LETTER DECISION
BCLRB No. B411/94

October 17, 1994

To Interested Parties:

Re: Joe Shayler and Boyd Bechler (the "Complainants") -and- United Association of the Plumbing & Pipefitting Industry of the United States & Canada, Local Union 170 (the "Union")
(Section 10 - Case No. 19414)

(i) Nature of the Application

This is an application by the Complainants under Section 10 of the *Labour Relations Code* for a declaration that the Union exceeded its jurisdiction under the Constitution by conducting a mail ballot for the purpose of approving certain audited financial statements. The Complainants also ask for an order declaring that the mail ballot conducted by the Union on June 27, 1994 is null and void. This decision solely addresses the preliminary issue of whether the Complainants should be required to exhaust the internal remedies provided by the Constitution as a pre-condition to bringing this application before the Board.

(ii) Background

The Complainant's dispute arises out of an attempt to approve the 1993 audited financial statement during a meeting of the local held on May 7, 1994. Because the members attending the meeting refused to adopt the financial statement, the Complainants allege certain representatives of the local determined that the financial statements should be ratified by a mail ballot and that such ballot should be conducted on or before June 27, 1994.

The Complainants appealed this decision to the General President, Marvin J. Boede, pursuant to the terms of the Constitution. Mr. Boede rejected the Complainants' appeal. The Complainants say they do not intend to appeal the decision of Mr. Boede to the General Executive Board pursuant to Section 46(f) of the Constitution.

Under Section 214 of the Constitution the General Executive Board has the power to

affirm, reverse, modify or amend any decision of the General President, as the General Executive Board, in its discretion, deems just and proper. Also pursuant to this section the General Executive Board has a discretion to appoint a hearing officer to conduct a hearing for the purpose of making findings and recommendations in respect of an appeal. By the terms of Section 46(a) of the Constitution, however, the General President is the presiding officer at all conventions and meetings of the General Executive Board. As the chair of the General Executive Board, the General President has authority to cast a deciding ballot if the members of the board are equally divided on an issue.

(iii) Argument

The Complainants ask the Board to exercise its discretion to hear the merits of their complaint under Section 10 of the Code without first requiring them to exhaust the internal review procedures contained in the Constitution. The Complainants make two arguments in support of this position. First, the Complainants say the appeal process sanctioned by the Constitution permits the decision maker to be a judge in his own cause thereby giving rise to a reasonable apprehension of bias and offending the maximum "*nemo judex in sua causa debet esse": R* v *Sussex Justices;* Ex-parte McCarthy, [1924] 1 K.B. 256, p. 259. The Complainants argue that where the appeal tribunal is conducted by the decision maker of the decision appealed from, and where the aggrieved person is not entitled to make representations at that appeal, the Board ought to hear the application without requiring the Complainants to appeal to the Executive Board. While the principles of natural justice may not apply to internal union review procedures in the same manner as they apply to a court or administrative tribunal, the Complainants argue Union members are entitled to an acceptable standard of fairness in the administration of the Constitution: *Matkin* v *Gallagher*, [1974] 2 N.S.L.R. 559 (NSW Sup. Ct.).

Second, the Complainants maintain the Board should not strictly apply the rule concerning exhaustion of internal remedies where the substance of the complaint is that the Union has violated the Constitution. In these circumstances, the Union is said to have acted without jurisdiction: *Wood, Wire and Metal Lathers' International Union et al.* v *United Brotherhood of Carpenters and Joiners of America et al.* (1973), 35 D.L.R. (3d) 714 (S.C.C.); *Howard et al.* v *Parrington et al.* (1971), 3 O.R. 659 (OHC); and *McRae* v *Local 1720, the Cargo and Gangway Watchmen's Union of the Port of St. John, N.B. et al.* (1953), 1 D.L.R. 328 (NBSC; Appeal Div.) at p. 333. The Complainants say the Union conducted a mail ballot to accept audited financial statements without any constitutional authority to do so after the elected members of the Union's finance committee refused to accept the statements during the local meeting. As a consequence, the Complainants argue the Union's actions were without jurisdiction.

The Union says the Complainants' application should be dismissed as premature because they have failed to exhaust all internal remedies available under the Constitution. The Union

argues that since Christopher Tottle, [1978] 2 Can LRBR 1, the Board has consistently required parties to first exhaust the internal remedies available under the Constitution. In this case, the Union says there is no reasonable basis for the Complainants to refuse to appeal the General President's decision to the General Executive Board. Pursuant to the relevant provisions of the Constitution, the Executive Board has full power to act as an appellate body. There is no reason the Complainants should be relieved of the requirement under the Constitution to appeal the General President's decision to the General Executive Board. The Union says the Complainants' argument with respect to a reasonable apprehension of bias is insufficient to justify a refusal to pursue an appeal; the Complainants must prove actual bias: *Vlahovic* v *Teamsters Joint Council No. 36* (1979), 17 B.C.L.R. 277 (B.C.S.C.) p. 281.

(iv) Analysis and Decision

It is a long established policy of the Board to require Complainants to exhaust the Union's internal appeal procedures prior to coming to the Board for relief. Unless the Complainants show the internal appeal procedures are impractical, unfair, or uneconomical, the Board will normally defer the matter until the final result is known: *TNL Services Ltd.,* BCLRB No. B19/94.

In the particular circumstances of this case, however, I am satisfied the Complainants should not be required to exhaust the Union's internal review procedures. The rule against bias is a fundamental principle of natural justice and failure to abide by this rule creates an apparent sense of unfairness recognized in the well known maxim, "justice must not only be done, but must manifestly and undoubtedly be seen to be done". The judicial authorities are consistent in their conclusion that unless authorized by statute, a quasi judicial decision maker will not be permitted to sit on what could properly be regarded as an appeal from their own decision: *R.* v *Alberta Securities Commission Ex-Parte Albrecht* (1962), 36 D.L.R. (2d) 199 (Alta. S.C.); *Law Society of Upper Canada* v *French* (1974), 49 D.L.R. (3d) 1 (S.C.C.); and *Schandler* v *Alberta Association of Architects,* [1989] 2 S.C.R. 848. As Mr. Justice Taylor says in *Bennett and Doman et al.* v *The Superintendent of Brokers and the British Columbia Securities Commission* (2 September 1994), Vancouver CA019280 (B.C.S.C.):

> Thus where the second proceeding, however described, is in the nature of appellate or supervisory review, it seems to be accepted, absent any contrary statutory provision, that the process will be one which calls for a "second opinion" to be given by others who may see things in a different light than did the original decision maker, or find in the first decision some error not apparent to the original maker. (p. 12)

While the content of the rule against bias may vary depending upon the nature of the review body in question, there is no doubt the rule applies to the internal review procedures contained in the Union's Constitution. The Union relies upon the following comments by Gould J. in *Vlahovic* v *Teamsters Joint Council No. 36, supra,* for the proposition that only actual bias will taint the proceedings of a domestic tribunal:

> In a domestic tribunal such as the one with which we are concerned here, a reasonable likelihood of bias very often exists. Indeed, the Plaintiff, by his membership in the Union and consequent agreement to abide by the Constitution, has impliedly consented to be subject to the disciplinary machinery of the Teamsters, and the jurisdiction of the trial panel for which the Constitution provides:…the trial panel was constituted in accordance with the Teamsters' Constitution, and it so happens that those people who duly constituted the trial panel were, not surprisingly, of the old guard, rather than supporters of the Plaintiff. In such a situation, as with a statutory tribunal which is specifically authorized by the Legislature to act, the Plaintiff must show the existence of 'actual bias':… (p. 281)

I do not interpret Gould J's comments as precluding a finding of unfairness where, as in this case, the very structure of the domestic tribunal violates a fundamental principle of natural justice. This is particularly true where the statute, and in this case Section 10 of the Code, specifically requires the trade union to administer its Constitution in a manner consistent with those principles.

Moreover, in the case at hand we do not have a situation where the General Executive Board is composed of members who merely do not view matters in the same light as the Complainants or who are politically opposed to the Complainants' position. Here, the General President, who rendered the first decision, intends to actively participate in the review of his own decision. Further, there is no indication from the Union that the General President intends to disqualify himself from sitting on the General Executive Board. In my view, a pre-determination on the issue and evidence of an overlap between the initial and the appellate decision makers comes perilously close to actual bias. The *Carswell Dictionary of Canadian Law* defines bias as:

> Anything which tends or is seen as tending to cause someone acting in a judicial capacity to decide a case on another basis than the evidence.

Clearly the fact the General President's original decision was to deny the Complainants' request tends or may be seen as tending to cause him to have a pre-conceived determination with

respect to their appeal. Moreover, the General President's participation in the deliberations of the General Executive Board taints the entire process: *Canadian Airline Flight Attendants Association and Mr. Val Udvarhely,* [1979] 2 Can LRBR 569 (Canada Board) and *Wire Rope Industries Ltd.,* IRC No. C19/88, (1988), 18 CLRBR (NS) 347.

Accordingly, I find it would be unfair and impractical to require the Complainants to exhaust the internal review procedures in the Union's Constitution as a pre-condition to addressing the merits of this application. The Board will be contacting the parties in the very near future to arrange suitable hearing dates for the Complainants' application.

LABOUR RELATIONS BOARD

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