BCLRB No. B90/94
(Reconsideration of IRC No. C244/92)

BRITISH COLUMBIA LABOUR RELATIONS BOARD

DONATO FRANCO

("Franco")

-and-

HOSPITAL EMPLOYEES' UNION

(the "Union")

-and-

NORTH AND WEST VANCOUVER HOSPITAL SOCIETY

(the "Employer")

PANEL: Stan Lanyon, Chair
Suzan Beattie, Vice-Chair
Emily M. Burke, Vice-Chair

COUNSEL: Craig Paterson, for Franco
G. James Baugh, for the Union
Harry Gray, for the Employer

CASE NO.: 13887

DATE OF DECISION: December 17, 1993

DATE OF REASONS: March 7, 1994

REASONS FOR THE BOARD'S DECISION

I. NATURE OF THE APPLICATION

The Union applied under Section 36 of the *Industrial Relations Act* seeking reconsideration of IRC No. C244/92. In that decision, the original panel held the Union handled Franco's grievance in an arbitrary manner, contrary to Section 7 of the Act. In its reconsideration application, the Union argued the law and policy of the Act was not properly interpreted. It also argued the original panel relied on uncorroborated hearsay evidence, contrary to the rules of natural justice.

On December 17, 1993 this Panel dismissed the Union's application for reconsideration. In doing so, we declined to consider unsolicited submissions, including one filed by Franco as a cross-appeal. A request for legal costs by Franco was also dismissed. Reasons for the latter two determinations were set out in Letter Decision BCLRB No. B430/93. Reasons for the dismissal of the Union's application for reconsideration follow.

II. TRANSITIONAL

This application was commenced before the Industrial Relations Council under Section 36 of the *Industrial Relations Act*. The *Labour Relations Code*, S.B.C. 1992, c. 82, (Bill 84) came into force on January 18, 1993, pursuant to Section 176 of the Code and B.C. Regulation 6/93. Section 115(1) of the Code continues the Industrial Relations Council as the Labour Relations Board; Section 115(2) provides that all business pending before the Council shall be continued before the Board. Section 161 of the Code further provides that:

> 161. All applications, proceedings, actions and inquiries commenced under the *Industrial Relations Act* shall be continued to their conclusion and treated for all purposes under

> and in conformity with this Code so far as it may be done consistently with this Code.

The parties were invited to make submissions on this legislative change. The Union and Franco made submissions.

Section 36 of the Act continues as Sections 141 and 142 of the Code, but with significant changes. The right to have a decision reconsidered under Section 36 of the Act was a substantive right. By applying for reconsideration under Section 36 prior to the enactment of the Code, the Union had an accrued right under the Act. (See *Teskey* v. *Law Society of British Columbia* (1990), 49 B.C.L.R. (2d) 223.) Therefore, the reconsideration jurisdiction that existed under the Act at the time the Union filed the Section 36 application with the Council is applicable to this application. We are satisfied that this application can be dealt with under the Act.

III. BACKGROUND

The sequence of events leading to this reconsideration is set out below. The facts are drawn entirely from the various panels' decisions.

1. March 18, 1991 - an expedited arbitration award was issued concerning two grievances filed on behalf of Franco. One grievance concerned the Employer's decision that Franco was unsuccessful in completing his three month probationary period as a Pharmacy Technician. The arbitrator concluded that Franco did not have the present ability to perform the job.

   The second grievance concerned Franco's attempt to use his seniority rights to bump into the position of Ward Clerk. The arbitrator determined Franco did not possess the ability to perform the Ward Clerk's duties.

2. Franco filed an application pursuant to Section 7 and Section 108 of the Act. He sought a review of the expedited arbitration award. He also alleged that the Union's conduct in handling both his grievance and his expedited arbitration hearing was arbitrary.

3. By letter decision dated September 5, 1991, the Council dismissed Franco's Section 108 application.

4. Franco's Section 7 hearing commenced on January 14, 1992. Notice was mailed to all parties. The Union notified Franco's counsel it did not intend to appear at the hearing. Neither the Employer nor its counsel was in attendance at the commencement of the Section 7 hearing.

After Franco completed his testimony with respect to the merits of his Section 7 complaint, but before his counsel began argument, the Vice-Chair was notified that the Employer had contacted the Council and desired to make representations to the panel. The Employer's counsel sought to make submissions with respect to the issue of remedy, if the outcome of the case involved the hospital. Counsel stated the Employer did not seek to re-open the case or apply for an adjournment. Franco's counsel had no objection to the Employer's late participation and proceeded with his argument.

During argument, Franco's counsel submitted the panel was bound, under the circumstances, to accept sworn testimony where it conflicted with the content of the written submissions filed by either the Employer or the Union. At the conclusion of counsel's argument on behalf of Franco, the Employer's counsel sought and received an adjournment to receive instructions.

When the hearing resumed, the Employer's counsel advised the panel he now sought to adduce evidence from written submissions. In particular, the Employer's counsel sought to introduce evidence with respect to the nature of the expedited arbitration proceedings contained in the

collective agreement. The Employer sought an order re-opening the Section 7 hearing for that purpose. By letter decision January 16, 1992 the panel granted the Employer's request.

5. On February 7, 1992, Franco's application for reconsideration of the letter decision dated January 16, 1992 was dismissed.

6. By letter decision dated February 27, 1992 the Council, on its own motion, reconsidered the letter decisions of January 16 and February 7, 1992. After reviewing the letter decisions and the submissions of Franco and the Employer (the Union did not make any submissions), Franco's application for reconsideration was allowed. In the circumstances of this case, it was determined that all parties had been presented with an opportunity to make full submissions. The Union elected not to appear. The Employer's counsel appeared before the panel prior to Franco's argument and did not then seek to introduce new evidence or request an adjournment. The Employer's counsel was permitted to participate in the hearing based on his statement that he wished to "make submissions with respect to the issue of remedy if the outcome of the case involved the hospital". The Employer therefore chose only to make submissions on the narrow issue of the appropriate remedy.

A party seeking a new hearing or the introduction of new evidence must provide a good and sufficient reason to support such a request. In this case, the panel stated:

> In particular, there was no evidence that the Employer did not receive notice of the hearing, or that the Employer had a legitimate excuse for the lateness of his [sic] appearance, or that the Employer had indicated an intention of participating in the hearing, or that the Employer was not aware of the substance of the complaint. If evidence of this kind had been presented, then the decision to order a new hearing may have been justified; however, that was clearly not the case. The general duty of fairness dictates that a party which has presented its entire case can expect the hearing to continue unless another party to the

> dispute presents good and sufficient reasons as to why that should not be so. The Employer provided no such reasons and consequently the hearing should continue from where it stood at the time of the Employer's motion to reopen the case. Section 21(1) did not mandate the ordering of a new hearing in the circumstances of this dispute. (p. 3)

The matter was remitted back to the original panel to continue its hearing. The Employer's counsel was entitled to make argument on remedy. Franco was entitled to respond to the Employer's submissions. It was held the Union had no standing to participate.

7. The Union applied for reconsideration of the letter decision dated February 27, 1992 and requested a stay of proceedings.

By a letter decision dated May 1, 1992, the decision of the panel dated February 27, 1992 was vacated to the extent that the decision denied the Union standing to make arguments on remedy in the Section 7 hearing. The request for a stay of proceedings was dismissed.

8. On May 4, 1992 the hearing continued with respect to the issue of remedy only. On October 1, 1992 the panel issued its decision with reasons to follow. It found the Union had violated Section 7(1) of the Act.

9. The original panel issued its reasons on December 23, 1992. The reasons stated, in part:

> I am logically driven to the conclusion, on the evidence before me, that the Union breached its duty under Section 7 of the Act by representing Franco in an imprudent, perfunctory and superficial manner. (IRC No. C244/92, p. 18)

> I am satisfied that Franco has shown that the Union's conduct of his grievance and arbitration hearing contravened Section 7 of the Act. I realize that this case is unusual in that neither the Union nor the Employer led sworn testimony with respect to the

> merits. They both did not participate in this proceeding when the hearing began. The Union, especially, must now live with the consequences of this choice. Additionally, having a [sic] made a positive assessment of Franco's credibility, I must, in all logic, prefer his sworn testimony where it contradicts the written submissions of the Union and Employer. ... (IRC No. C244/92, p. 17)

As a remedy, the original panel directed that both grievances be re-heard by a single arbitrator under Part 6 of the Act. The panel ordered the arbitrator to be chosen by the joint agreement of Franco, the Union, and the Employer. Franco was entitled to legal representation of his choice and the Union would be responsible for Franco's reasonable legal fees and disbursements. The Union would also be responsible for all of the arbitrator's costs and disbursements. In the event the arbitrator decided Franco was entitled to compensation, the arbitrator would decide the allocation of responsibility between the Union and the Employer. Finally, the Union was ordered to pay Franco reasonable legal fees and disbursements with respect to all steps in the Section 7 complaint only.

10. On January 15, 1993 the Union applied for reconsideration of the original panel's decision on two grounds: the original decision turned on a conclusion of law or general policy not properly interpreted by the original panel; and the decision of the original panel is tainted by a breach of natural justice.

For the reasons set out below, we dismissed both grounds for reconsideration.

IV. GROUNDS FOR REVIEW

As indicated, the argument of the Union is two-fold. The Union argues first that the decision turned on a conclusion of law or general policy not properly interpreted by the original panel; and second, was tainted by a breach

of natural justice. We shall deal with the law and policy first.

1. Law and Policy of the Act

The Union argues that the original panel held it violated Section 7 of the Act by reason of its failure to conduct the expedited arbitration in a manner which the original panel found acceptable. This constitutes a significant expansion of a union's duty of fair representation. It also constitutes a significant expansion of the scope of review under Section 7 of a union's conduct of an expedited arbitration. As such, the original decision is a departure from the past jurisprudence.

The Union submits it is the policy of the tribunal not to review under Section 7 either the evidence called or the arguments made by a union or its counsel: *Ed Cherak*, IRC No. C202/90, (1991), 10 CLRBR (2d) 59; *Lucio Samperi*, [1982] 2 Can LRBR 207 (CLRB). The policy of "party controlled compulsory grievance arbitration" is compromised when a tribunal can quash an expedited arbitration award and order the matter re-arbitrated based on the original panel's disapproval of the union's presentation of its case: *Samperi, supra*, at p. 214.

The Union states it should be free to utilize lay representatives (as was done in this expedited arbitration case), without fear of a Section 7 complaint. The tribunal should not second-guess the union representative's presentation at expedited arbitration as if the union's representatives were legally trained professionals. Moreover, the tribunal should be hesitant to interfere with an expedited arbitration process agreed to by the union and the employer which satisfies all legal requirements under the Act.

Franco argues that the mere fact his grievance went to expedited arbitration does not relieve the Union of its duty of fair representation. Franco also submits that expedited arbitration in itself does not demand a different, lesser duty of fair representation.

The Employer argues there is a need to apply different standards to an expedited arbitration process: *Pullman Trailmobile Canada Limited*, BCLRB No. 43/79, [1979] 2 Can LRBR 458. The original decision has the potential effect of hampering the ability of the parties to conduct an expedited hearing under their agreed upon process.

2. Natural Justice

The Union argues the original decision is tainted by a breach of natural justice. First, the Union submits the original panel relied upon the uncorroborated hearsay evidence of Franco, contrary to the rules of natural justice. Second, the Union says an adverse inference should be drawn from Franco's failure to call witnesses to the Section 7 hearing to corroborate his statements. Lastly, the Union argues the review panel is in just as good a position as the original panel to assess the facts.

In response, Franco lists numerous facts he suggests the Union has either omitted, misrepresented or stated erroneously. He points out the Union chose not to attend the Section 7 hearing. Further, the Union chose not to file a statutory declaration. The original panel relied on Franco's oral evidence as well as his written submissions, the written submissions of the Employer and the Union, and the exhibits introduced at the hearing by Franco.

The only portion of Franco's evidence which could be labelled "hearsay" was his statements regarding other Union members' complaints about the probationary period.

Franco argues the original panel applied the tests in *Faryna* v. *Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), and found him to be a credible witness. As well, Franco filed 184 pages of documentary evidence and submissions before the original panel. Finally, Franco points out the Union does not cite any specific error of fact which it alleged the original panel relied upon in its decision.

The Union responds that its summary of the facts is fair and accurate. It suggests that Franco misrepresented the facts and, as a result, misled the original panel. Therefore, the review panel should consider the performance evaluation evidence: *Harper* v. *Harper*, [1980] 1 S.C.R. 2, and *Robert Fullerton and Francine Fullerton* v. *District of Matsqui et al.*, (1992), 62 B.C.L.R. (2d) 273 (C.A.).

Secondly, the Union states the original panel's reliance on Franco's uncorroborated hearsay evidence in making crucial findings of fact renders the entire decision invalid. Specifically, the original panel found the Union in breach of Section 7 as a result of its failure to directly challenge the performance appraisals.

In the alternative, the original panel's failure to give proper consideration to the performance appraisals, although submitted as part of the Union's documentary evidence, is a denial of natural justice which invalidates the original panel's findings: *Bruce B. Nobbs*, IRC No. C244/88.

IV. ANALYSIS

1. Law and Policy

In the leading case of *Rayonier Canada (B.C.) Ltd.*, BCLRB No. 40/75, [1975] 2 Can LRBR 196, the Board articulated a number of fundamental principles concerning a union's duty of fair representation. These principles remain relevant today. A trade union's legal authority to negotiate and administer a collective agreement flows from the certification provisions of the Code. Certification is granted once a majority of employees in the bargaining unit select the union as their representative. The Board in *Rayonier* noted this is based on the rationale that "the bargaining power of each individual employee must be combined with that of all others to provide a sufficient countervailing force to the employer so as to secure the best overall bargain for the group" (pp. 200-201).

The grant of exclusive bargaining authority to a union includes regulation of the manner in which the power is exercised. In order to protect individual employees from the potential abuse of the majority, regulation of this power is codified in Section 7 of the *Industrial Relations Act* (now Section 12 of the *Labour Relations Code*).

Section 7 of the Act provides, in part, that "a trade union...shall not act in a manner that is arbitrary, discriminatory or in bad faith in representing any of the employees in an appropriate bargaining unit...". Section 12 of the Code contains an identical provision.

The Board's inquiry under Section 7 is limited to determining whether a union's actions have been "arbitrary, discriminatory or in bad faith". These three forms of conduct were described in *Rayonier*, *supra*, as follows:

> 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. (pp. 201-202)

The duty established by Section 7 does not require the union to be right in the decisions which it makes. Its duty is discharged when it does not act in a manner that is arbitrary, discriminatory, or in bad faith.

The legislative decision to limit the Board's inquiry is predicated upon a balance of competing interests inherent in the bargaining structure set up by the Code. The interests include those of employers and unions, as well as individuals. *Rayonier* referred to a discussion by Archibald Cox, where in

articulating the dynamics of the relationships, he said:

> Allowing an individual to carry a claim to arbitration whenever he is dissatisfied with the adjustment worked out by the company and the union treats issues that arise in the administration of a contract as if there were always a `right' interpretation to be divined from the instrument. It discourages the kind of day-to-day co-operation between company and union which is normally the mark of sound industrial relations -- a dynamic human relationship in which grievances are treated as problems to be solved and contract clauses serve as guideposts. Because management and employees are involved in continuing relationships, their disposition of grievance and the arbitrator's rulings may become a body of subordinate rules for the future conduct of the enterprise... When the interests of several groups conflict, or future needs run contrary to present desires, or when the individual's claim endangers group interests, the union's function is to resolve the competition by reaching an accommodation or striking a balance. The process is political. It involves a melange of power, numerical strength, mutual aid, reason, prejudice, and emotion. Limits must be placed on the authority of the group, but within the zone of fairness and rationality this method of self-government probably works better than the edicts of any outside tribunal. Cox, *Law and the National Labor Policy*, (1960) at pp. 83-84. (p. 204)

The Board concluded that a union has "considerable latitude in deciding whether to drop or settle grievances...even though the individual employee wishes them pursued through to arbitration". It noted, however, that considerable protection existed for the employee through an interpretation of Section 7 that took into account a variety of factors including the importance and validity of the claim, the previous practice and interests of other employees or the bargaining unit.

Since *Rayonier* the Board has frequently noted that even in the case of an individual's discharge from employment, an employee does not have an absolute right to have a grievance taken to arbitration. A union can settle or abandon a grievance even where the individual grievor disagrees, as long as the union's

decision is not made in a manner which is arbitrary, discriminatory or in bad faith. See, for example, *Richard Findlay*, IRC No. C144/90 (reconsideration dismissed by LD October 17, 1990; further reconsideration dismissed at BCLRB No. B140/93; judicial review pending); *Marie A. Ellison*, IRC No. C38/92 (Reconsideration of Letter Decision December 10, 1991).

Another area of review is whether the union has conducted an adequate investigation into the grievor's complaint. A union discharges its obligation where it makes sure it is aware of the circumstances, of the possible merits of the grievance, puts its mind to the case and comes to a reasoned decision whether to proceed. Again, there is no requirement that the union adopt or agree with the position of the grievor. See, for example, *George Reid*, IRC No. C199/89.

In reaching its conclusion, the Board regards the conduct of the union as a whole, rather than focusing on single aspects of the union's conduct which may be found lacking. The Board will more closely review the union's conduct based on the seriousness of the matter to the individual. Where the issue is termination of employment the Board has stated that the conduct of the union must be looked at more closely than in other circumstances: *Gordon Peacock*, IRC No. C20/90 (reconsideration dismissed).

The application of the duty of fair representation at the stage of arbitration has been commented upon by several labour boards. In *Lucio Samperi*, *supra*, the Canada Labour Board determined that the duty did not extend to the evaluation of the competence of union representatives or their counsel. In this way:

> ...[it] falls short of an avenue of appeal from arbitral decisions based upon a judgment by this Board's legal and non-legally trained members about the competence and performance of union representatives and their counsel.
>
> Human behaviour is too diverse for the establishment of unequivocal rules. We cannot say the duty of fair representation has absolutely no role

> during the arbitration process. There may be the extreme case where a union in bad faith merely puts on a charade with employer collusion or the union representative or counsel appears inebriated. Those like all cases in this area will turn on their facts. The message is, however, that this Board will not, through the duty of fair representation, microscopically review union conduct during arbitration proceedings. (pp. 214 -215)

In *Ed Cherak*, *supra*, the Council endorsed the *Samperi* decision and noted it would not "review under s. 7 the evidence called or the arguments made by the union and their counsel during an arbitration hearing" (p. 65). It went on to say:

> The union may breach s. 7 if the union proceeds to arbitration not having properly investigated a grievance such that the case could not be properly represented. The union may also breach s. 7 if it is in a clear conflict of interest with respect to its representation of the grievor.... (p. 65)

The question of the duty of fair representation during an arbitration hearing was also discussed in *Fritz Steisslinger*, IRC No. C231/91 (Reconsideration of C68/91). The original panel in *Steisslinger* concluded the union had breached its duty of fair representation by arranging to have the grievor terminated, and then "virtually assuring" a rejection of his grievance by asserting at the hearing that he had resigned and failing to advise him that he should appear at the hearing. In upholding the original panel, the review panel adopted the comments in *Samperi* that the duty of fair representation did not extend to evaluating the competence of union representatives or their counsel. It rejected the proposition, however, that the duty of fair representation has no role during the arbitration process.

In *Richard Findlay*, *supra*, the Council confirmed that it is the union and the employer who control the arbitration proceedings, even though the individual grievor may have substantial interests at stake. Where legal counsel is utilized, it is the union and not the individual who instructs the

lawyers. The union is not bound to conduct the arbitration according to the grievor's direction, provided the union conducts itself in a manner consistent with its duty of fair representation. This is consistent with the comments made in *Rayonier*, *supra*, concerning the competing interests generated by the continuing relationship in which the employer and employees are involved, and the need to find an accommodation reflective of this reality. The panel in *Findlay* further noted that the Council will not microscopically examine a union's preparation for or performance during arbitration proceedings. It reiterated that it is the conduct of the union as a whole which will be examined; decisions made in preparation for or during the arbitration proceeding will not be viewed in isolation.

In *Michel Blais*, IRC No. C195/92 (Reconsideration of IRC No. C215/91), the complainant had been terminated. At the arbitration, counsel for the union determined that Blais would not be a good witness. The union chose to put its case before the arbitration board by agreement of the parties with no witnesses being called to testify. The complainant's Section 7 application alleged that the decision of counsel for the union not to let him testify was an error in judgment which violated the duty of fair representation. The original panel found that the union had adequately investigated the grievance and that Blais had an opportunity to speak with counsel for the union prior to and during the arbitration hearing. While Blais did not agree with counsel's decisions regarding the conduct of the hearing, the union's conduct was not arbitrary, discriminatory nor in bad faith. Consequently, there was no violation of the duty of fair representation.

In summary, the case law illustrates that this Board will review a union's conduct during the entire grievance and arbitration process. This review is not a microscopic examination of each decision made in that process, but rather an examination of the union's conduct as a whole. The union can be wrong in its decisions as long as its conduct is not arbitrary, discriminatory or in bad faith.

The specific question which this Board is faced with, and one which other

panels will have to deal with in the future, is how the standard of review will apply to the quality of representation by unions in various forms of arbitration proceedings.

This Board will adopt a cautious, flexible, case by case approach to the application of the duty of fair representation during the conduct of an arbitration hearing. This is necessary because of the strong policy thrust to alternative forms of mid-contract dispute resolution. In British Columbia, the subcommittee of special advisors to the Minister of Labour stated, in their recommendations for labour law reform, that they had heard "persistent complaints from employers and unions concerning the delays and costs inherent in the present arbitration system" (p. 50). As a result, the subcommittee recommended a statutory form of expedited arbitration. They felt a quick and inexpensive system of arbitration was an essential component of a harmonious workplace.

The Board's approach in *Pullman Trailmobile Canada Limited*, *supra*, to the question of a "fair hearing" is instructive. Parties to a collective agreement may agree to resolve their disputes in specialized non-traditional arbitration settings. The process should be fair, but this standard "should be no more stringent than is logically and sensibly implied by the nature and usual characteristics of the agreed-upon method itself" (p. 465).

Unions and companies have a impressive array of dispute resolution mechanisms. The Board's review of the "fair hearing" requirements in those circumstances depends, in part, on the nature of the proceedings. So too will our review of whether fair representation was provided by the union in the conduct of a hearing take into account the nature of the dispute resolution process available to the parties. Depending on the process that is utilized it may be quite inappropriate to insist on all of the elements of a traditional arbitration (i.e., cross-examination of opposing witnesses or lengthy recitals of law), and a union will not be found in breach of its duty of fair representation for failure to provide the missing element. It is important to note that in choosing a mechanism to resolve a member's grievance the union is

governed by its duty of fair representation. Conduct regarding the choice of dispute resolution mechanism must not be arbitrary, discriminatory or in bad faith. In summary, no matter which method is chosen, the grievor is entitled to a fair hearing and "fair representation" at that hearing. The type of process is a factor to be considered by the Board in assessing whether a fair hearing was provided and whether a grievor was "fairly" represented.

We agree with the Union when it states that it should be free to utilize lay representatives without fear that the Board will "second guess" their representation before a tribunal. Applications before labour tribunals are designed to be less formal than a legal process before the courts: *Greg Bennett*, BCLRB No. 217/85 (Appeal of No. 117/85).

The Board will also apply self-restraint when examining the representational efforts of a union in any form of arbitration. The duty of fair representation does not extend to a detailed examination of the quality and expertise of the representative at an arbitration hearing. Rather, the conduct is examined only to ensure no arbitrary, discriminatory or bad faith conduct on the part of that representative.

This does not provide a basis for the Board to substitute its own views about the proper decisions made by the union representative or counsel simply because the Board may disagree. A panel hearing a duty of fair representation complaint based on the conduct of the arbitration hearing does not hear the evidence as it was presented; nor does it observe the witnesses. Given the vagaries of any dispute resolution hearing, the Board will exercise appropriate deference to the decisions of the representative or counsel presenting the case and will not microscopically examine every decision made regarding conduct of the case.

In the case before us there are two unusual features. First, the Union's failure to participate denied the original panel the benefit of the adversarial system in its fact-finding task. The Union's conduct in boycotting the Section 7 hearing has resulted in an "extreme case" that arguably will be restricted to

its unique facts. Second, Franco's grievance was processed through an expedited arbitration system. Both these factors were recognized by the original panel.

The Union argued the original panel significantly expanded the duty of fair representation by basing its conclusion on a disapproval of the union's presentation of its case. We disagree. While this Panel may not have reviewed the evidence and presentation in as much detail, the original panel examined the conduct of the Union as a whole and outlined several areas where the Union had treated Franco's grievance and arbitration hearing in a superficial manner. It referred to the cumulative effect of a number of relevant factors as set out in *Rayonier*, *supra*, in reaching its conclusion. In assessing the conduct of the Union, the original panel found:

> ...the Union treated his grievance and arbitration hearing in a superficial and capricious manner.... (p. 17)

Later the panel noted:

> ...the Union adopted an attitude of careless passivity in its representational efforts on Franco's behalf in the preparation and presentation of his grievances at arbitration. ... (p. 18)

In doing so, the panel noted the Union failed to lead a substantial body of relevant evidence which a reasonable investigation would have discovered; it neglected to cross-examined or critically oppose any of the Employer's witnesses; and it failed to critically challenge the Employer's performance standards and job appraisals. It went on to note:

> ...the *cumulative* effect of the evidence in this case satisfies me that the Union adopted an attitude of careless passivity in its representational efforts on Franco's behalf in the preparation and presentation of his grievances at arbitration. ... (p. 18)

In our view, these conclusions are not inconsistent with the policy articulated above. While the Board will exercise deference, particularly at the arbitration stage, the Union's conduct is not immune from review under Section 7 (now Section 12 of the Code). The Board does require that the union undertake a reasonable investigation (see *George Reid*, *supra*). Neglecting to cross-examine *any* employer witnesses (where, as stated by the original panel, "fruitful areas" existed) called for an explanation. As the Union chose not to provide this by its lack of participation, the original panel was left with this incongruous factor. Finally, the failure to challenge performance standards which Franco stated he was unaware of, contributed to the panel's overall assessment of the conduct.

We emphasize that one factor in isolation cannot be found to be determinative. Rather, it was the *cumulative* effect that led the original panel to its ultimate conclusion that the Union treated the grievance and arbitration hearing in a superficial and capricious manner. In its examination, the panel did not concern itself so much with the expertise and quality of the representation; rather, it examined whether the conduct of the Union at the arbitration hearing was arbitrary, discriminatory or in bad faith. We do not find this to be inconsistent with the principles as articulated in the law and policy of the Code.

We are not prepared to substitute our judgment on these findings of fact for the judgment of the original panel. We find the original panel, in applying the principles outlined in *Steisslinger*, *supra*, and *Blais*, *supra*, correctly interpreted the law and policy of the duty of fair representation and the scope of review of a union's conduct during an arbitration process. The Union's application for reconsideration under this ground is dismissed.

2. Natural Justice

The Act (and now the Code) does not provide a full-fledged appeal from an original panel's decision. The legislation did not intend the Board to be unduly legalistic in procedural matters. Nonetheless, the principles of

natural justice must be observed: *Harbourview Electric Ltd.*, IRC No. C212/88, at p. 3.

We have considered all of the Union's arguments under this ground and find each is without merit: *British Columbia Society of Respiratory Therapists*, IRC No. C101/89. The thrust of the Union's first argument is that Franco's evidence at the hearing was uncorroborated hearsay. As such, the Union argues the original panel breached natural justice by making findings of fact based on hearsay evidence.

The Union says the Vice-Chair relied on uncorroborated hearsay evidence regarding the content of performance appraisals, in finding the Union in breach of its duty as a result of its alleged failure:

> ...to critically challenge the Employer's performance standards and job appraisals before [the arbitrator]. This is especially important given Franco's evidence that he was not properly informed of production quotas, nor warned that his job was in jeopardy because of any alleged shortcomings. ... (p. 18)

In addition, the Vice-Chair is said to have relied on the following uncorroborated hearsay evidence:

- evidence of Rick Bell, a vocational rehabilitation consultant (IRC No. C244/92 at pp. 6-7);

- evidence of the Union's alleged knowledge of the importance of Franco's grievances to him (IRC No. C244/92 at p. 7); and

- evidence of the witnesses Franco wanted to call at the expedited arbitration hearing (IRC No. C244/92 at p. 7).

We disagree with all of these allegations. The evidence relied upon by the original panel was direct evidence of what occurred at the hearing at which

Franco was present. We note further that Franco's evidence that Bell, a vocational rehabilitation consultant, and other witnesses, were available to assist in the case, was evidence of that fact. The trade union did not rebut this evidence. Neither the Union nor the Employer chose to lead evidence at the hearing. We are satisfied that the original panel recognized the significance of this lack of participation. The original panel actively tested Franco's evidence and formed a favourable impression of Franco's credibility:

> Although he was clearly nervous, he gave his evidence in a quiet and straightforward manner. He responded to my questions in a direct and convincing fashion. Moreover, I have considered Franco's evidence and demeanour in light of the admonitions of the British Columbia Court of Appeal in Faryna v. Chorney, [1952] 2 DLR 354, and remain satisfied with respect to his veracity. Thus, although the Union urges me to utilize alleged "self-contradictory" statements of Franco and its written submissions to reject his testimony, I have, in cases of conflict between Franco's sworn evidence and the Union's and Employer's written submissions, decided to prefer the former. Accordingly, what follows reflects this determination. (pp. 4-5)

Finally, we note that whether or not some of this evidence is arguably hearsay, there was sufficient direct evidence to support the original panel's conclusion. That evidence came from Franco, who participated in both the arbitration hearing and the events leading up to that arbitration hearing.

Even if we were to accept the Union's position, we would follow the court in *International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 97* v. *Industrial Relations Council and Kerkhoff Contracting Ltd.* (1987), 16 B.C.L.R. (2d) 204 (B.C.S.C.), where it stated:

> There is a suggestion that because of inadequate disclosure on the declaration filed and served on the union, the board may have been led into error. But the union could have prevented that error (if in fact one was made) by participating in the application of which it had notice. ... (p. 209)

Secondly, the Union suggests an adverse inference should be drawn from Franco's failure to call witnesses to the Section 7 hearing to corroborate his testimony. Specifically, the testimony the Union wishes corroborated was Franco's statements regarding the probative value of the evidence he requested the Union to lead at the expedited arbitration hearing.

We are not prepared to draw such an inference. Had the Union participated in the Section 7 hearing it may have chosen to cross-examine Franco on several points in his evidence. It now attempts, on appeal, to establish an evidentiary basis from which it argues the review Panel should overturn findings of fact made by the original panel. We are not prepared to do so and reject this argument by the Union.

Thirdly, the Union submits the review Panel is in as good a position as the original panel to assess the facts. We disagree. The findings of fact disputed by the Union involve reconciling Franco's testimony and the exhibits filed at the Section 7 hearing against the written submissions of the Union and the Employer. As we have already stated, the original panel highlighted this very conflict at the beginning of its decision. The original panel preferred Franco's evidence because it found him to be a credible witness. The original panel stated:

> Additionally, having a [sic] made a positive assessment of Franco's credibility, I must, in all logic, prefer his sworn testimony where it contradicts the written submissions of the Union and the Employer. ... (p. 17)

The Union submits we should overlook the original panel's finding of credibility. We are not prepared to do so, and reject the Union's argument on this point.

The Union also takes issue with the original panel's assessment of the documentary evidence. It argues that the Employer's performance appraisals were not before the original panel. We base our rejection of this submission

on the following statement by the original panel: "In this regard, my review of the documentary evidence (including Franco's performance appraisals) indicates that there existed many fruitful areas for cross-examination. ..." (p. 17).

We disagree with the Union when it states evidence was either not disclosed, was suppressed or somehow fraudulently misrepresented before the original panel. We decline the suggestion from the Union that we should reach contrary findings of fact based on our assessment of the documentary evidence before the original panel.

In this case, there is no question the parties received notice of the hearing. The Union advised Franco's counsel it would not be appearing. Counsel for the Employer attended at the conclusion of Franco's oral testimony. As we explained earlier, the Employer's application to reopen the case in order to lead evidence on the merits was denied. All parties filed written submissions and attended a second hearing with respect to the issue of remedy only.

In these circumstances, we are not prepared to find the Union was denied a fair hearing. We conclude the Union was the author of its own misfortune. As such, it cannot now complain about the findings of fact and conclusions of the original panel: *White Lodge Rest Home*, IRC No. C251/89, at p. 3. (See also *British Columbia Society of Respiratory Therapists*, IRC No. C101/89, approved in (1991), 59 D.C.L.R. (2d) (B.C.C.A.).)

For all of the above reasons, the application for reconsideration by the Union is dismissed.

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