precedent in this area of the law. This initiative by the United States judiciary was emulated by one Canadian judge, in the case of *Fisher v. Pemberton* (1969), 8 D.L.R. (3d) 521 (B.C.S.C.), where he concluded that the same duty must bind British Columbia unions certified under the old Labour Relations Act (at pp. 540-541). But Canadian legislatures have not waited for the evolution of a common law principle to run its course. Instead, they have uniformly moved to write the obligation explicitly into the statute and entrust its administration to the Labour Relations Board which is responsible for the remainder of the legislation. (For the Ontario history, see *Gebbie v. U.A.W. and Ford Motor Co.* (1973) OLRB 519.) The B.C. legislature followed suit when it enacted s. 7 [now Section 12] in late 1973.
>
> What is the content of the duty of fair representation imposed on a union? Section 7(1) requires that a trade-union not "act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees" in the unit. The relevance of the American background can best be appreciated by these quotations from *Vaca v. Sipes* which defined the scope of [its] judicially developed obligation:
>
> > "Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of

> all members without hostility or *discrimination* toward any, to exercise its discretion with complete *good faith* and honesty, and to avoid *arbitrary* conduct… (at p. 18,294).
>
> A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is *arbitrary, discriminatory, or in bad faith*… (at p. 18,299)."

Under this language, which has been directly imported into our legislation, it is apparent that a union is prohibited from engaging in any one of three distinct forms of misconduct in the representation of the employees. The union must not be actuated by bad faith in the sense of personal hostility, political revenge, or dishonesty. There can be no discrimination, treatment of particular employees unequally whether on account of such factors as race and sex (which are illegal under the Human Rights Code) or simple, personal favouritism. Finally, a union cannot act arbitrarily, disregarding the interests of one of the employees in a perfunctory matter [sic]. Instead, it must take a reasonable view of the problem before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations.

33 In *The Corporation of the City of Thunder Bay* (1983), 3 CLRBR (NS) 14, at page 43 the Ontario Board described the duty of fair representation as containing two dimensions:

> The duty of fair representation has both substantive and procedural dimensions. In some cases a union's actions may result in an outcome that is itself arbitrary, discriminatory or in bad faith, even though the procedures by which it creates that result are to all appearances fair and open. The most obvious example of a substantive violation of the duty would be a union voting by a majority of its members to restrict membership or certain rights under a collective agreement to a particular racial group. The fact that it has not been arbitrary or discriminatory in its procedures, and has arrived at its decision by an accepted democratic process involving proper notice, debate and balloting is no answer to a charge that it has nevertheless violated the duty of non-discrimination owed to the minority. That kind of insidious distinction, which for ease of reference may be characterized as substantive discrimination, has been contrary to the duty of fair representation since its earliest judicial expression (*Steel v. Louisville*, N.R.R., 323 U.S. 192 (1944)).
>
> Procedural infringements on the duty of fair representation have more frequently been the basis of complaints under s. 68 before this Board….The procedural aspect of the duty requires that decisions adversely affecting the interest of an individual or group

> of employees be made by a process within the unit that is untainted by ill, [sic] will, hostility or any other aspect of discrimination, arbitrariness or bad faith. Outcomes which are the fruit of such procedures have consistently been found to be in violation of the duty of fair representation and have given rise to a number of remedial orders….

34 In *Rayonier* the duty of fair representation was stated in the abstract and its parameters were not precisely defined. In B.C., as in Ontario, the most common complaint relates to the breach of the procedural dimension of that duty, e.g., the procedure used by a union in coming to some or other decision regarding a bargaining unit member's problem. However, that in and of itself does not define the limits of the duty. As was pointed out by the Ontario Board in *The Corporation of the City of Thunder Bay* there can be a breach of the substantive dimension of the duty while the procedural dimension is beyond reproach.

35 To establish the limitations on the duty of far representation necessarily involves a consideration of its basic premise. The duty of fair representation is an obligation that is an integral part of the exclusive bargaining agency granted to a union pursuant to Section 27(3) of the Code. The exclusive bargaining agency supplants the individual employee's right to deal directly with his or her employer. Therefore, it operates when a union exercises its rights, authority and power that comprises that exclusive bargaining agency. Put another way, a union must be exercising its power as exclusive bargaining agent in the act of dealing with the employer or there must be a causal link between the actions of the union and representation of the bargaining unit vis-à-vis the employer in order for the concomitant duty to arise: *Angelo Moro*, [1983] O.L.R.B. Rep. Aug 1354 at pp. 1354-5; *Jack C. Vlahovic*, IRC No. C222/88; *H.D. Jakumeit,* IRC No. C296/88; *Magnus E. Seime*, BCLRB No. B124/94; *Curtis D. Martin,* BCLRB No. B490/94 (Leave for Reconsideration of BCLRB No. B229/93).

36 Beyond that, the relationship between union members and the union are matters internal to the union arising out of the contract of membership. As W. B. Rayner points out in his book *The Law of Collective Bargaining*, (Scarborough: Carswell, 1995):

> The regulation of internal union affairs must be founded on other statutory provisions guaranteeing union membership and protecting the right to dissent, or through the court's willingness to use other legal concepts, e.g., contract, property, or judicial review to police the internal operations of unions. (p. 25-31)

37 In B.C., Sections 5, 10 and 31 of the Code are provisions which grant the Board limited powers of supervision over internal union affairs (see for example, *John Graham*, BCLRB No. B302/98).

38 The difficulty with the present case is that it does not fall within the typical Section 12 complaint where an allegation is raised that a union has failed to advance a grievance or has failed to conduct negotiations in accordance with the duty contained in

Section 12. Rather, it occurred in the context of a union campaigning to maintain its status as bargaining agent. The very nature of that campaign necessarily pits Local 882's interests against those members of the bargaining unit who are campaigning to decertify. Whether one characterizes such a campaign as an internal union matter or an external one as between the union-qua-union and members of the bargaining unit, we conclude that it is not a matter that engages the representation of employees vis-à-vis Central Care within the meaning of the jurisprudence. Had there been no Agreement, no further analysis would be necessary.

39 However, when the Agreement which prohibited Dresen's attendance at the work place, and the fact that it was his attendance at Local 882's invitation that caused the confrontation of April 14 are added to this matrix, then the question of what duty, if any, is owed under these circumstances becomes a more complex issue.

40 In this case there is a dimension of Local 882 dealing with Central Care in the capacity of exclusive bargaining agent embodied in the Agreement. This necessarily includes not only its negotiation and execution, but its implementation as well. But, entering into the Agreement also gives rise to other duties and obligations that are distinct from the duty of fair representation and the breach of which will not amount to a breach of Section 12 of the Code. Consequently, if Dresen's presence and the occurrence on the evening of April 14 amounts to breach of one of those other duties, but not the duty of fair representation, then there may be other remedial avenues available to those affected, but no remedy under Section 12 of the Code.

41 Local 882 and Dresen entered into the Agreement with Central Care, which Agreement among other things, prohibited Dresen from attending at the premises of Central Care. Local 882 voluntarily executed that agreement and received for and on behalf of Dresen good and valuable consideration. While one can say that on its face, because Local 882 agreed to the prohibition, it must have considered the prohibition beneficial to the bargaining unit as a whole, that is too simplistic a view. It is equally too simplistic to leap from that proposition to say that therefore Local 882's duty of fair representation vis-à-vis all other members of the bargaining unit was engaged and Local 882's failure to ensure its implementation amounts to a breach of that duty. Indeed, the circumstances require a more sophisticated analysis.

42 Unions often enter into agreements that may advance the interests of one or some bargaining unit members to the detriment of others. That in and of itself does not amount to breach of the duty of fair representation. This Board and other boards have held that unions may from time to time make such choices: *Rayonier, supra*; *Walter Prinesdomu*, [1975] 2 Can LRBR 310.

43 In this case Local 882 represented the interests of Dresen in negotiating the Agreement. We conclude from the Agreement as a whole, and the wording of the provision prohibiting Dresen from the attendance at the facility in particular, that the prohibition was inserted for the benefit of Central Care. The Baptist Housing Society (the "Society") was party to the Agreement. The prohibition, on its face, names the Society and benefits the Society by keeping Dresen away from all of the Society's premises (of which the Central Care facility is but one). It is from the perspective of the Society's interest that the prohibition on contact with employees and representatives of the Society is appropriately considered. We have no hesitation in concluding that, at the very least, Local 882 owed a duty to Central Care not to facilitate or solicit Dresen's attendance such that a breach of the Agreement would occur. Having concluded that, however, we cannot conclude that the same duty was owed by Local 882 to Jensen himself as an employee in the Central Care bargaining unit.

44 Jensen testified that Dresen's conduct vis-à-vis various employees of Central Care was such as to cause considerable interpersonal problems in the workplace. Thus, if the benefit of the prohibition was expressly intended for the employees, it would arise so in the context of the Society's (Central Care's) duty to provide a safe workplace and its interest to avoid workplace disruption. This evidence does provide a basis for establishing why Central Care might want such a provision. Further, the exit of employees via convoy on the evening of April 14 after Jensen had announced to the building that Dresen was present on the sidewalk also supports the view that there were some difficulties between other employees and Dresen. Again, this would be a matter of concern to Central Care. Central Care would have an obvious interest in limiting workplace disruption.

45 On the other hand Local 882 witnesses testified that on the afternoon of April 14th Dresen was greeted by some employees coming to work in a friendly manner. Indeed, Jensen himself took no particular notice of Dresen's presence when coming on shift. This suggests that there was no great friction between Dresen and other employees and that Local 882 did not share Central Care's concern regarding Dresen's relations with other employees.

46 Therefore, we conclude that any duty or obligation owed to employees of Central Care to prevent Dresen's attendance at the facility, was a duty that arose in the context of Central Care's obligations to its employees, and not in the context of Local 882's obligation to its bargaining unit members. Local 882 did not subscribe to or accept the proposition that Dresen was a menace to other employees although it may well have acquiesced to the prohibition in order to get agreement. We therefore conclude that Local 882, in agreeing to the prohibition on Dresen's attendance, was not representing the interests of other members of the bargaining unit. Any duty on the part of Local 882 to prevent Dresen's attendance arose solely in the context of its obligation to Central Care, not to other employees. Thus, any breach of obligations by Local 882 was a breach vis-à-vis Central Care to be enforced by Central Care, not Jensen individually. Having considered the issues we have concluded that Local 882's statutory duty of fair

representation owed to Jensen did not extend to the Agreement or to the events of April 14, 1997.

47 If we are wrong in our conclusion in that Local 882 owed no duty of fair representation to Jensen in these circumstances, then we conclude that facilitating Dresen's presence on the sidewalk at the premises of Central Care was at most an error in judgment committed by Saundra Johnson. We recognize that Johnson was a signatory to the Agreement and is a Local 882 executive officer. As such, she would be well aware of the condition requiring Dresen to stay away from the facility with one exception. By inviting him there, she took a deliberate and intentional step to breach the Agreement.

48 We are not persuaded by the argument that his presence on public property outside the facility did not constitute a breach of the Agreement. It is clear from the Agreement that the prohibition on attendance is in the context of prohibiting contact with employees and representatives of Central Care. Thus, apart from casual passage by the facility, we find that in these circumstances the attendance was a breach of the Agreement.

49 Nonetheless, however disingenuous her reasons may appear for having him present, we accept that Johnson genuinely believed that his presence was a matter of personal security to her. Moreover, we note that notwithstanding Local 882's failure to promptly communicate with Jensen after Jensen had lodged a complaint regarding Dresen's conduct, Local 882 moved swiftly to preclude any further incidents of the same kind involving Dresen. Thus, even if there was an intentional breach of the Agreement, in these circumstances we cannot find that it rises to the level of an abrogation by Local 882 of its statutory duty under Section 12.

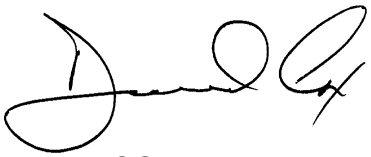
50 Earlier we stated that insofar as conduct outside the scope of Section 12 is concerned other remedial avenues may be available. Here, although no complaint was filed pursuant to Section 9 of the Code, we have no hesitation in concluding that Dresen's conduct in verbally attacking Jensen, for which Local 882 is nevertheless responsible, was an attempt to intimidate. Because there was no complaint filed by Jensen under this Section, we decline to give any remedy but do note that this conduct and Local 882's responsibility for it was one of the factors we took into consideration when developing a remedy in BCLRB No. B406/99.

51 Finally, Local 882 received its just due for soliciting Dresen's presence on the information line. Jensen, initially a Local 882 supporter, became a Local 882 detractor and it is anybody's guess how many others he may have persuaded to his view. Lindsay was right in that much more can be accomplished by being friendly and smiling (see BCLRB No. B406/99) than with abusive conduct. The mores the pity that other Local 882 supporters did not subscribe to that view.

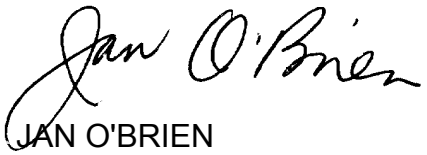
52 For all of the foregoing reasons, Jensen's complaint is dismissed.

LABOUR RELATIONS BOARD

V. A. PYLYPCHUK
VICE-CHAIR



DAVID COX
MEMBER



JAN O'BRIEN
MEMBER