IN THE MATTER OF:

A POLICY GRIEVANCE DATED AUGUST 30, 2022; AND

AN ARBITRATION OF THE SAID GRIEVANCE;

BETWEEN:

The International Association of Fire Fighters, Local 3270,

UNION,

- and -

Dutchak Holdings Ltd., Operating as Rosthern and District Ambulance Care, WPD Ambulance Care & WPD Ambulance - Lloydminster,

EMPLOYER.

AWARD

APPEARANCES:

For the Union: Gary L. Bainbridge, KC
For the Employer: Gordon D. Hamilton

BEFORE:

T. F. (Ted) Koskie, B.Sc., J.D., Sole Arbitrator

AWARD DATE:

September 6, 2024

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I. BACKGROUND

[1] The International Association of Fire Fighters, Local 3270 (the "Union" or the "IAFF") has filed a grievance pursuant to its Collective Agreement (the "CBA") with Dutchak Holdings Ltd., Operating as Rosthern and District Ambulance Care, WPD Ambulance Care and WPD Ambulance - Lloydminster (the "Employer" or "WPD").

[2] The Union is the certified bargaining agent for approximately sixty employees across the Employer's three locations. The Union was first certified for this Employer on January 9, 2018.

[3] The Employer is an accredited ambulance service that provides emergency and non-emergency pre-hospital care and inter-facility transfers using Basic Life Support and Advanced Life Support ambulances.

[4] The grievance is dated August 30, 2022, (the "Grievance") and alleges that the Employer has:

a) refused to notify the Union of disciplinary meetings with members of the bargaining unit; and

b) failed to provide it with copies of employee waivers of their association representation rights (the "Waivers").

[5] The Union argues that these actions breach Article 7.01 - Progressive Discipline and Article 7.02 - Association Representation of the CBA. It seeks the following redress:

a) a declaration that the Employer has breached the CBA;

b) an Order that the Employer provide to the Union copies of any waivers signed by Union members pursuant to Article 7.02 of the CBA;

c) an Order that the Employer provide to the Union copies of any disciplinary documents placed on any employee's file;

d) an Order that the time limits to engage in pre-grievance discussion and to file a grievance under Article 8.02 and 8.03 commence, regarding a particular employee, at the time the Union receives from the Employer copies of any disciplinary documents that may have been placed on that Employee's file, or confirmation of the discipline rendered on that employee;

e) a Compliance Order that the Employer shall in future provide to the Union copies of any waivers that Union members may sign pursuant to Article 7.02 of the CBA and all disciplinary documents that may be placed on any employee's file; and

f) an Order that the Employer pay to the Union $20,000.00 in damages.

[6] Pursuant to Article 9 of the CBA, the Grievance was referred to binding arbitration. The parties agreed to appoint me as sole arbitrator to hear and resolve the Grievance.

[7] Before the hearing of this matter, the Union applied for an Order that would compel the Employer to provide the names of the employees that had been disciplined, but had waived their right to Union representation, for the 24-month period before the date of the Grievance.

[8] I granted the Union's application for production and ordered the Employer to disclose to the Union on or before 5:00 p.m. Wednesday, October 25, 2023, the names of those employees whom it has disciplined, but who waived their right to Union representation, for the 24-month period before the date of the Grievance (August 30, 2022).

[9] Now, I address the Policy Grievance filed by the Union regarding the Employer's refusal to provide copies of the employee waivers obtained pursuant to Article 7.02 of the CBA.

II. FACTS

[10] The facts that underlie this dispute are straightforward and generally not contested by the parties.

[11] The Employer alleges that its practice, when an employee indicates his or her wish to waive his or her right to Union Representation at a discipline meeting, is to have that employee sign a standardized waiver.

[12] The Employer concedes that it does not transmit a copy of that waiver to the Union. The Employer also does not transmit any information to the Union regarding any discipline it has meted in circumstances where an employee has waived his or her right to Union Representation at a discipline meeting.

[13] The Employer presented no information about whether the employees are informed of the disciplinary nature of the meeting before being asked to attend. The Employer also did not indicate whether or how the employee is informed of their right to have a Union representative present, particularly whether this is done before the disciplinary meeting.

[14] The Union represented that its understanding is that employees are not informed of their rights in advance. Rather, they are invited to a meeting with management personnel and are then asked whether they would like to have a Union representative present.

[15] If the employee indicates that he or she would like a Union representative, the Union is contacted and notified of the meeting.

[16] If the employee declines to have a Union representative present, then the Employer requires the employee to sign a waiver. When this is done, the Employer does not notify the Union of the meeting, whom it disciplined, what they were disciplined for, or what discipline was imposed. It also does not provide a copy of the waiver to the Union or to the employee.

[17] Being a policy grievance, the details of each disciplinary event are not before me.

[18] However, in the case of four noted instances on which the Employer disciplined a member of the bargaining unit during the relevant time, the Employer claims to have obtained a waiver from the employee and did not notify the Union of the discipline or give it a copy of the waiver, consistent

with the practices described above.

III. ISSUES

[19] This award addresses the following issues:

a) whether the Employer violated the CBA by refusing to provide copies of the waivers or information regarding employee discipline to the Union;

b) whether the Union is estopped from pursuing this grievance;

c) if there is a breach of the CBA, whether same entitles the Union to the requested relief including:

   i) relief against the time limits relating to any grievances that may be filed in response to any disciplinary documents and notice of discipline received pursuant to this grievance; and

   ii) an Order for damages.

IV. DECISION

[20] For the reasons that follow, I find that the Employer violated Article 7.02 of the CBA by failing to provide copies of the employee waivers to the Union. I further conclude that the Employer violated the implied terms of the CBA by failing to inform the Union of discipline related to members of the bargaining unit who signed waivers.

[21] I have decided that this is an appropriate case in which to exercise my discretion under *The Saskatchewan Employment Act* to extend the time limits relating to any grievances that may be filed in response to the previously undisclosed discipline.

[22] I decline to make any order for additional damages.

[23] I therefore Order that:

a) the Employer provide to the Union a copy of any employee waivers signed pursuant to Article 7.02 of the CBA;

b) the Employer provide to the Union copies of any disciplinary documents placed on an employee's file that have not been previously disclosed as a result of an employee's waiver;

c) the Employer provide to the Union confirmation and particulars of any discipline that it rendered on an employee that signed a waiver;

d) any time limit to engage in pre-grievance discussion and to file a grievance under Article 8.02 and 8.03 of the CBA commence, regarding a particular employee, at the time the Union receives copies of the relevant disciplinary documents and notice of particulars of discipline; and

e) the Employer will, in future, provide to the Union copies of any waivers that Union members may sign pursuant to Article 7.02 of the CBA, and particulars of any discipline imposed upon such members and copies of any disciplinary documents that may be placed on any employee's file.

V. REASONS

A. LEGISLATION

[24] The relevant provisions of *The Saskatchewan Employment Act*[1] (the "*SEA*") are:

[1] S.S. 2013, c. S-15.1

DIVISION 3
Acquisition and Termination of Bargaining Rights

. . .

Certification order
6-13(1) If, after a vote is taken in accordance with section 6-12, the board is satisfied that a majority of votes that are cast favour certification of the union as the bargaining agent for a unit of employees, the board shall issue an order:

(a) certifying the union as the bargaining agent for that unit; and

. . .

(2) If a union is certified as the bargaining agent for a bargaining unit:

(a) the union has exclusive authority to engage in collective bargaining for the employees in the bargaining unit and to bind it by a collective agreement until the order certifying the union is cancelled; and

. . .

Subdivision 3
Resolution of Collective Agreement Disputes

Arbitration to settle disputes
6-45(1) Subject to subsections (2) and (3), all disputes between the parties to a collective agreement or persons bound by the collective agreement or on whose behalf the collective agreement was entered into respecting its meaning, application or alleged contravention, including a question as to whether a matter is arbitrable, are to be settled by arbitration after exhausting any grievance procedure established by the collective agreement.

. . .

Rules of arbitration
6-49(1) Subsections (2) to (4) apply to all arbitrations required to be conducted in accordance with sections 6-45 to 6-48.

. . .

(3) An arbitrator or an arbitration board may:

(a) exercise the powers that are vested in the Court of Queen's Bench for the trial of civil actions:

(i) to summon and enforce the attendance of witnesses;

(ii) to compel witnesses to give evidence on oath or otherwise; and

(iii) to compel witnesses to produce documents or things;

. . .

(c) receive and accept any evidence and information on oath, affirmation, affidavit or otherwise

that the arbitrator or arbitration board considers appropriate, whether admissible in a court of law or not;

. . .

(f) relieve, on terms that in the arbitrator's or arbitration board's opinion are just and reasonable, against breaches of time limits set out in the collective agreement with respect to a grievance procedure or an arbitration procedure;

. . .

DIVISION 11
Unions and Union Members

. . .

Fair representation
6-59(1) An employee who is or a former employee who was a member of the union has a right to be fairly represented by the union that is or was the employee's or former employee's bargaining agent with respect to the employee's or former employee's rights pursuant to a collective agreement or this Part.

(2) Without restricting the generality of subsection (1), a union shall not act in a manner that is arbitrary, discriminatory or in bad faith in considering whether to represent or in representing an employee or former employee.

. . .

B. THE COLLECTIVE BARGAINING AGREEMENT

[25] In deciding this matter, I have had regard for the entire collective bargaining agreement between the Union and Employer (the "CBA"). However, in particular, I considered the following provisions:

ARTICLE 3 - ASSOCIATION RECOGNITION

3.01 Recognition

The Employer recognizes the Association as the sole collective bargaining agent for non-supervisory employees covered by this agreement. . . . .

. . .

ARTICLE 6 - MANAGEMENT RIGHTS

6.01 The Association recognizes that the Employer retains the sole and exclusive right to manage its business as it sees fit in all respects and; Subject to the terms of this Agreement it is the right of the Employer to:

. . .

(d) Maintain order, discipline and efficiency and establish and enforce reasonable rules, policies, procedures and regulations governing the Employees;

(e) Promote, demote, discipline, suspend or discharge any Employee, provided however that any such action may be subject to the grievance procedure.

. . .

ARTICLE 7 - DISCIPLINE

7.01 Progressive Discipline

The parties to this agreement recognize and endorse the principles of progressive discipline, however, it is understood that certain misconduct or infraction may warrant immediate suspension or dismissal at a first offence as determined by the Employer. Such decisions are subject to the grievance procedure.

7.02 Association Representation

In cases where the Employer considers the Employee's conduct warrants a written reprimand or more serious disciplinary action, the Employee may elect to have an Association representative or designate in attendance at the disciplinary meeting. The Employer will have the Employee sign a letter indicating their refusal to have an Association representative if that choice was made.

An Association representative or designate will be available for disciplinary meetings in a timely manner, when given reasonable notice. Attendance may be in person, via telephone or other electronic means.

ARTICLE 8- GRIEVANCE PROCEDURE

8.01 Definition

A grievance shall be defined as any difference or dispute between the Employer and any Employee(s), or the Association regarding the interpretation, meaning, operation, application or alleged violation of this Agreement. Neither party to this Agreement shall cause a suspension of work because of a grievance.

8.02 Pre-Grievance Discussion

Either party shall initiate a written request for a meeting for the purpose of resolving a difference prior to filing a formal grievance. Before filing a formal grievance, the Employee and Manager shall meet to discuss and attempt to resolve the complaint. The complaint must be presented within twenty-one (21) calendar days after the event or circumstances giving rise to the complaint came to the attention or should have come to the attention of the Employee or Employees raising the complaint. Following the meeting a written response will be provided within seven (7) calendar days if the complaint is not resolved.

8.03 Grievance Filing Time Limits

No formal grievance shall be considered which is not presented within fourteen (14) calendar days after the response is received in accordance with 8.02.

8.04 Grievance Particulars

Any grievance submitted shall specify the Article and Section of the Agreement alleged to have been violated, the circumstances and occurrence leading to the alleged violation and the redress or adjustment requested. It shall not be sufficient to allege violation of the Agreement as a whole.

8.05 Grievance Process

Where a formal grievance is filed, the parties to this Agreement shall make an earnest effort to resolve such differences through the following procedure.

STEP 1:

Either the aggrieved Employee with the Association Representative on behalf of the aggrieved employee shall present a written grievance to the Manager. If an adjustment satisfactory to the Employee concerned is not made within fourteen (14) calendar days of the time it is brought to the attention of that person, the grievance shall be processed as follows or considered settled.

8.06 Referral to Arbitration

If satisfactory settlement is not reached in Step 1, either party may request arbitration as provided in Article 9, providing the request is made in writing within, but not after twenty one (21) calendar days of the decision in Step 1.

8.07 Grievance Meetings

An Association Representative who is assigned to discuss a grievance with the Employer shall not lose regular wages as a result of time spent during that Employee's regular working hours in discussing the grievance in meetings with the Employer.

8.08 Grievance Information

The Employer will provide information relevant to the grievance to the Association. In the event that the consent of the Employee or Employees concerned is required, such consent shall be obtained by the Association and provided to the Employer.

8.09 Time Limits

a) Should the Employer fail to reply within the required time limits, the Association shall have the right to proceed to the next step.

b) Should the Association fail to proceed to the next step within the required time limits, the grievance shall be considered settled in accordance with the Employer's answer at the last step, and the grievance shall be deemed to be abandoned.

The time limits specified in Article 8 are mandatory and not merely directory.

8.10 Extension of Time Limits

The time limits specified in Article 8 may be extended by written agreement of the Employer and the Association.

. . .

ARTICLE 19- PERSONNEL FILE

19.01 Personnel File

Upon reasonable notice an Employee shall have access to review their personnel file, pertaining to work performance or conduct except for references from previous employers.

Upon making prior arrangements with the Employer, and with written consent from the Employee(s) in question, members of Local 3270 Executive shall have access to the personnel file of said Employee(s). The Association representative may copy documents deemed necessary for the purpose of grievance investigation in cooperation with the Manager. The Association shall not have access to any information on said employee(s) regarding previous employer(s).

. . .

C. ANALYSIS

1. Whether the Employer Violated the CBA

[26] The Union argues that the Employer's policy of refusing to provide copies of employee waivers, and of refusing to notify the Union of employee discipline where such a waiver has been signed, is a violation of the CBA.

[27] The Union references Arbitrator Elliot in *Imperial Oil Strathcona Refinery and C.E.P., Loc. 777 (Re)*[2] and Arbitrator Hood in *Saskatchewan Telecommunications v Communications, Energy and Paperworkers Union of Canada, Locals 1-S and 2-S*[3] for the general principles to be applied to collective agreement interpretation:

> The objective of the interpretation of a collective agreement is to determine the mutual intentions of the parties at the time the agreement is made. There are rules that are followed to determine this intention, such rules are generally consistent with the interpretation of ordinary contracts include:
>
> - The presumption is that the parties' intentions are manifest in the words that are used. Had the parties intended something different, they would have said so.
> - The words used are to be construed in their ordinary and grammatical sense, except to the extent that some modification is necessary to avoid absurdity, inconsistency or repugnancy. The words are to be given their plain, literal and ordinary meaning unless the context

[2]2004 CanLII 94735

[3]2009 S.L.A.A. No.4

> otherwise requires. If competing interpretations are possible, deference is given to reasonableness; absurdity is to be avoided.
>
> - Words and phrases should not be interpreted in isolation, but rather in the context of the agreement in its entirety. The agreement should be read as a whole to reconcile all terms but yet, to the extent possible, provide meaning to all words and without unnecessarily rendering words superfluous.
>
> - If the operative part of the agreement is unclear, recitals (unless otherwise stated) may be used to control, cut down, or modify the operative part. Headings in the agreement (unless otherwise stated) may be used to explain the meanings of the paragraphs that follow.[4]

[28] The Union also relies on *Saskatoon (City) and IBEW, Local 319*[5] for the proposition that arbitrators should consider the "the surrounding circumstances of the contract–often referred to as the "factual matrix" in interpreting contractual language."

[29] Finally, the Union argues, relying on several authorities, that there is no onus, or presumptive burden, on either party when interpreting the CBA.

[30] I agree with all of the foregoing and will apply those principles in interpreting the CBA here. I also add the following comments from Arbitrator Tims in *OLG - Point Edward Casino* v *Teamsters Local Union No 879*[6] on the proper interpretation of Union representation clauses:

> In so concluding, I have considered the comments of the arbitrator in *Re Riverdale Hospital*, *supra*, regarding the basis for and the purpose of Union representation clauses. Arbitrator Surdykowski addressed the rights and obligations of a trade union once it obtains bargaining rights for a bargaining unit pursuant to the *Labour Relations Act, 1995*. He further noted that Union representation clauses ensure that employees have the support and advice of their Union, "particularly where their employment rights and even continued employment may be in jeopardy." (parag 26)
>
> I accept that the Union's status as exclusive bargaining agent with its associated rights and obligations should inform my reading of the Union representation language agreed to by the parties, and that such provisions should be broadly construed, taking into account such statutory context.
>
> I also accept that I should bear in mind the purposes served by Union representation language when construing the contractual provisions in issue here. In *Re London Purchaseco*, *supra*, Arbitrator Etherington usefully summarized what arbitrators have characterized as the primary purposes of such

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[4] *Ibid* at para. 36

[5] 2021 CarswellSask 185

[6] 2013 CanLII 8122

provisions, and noted in part that they function as a safeguard against the making of concessions.

[31] The Union argues that:

a) its status as the exclusive bargaining agent is foundational and that any agreement between the Employer and a member of the bargaining unit should be disclosed to the Union;

b) receiving Union representation and assistance regarding discipline matters is a fundamental workplace right;

c) the Union is prevented from fulfilling its role if it is not informed of disciplinary matters;

d) employers are expected to transmit certain information, including some confidential information, to the Union to facilitate labour relations activity; and

e) Article 7.02 does not exclude the Union from the disciplinary process–it may still file grievances on behalf of the bargaining unit in relation to employee discipline, even without the cooperation of the individual employee.

[32] The Employer argues that:

a) there is no requirement in the CBA that the Employer provide waivers signed pursuant to Article 7.02 to the Union;

b) the CBA is silent on whether copies of disciplinary documents must be provided to the Union where a waiver has been signed;

c) the ability to "opt-out" of Union representation was important to the Employer and the subject of direct bargaining between the parties; and

d) the scope of the Union representation right is determined by the specific language of the

CBA, and in this case is narrowed by the ability for an employee to waive that right.

[33] None of the authorities relied on by the parties address the specific issue of whether the Union is entitled to receive copies of a waiver of an employee's right to have Union Representation. This is likely because, as admitted by both of the parties here, Article 7.02 is an uncommon provision.

[34] The parties agree that the CBA protects the right of employees to have Union representation in the disciplinary process. This right is both explicit in Article 7.02 and implied from the status of the Union as the exclusive representative. This is recounted in Brown & Beatty[7] at §7:8:

> One of the most important ways that collective agreements shape the structure of the disciplinary process is by guaranteeing that employees will be able to call on their unions for help when faced with the threat of discipline. Representing employees during disciplinary meetings, interviews, etc. has always been seen as a fundamental, substantive right flowing from the union's statutory designation as the exclusive representative of all employees covered by the agreement in all of their dealings over terms and conditions of employment with the employer, including last-chance agreements. The expectation is that, with their experience, union representatives can improve the disciplinary process and make it more balanced by giving employees counsel and advice, and by directing the employer's attention to matters that it might otherwise fail to consider.

[35] Where the parties differ is with respect to the waiver provision in Article 7.02. Under the Employer's reading, when an employee signs a waiver under that provision, they are presumed to be choosing to exclude the Union from the disciplinary process. The Union's narrower reading is that they have waived the right to have a Union representative present at the disciplinary meeting, but that the Union still has an obligation to ensure the employee is aware of their rights, that their waiver was genuine, and to choose whether to bring a grievance in relation to any discipline that was actually imposed.

[36] As I read the CBA, Article 7.02 allows an employee to waive their right to have a Union representative present at disciplinary meetings, no more and no less. The Employer construes this provision too broadly when they claim that the Union can be entirely excluded from the disciplinary process because an employee signs a waiver.

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[7]Brown, D.J.M., Beatty, D. M., & Beatty, A.J. (Eds.). (2019). *Canadian Labour Arbitration, 5th ed.* Thomson Reuters

[37] The Employer argues that the CBA must be read narrowly, and they urge against "reading in" any substantive rights. They claim that the silence of the CBA on the specific question of whether the Employer has a duty to provide the requested waivers and disciplinary materials is dispositive.

[38] *Re County of Athabasca No. 12 and Alberta Teachers' Association, Athabasca Local*[8] provides a useful overview of implied terms and when they can reasonably be relied on in the context of a collective bargaining agreement.

> Issue No. 1
>
> In its interim decision dated July 7, 1977, this arbitration board indicated its concern that art. 16.04 may prevent it from determining a subject-matter not covered by the terms of the collective bar-gaining agreement, and as such, the first issue that this arbitration board must deal with is whether the provisions of art. 16.04 prevent this arbitration board from resolving a grievance with respect to a breach of an implied term of the collective bargaining agreement. Article 16.04 provides as follows:
>
> > The arbitration board shall not change, amend or alter any of the terms of this agreement. All grievances or differences submitted shall present an arbitrable issue under this agreement, and shall not depend on or involve an issue or con-tention by either party that is contrary to any provision of this agreement or that involves the determination of a subject matter not covered by, or arising during the term of this agreement.
>
> The effect of an implied term in a contract is exactly the same as the effect of an express term and an implied term is said to be "actually present in the contract and intended by the parties to be there, but is simply not expressed in so many words": *Côté, An Introduction to the Law of Contract (1974)*, p. 158; see also 12 Hals., 4th ed., p. 662, para. 1541. It is the conclusion of this arbitration board that an implied term of a collective bargaining agreement is no less a term than is an express term of a collective bargaining agreement and that a grievance with respect to an alleged implied term is therefore a grievance which involves a subject-matter covered by the agreement within the meaning of art. 16.04.
>
> For these reasons, it is the conclusion of this arbitration board that this grievance does not come within the proscription of art. 16.04.
>
> Issue No. 2
>
> Does an arbitration board have jurisdiction to imply a term into a collective bargaining agreement?
>
> It was submitted on behalf of the county that there is no authority to support the proposition that an arbitration board, as opposed to a Court, has the jurisdiction to imply a term into a collective bar-gaining agreement and that a review of the arbitration jurisprudence to date does not reflect any trend on the part of arbitrators to imply terms into a collective bargaining agreement.

[8] 1978 CanLII 3532

Counsel for the association submitted that the decision of the Supreme Court of Canada in *Winnipeg Teachers' Assoc. No. 1 of Manitoba Teachers' Society* v. *Winnipeg School Division No. 1* (1975), 59 D.L.R. (3d) 228, [1976] 2 S.C.R. 695, [1976] 1 W.W.R. 403, 7 N.R. 91, particularly the dissenting opinion of Chief Justice Laskin, supported the proposition that an arbitration board had jurisdiction to imply a term into a collective bargaining agreement.

Counsel for the county submitted that the *Winnipeg Teachers'* case was distinguishable on the basis of the incorporation of the provisions of the Code of Rules and Regulations into the collective bargaining agreement in that case. Secondly, it was submitted that the *Winnipeg Teachers'* case is an example of a Court implying a term into a collective bargaining agreement and the county submits that there never has been a doubt about the jurisdiction of a Court to imply terms into a contractual relationship.

An analysis of the decision of the Supreme Court of Canada in the *Winnipeg Teachers'* case leads to the conclusion that all of the Judges of the Supreme Court of Canada agreed with the proposition that a contractual obligation to provide noon-hour supervision could be implied into the collective bargaining agreement in that case. At p. 243 D.L.R., p. 408 W.W.R., Mr. Justice Martland states that he agrees with the following view expressed by Hall, J.A., in the Manitoba Court of Appeal [36 D.L.R. (3d) 736 at p. 742, [1973] 4 W.W.R. 623], namely:

> "It is therefore my opinion that school-teachers are under a duty arising from an implied contractual obligation to provide noon-hour supervision at secondary schools under the direction of the school principal."

Mr. Justice Martland further states that he also agrees with the reasons of Chief Justice Laskin on this point. At pp. 234-5 D.L.R., p. 417 W.W.R., Chief Justice Laskin (who dissented on the question of damages) referred to the fact that the Court of Appeal had found an implied contractual obligation on the teachers to provide noon-hour supervision and stated as follows, namely:

> I am satisfied that there is nothing in the collective agreement, nor in any of the documents or legislation which are made part thereof or to which it is subject, that expressly puts upon the teachers a duty of noon-hour supervision.

At p. 236 D.L.R., p. 418 W.W.R., Chief Justice Laskin concluded as follows:

> I dispose of the first point on the simple ground that the parties' collective relations envisage that directions will be given from time to time by the principals of the schools which may, when issued, become part of the duties to be dis-charged under the collective agreement.[9]

...

It is, however, the opinion of this arbitration board that, as a matter of legal principle, an arbitration board has the jurisdiction to imply a term into a collective bargaining agreement.

A collective bargaining agreement is a contract and it is well established that conceptually the task of interpreting a collective bargaining agreement is no different than the task of interpreting any other contract and arbitrators have therefore applied to the interpretation of collective bargaining agreements the rules of construction formulated by the Courts with respect to the interpretation of contracts: see Brown and Beatty, *Canadian Labour Arbitration (1977)*, paras. 4:2000 to 4:2300, at pp. 158-69, and Palmer, *Collective Agreement Arbitration in Canada*, pp. 95-104.

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[9] *Ibid* at pg. 2-4

The goal of any person charged with the duty of interpreting a contract is to discover the intention of the parties. An examination of the standard references on the law of contracts makes it clear that the Courts will imply an unexpressed term in a contract when the same is necessary to give effect to the presumed intention of the parties: see the following, namely, (a) 9 Hals., 4th ed., pp. 229-30, para. 355; (b) Fridman, *Law of Contract in Canada* (1976), at pp. 258-60; (c) *Chitty on Contracts*, 23rd ed. (1968), vol. 1, paras. 692 to 696, pp. 313-5; (d) Treitel, Law of Contract, 4th ed. (1975), pp. 128-30; (e) Cheshire and Fifoot's *Law of Contract*, 9th ed. (1976), pp. 132-5; (f) Côté, *An Introduction to the Law of Contract* (1974), pp. 158-9.

The above described references indicate that there are three kinds of implied terms, namely:

1. Terms implied by law.
2. Terms implied by custom.
3. Terms implied in fact.

See 9 Hals., 4th ed., p. 225, para. 351, and Treitel, *Law of Contract*, 4th ed., p. 128.

A term is said to be implied by law when it is added to a contract to promote fairness, justice and equity even though it is not clear that the parties would have agreed to include the same in the con-tract. Terms implied by law are not therefore based on the presumed intention of the parties, but depend on considerations of public policy.

A term is said to be implied by custom when a contract is silent on a particular point and it can be shown that custom or usage normally governs the particular type of contract in question. Terms implied by custom are based on the presumed intention of the parties, e.g., where such custom or usage exists, it is presumed that the parties did not intend to express the entire contract between them, but intended to contract in accordance with the established custom or usage.

A term is said to be implied in fact when its existence is derived from the facts and circumstances surrounding a particular transaction. A term will be implied in fact if, from the language of the contract and the circumstances under which it was entered into, it can be concluded that the parties must have intended the provision in question. A term will be implied in fact if it is necessary to give business efficacy to the transaction and prevent such failure of consideration as cannot have been within the contemplation of either side. Terms implied in fact are therefore based on the presumed intention of the parties.

From the above, it can be seen that terms implied by custom and terms implied in fact are based on the presumed intention of the parties and that the implication of these terms is a part of the function of interpreting a contract, and as such, it is the opinion of this arbitration board that it does have jurisdiction to resolve a grievance with respect to terms implied by custom or terms implied in fact.

It is the further opinion of this arbitration board that it does not have jurisdiction to deal with a grievance based on a term implied by law.

It was suggested that as a matter of practice and policy it would be unwise for an arbitration board to imply terms into a collective bargaining agreement. It was further suggested that to do so would seriously complicate the negotiation of a collective agreement because such negotiations are conducted on the basis of both parties proposing many more terms than the terms that end up in the agreement, and as such, the parties could no longer rely on the absence of an express provision to preclude a grievance in respect of that particular subject-matter.

The legal principles governing the implication of a term into a contract are very strict and an arbitration board, like the Court, must be extremely careful as to how and when it implies a term into a collective bargaining agreement. If a term is raised by one of the parties during negotiations, but

> there is no agreement with respect to the same, such a provision cannot become an implied term within the legal test discussed in Issue No. 3 hereof. It is only those terms that are not raised during negotiations, but which had they been raised during negotiations, both parties would have instantaneously expressed their agreement therewith, that are capable of being implied into a contract.[10]

[39] Having regard to the above, I find that it was an implied term of the CBA that the Union would be notified of any incidences of employee discipline and that it would be provided with a copy of any waiver of Union representation.

[40] This conclusion is consistent with the customary practice of labour relations, in which the Employer, having recognized the Union as the exclusive representative of the employees in the bargaining unit, must inform them of any agreement with employees and of any discipline that it has decided to impose.

[41] This conclusion is also consistent with the facts and circumstances surrounding the contract. Although the Employer insists that this issue was discussed during bargaining, and that the absence of any definitive language is significant, the obvious reason for the requirement in Article 7.02 that employees sign a waiver of their Union representation right was to ensure that they had been informed of that right and had chosen to waive it.

[42] When an employee is summoned to a meeting with management personnel and is disciplined, the Union is entitled to ensure that he or she was notified of his or her right to representation. The Employer's position that it does not need to provide the waiver of those rights would remove any ability for the Union to determine whether the employee was informed of his or her rights or signed a waiver at all.

[43] The cases referenced by the Union provide further authority for these arguments. *Northwest Territories* v *PSAC*[11] highlighted that there are numerous potential issues with the use of a waiver

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[10] *Ibid* at pg. 4-7

[11] 2012 CarswellNWT 40

form by Employers, any of which could be reasonably challenged by the Union:

> Mr. Rabesca did display little familiarity of what union representation involved. He has never been to the Union office and says he has never asked for the Union to come help him. Indeed, he says he did not know he could have a union representative present. He acknowledges that a person was on the phone for one meeting, but says that he had not called her.
>
> When, after being advised of his right to Union representation, Mr. Rabesca attended the meeting without that help, the Employer's evidence is that he was asked whether he wanted representation or to proceed without it. In the latter case, he was asked to sign a Waiver of Union Representation Form, reading as follows:
>
> > I, Leon Rabesca, of the City/Town/Hamlet of _____, in the Northwest Territories, hereby acknowledge that I have been informed of my right to union representation prior to the meeting scheduled for _____, in accordance with Article 37.07 (d) of the Collective Agreement.
> >
> > It is my intention to attend the meeting without union representation.
> >
> > By signing this waiver, I acknowledge that I have voluntarily chosen to attend this meeting, without a union representative.
>
> This form came from Human Resources. Mr. Miller had never used it before. The procedure, as explained to Mr. Miller, was to ensure that all notices to attend a meeting over potential discipline contained the following advice "as a member of the Union of Northern Workers, you have the right to have a union representative present at the meeting." If the employee chose not to have such representation at the meeting, after being given the notice, then the Employer would proceed with the meeting only if the grievor at that time chose to sign the waiver form set out above.
>
> The Union takes exception to the use of the waiver form. In my view, it is not objectionable or an interference with the grievor's right to Union representation, at least not in the manner it was used here. The grievor was told before the meeting of his right to seek representation. The waiver was only sought once the grievor then attended the meeting without representation. It was used to confirm an informed choice the grievor had already made, not to influence that choice at the outset. There is no evidence which suggests the grievor was pressured to sign the form. To the contrary, the Employer postponed at least one meeting and actively encouraged the grievor to get representation…
>
> […]
>
> The Employer must advise the employee of the right, not simply wait for the employee to ask. It must do so in advance of the meeting so the employee can contact the Union for representation. The Employer cannot act to impede the employee's exercise of the right. None of that can be waived…[12]

[44] Implicit in the CBA's recognition of the right to Union representation is the ability for the Union to enforce those rights on behalf of employees. The cases cited by the Union confirm that the Employer has an obligation to provide this type of documentation to facilitate labour relations under

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[12] *Ibid* at para. 51-58

the CBA.

[45] *Windsor Regional Hospital* v *ONA*[13] and *Aluminum Brick and Glass Workers International Union (AFL-CIO-CLC)* v *Ford Glass*[14] are cited as examples where employers were required to provide documents, on implied terms, to the Union. The following passage is instructive:

> In our view, the company's refusal to provide a copy of the Master Plan to the union interferes with the "representation of employees by a trade union" within the meaning of section 64 of the Act. It goes beyond the simple matter of convenience. The union is charged with the responsibility fairly to represent its members and to safeguard their rights under the collective agreement pursuant to its legal obligations under section 68 of the Act. To do this adequately, it requires information and ought not to be put to the burden of travelling to downtown Toronto or calling the Personnel Department every time it needs an answer to a question arising out of the agreement. There is no doubt that the company has provided access to the information, but it is not meaningful access if it is not readily accessible to the union for the benefit of its members and for the proper discharge of its representational duties. The company has offered no countervailing business purpose for withholding a copy of the Master Plan, a copy it is prepared to show but not give to the union, and in balancing competing interest, therefore, the union's representational obligation prevails. The adverse impact on the union's representational rights of withholding physical possession of the information outweighs the company's interest in wishing not to release it.[15]

[46] This same reasoning applies equally, if not more forcefully, to the requirement that the Employer report disciplinary incidents to the Union.

[47] The Employer argues that the CBA is silent about whether it must provide information regarding employee discipline where a waiver has been signed by the employee.

[48] The silence of the CBA cannot be read to relieve the Employer of its duty to inform the Union of employee discipline. Employees who have signed a waiver are nonetheless members of the bargaining unit and may still choose to inform the Union of any discipline at a later time. For that matter, an employee may choose to seek advice from the Union before a disciplinary meeting and still choose to waive the right to have a Union representative present at the meeting itself. As discussed,

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[13] 2008 CarswellOnt 7505

[14] 1986 CanLII 1480

[15] *Ibid* at para. 6

and conceded by the Employer, a grievance may still be brought in connection with the discipline, notwithstanding a waiver signed by an employee at one or more disciplinary meetings.

[49] In the normal course of labour relations, the Employer is expected to inform the Union of employee discipline. This requirement exists even where a waiver has been signed in connection with a particular employee or a particular disciplinary meeting. There is no language in the CBA that implies otherwise, whereas the role of the Union as the exclusive representative of the employees mandates that the Union be informed.

[50] The Employer argues that Article 9.03 of the CBA prohibits arbitrators from "altering, adding to…or substituting any new provisions in lieu thereof or to giving any decision inconsistent with the terms of this Agreement or to deal with any matter not covered by this Agreement."

[51] Article 9.03 is no bar to this decision. In interpreting the CBA, it is necessary to give effect to the provisions adopted by the parties. A necessary implication of Article 7.02, and of the Union's status as exclusive representative, is that the Employer not unreasonably hinder their ability to discharge their responsibilities. This duty arises from the provisions the Employer agreed to, not something created by this award.

[52] The Union raises a further argument that it must be informed of any discipline so that it can fulfill its duty of fair representation to the members of the bargaining unit. The Union relies on *McRaue-Jackson* v *CAW-Canada*[16] to demonstrate that:

a) the Union has a duty not just to individual employees, but to the bargaining unit as a whole;

b) the Union cannot simply accept an employer's argument or position; it must investigate and take a reasonable view of the situation;

c) it would be arbitrary for a Union not to investigate the circumstances of a given case–the

[16] 2004 CarswellNat 6044

Union has an obligation to consider the various interests within the bargaining unit in light of the circumstances; and

d) the Union's representational duty is heightened where discipline is involved.

[53] The Employer argues that any claim against the Union for a failure to fulfill its duty of fair representation would fail because the employee would be unable to satisfactorily explain their decision to waive their right of Union representation in the first place. That may or may not be so. However, even if it was so, it would not resolve the matter.

[54] I conclude that the Union is correct. In order to carry out its duty of fair representation, it must be informed of any discipline against members of the bargaining unit.

[55] The Union cannot take as a given that the Employer has informed employees of their rights and complied with the terms of the CBA. Moreover, the Union has an obligation to the entire bargaining unit, regardless of an individual employees' choice to waive the attendance of a Union member at a particular disciplinary meeting. They may nonetheless decide to bring a grievance in relation to a disciplinary event or policy even though a waiver was signed and even where an employee would not want to proceed with such a grievance.

[56] The Employer argues that employees who have chosen to sign a waiver of their Union representation rights do not want the Union involved and that the Employer has an obligation to protect the employee's confidential information–information regarding the discipline–from the Union.

[57] I do not accept the Employer's submission that, wherever a waiver has been signed, an employee has indicated a desire to keep disciplinary information confidential from the Union. There are many possible reasons why an employee might choose to waive the attendance of a Union representative and it would be unreasonable to assume that intention.

[58] Moreover, an individual employee is not entitled to prevent the transmission of information

relating to discipline to the Union. Although it is easy to imagine that an employee may not want the Union to be aware of discipline against them, especially if they feel their reputation could be damaged, the Union nonetheless has a right to that same information.

[59] In *Bernard* v. *Canada (Attorney General)*[17] the Supreme Court of Canada considered whether an employer was obligated to provide the home mailing addresses and home telephone numbers of members of the bargaining unit to the Union. This policy was challenged by an employee, Elizabeth Bernard, who was a member of the bargaining unit but did not belong to the union. Referred to as "a Rand Formula employee," Ms. Bernard was entitled to the benefits of the collective agreement and representation by the union and was required to pay union dues despite not belonging to the union. The Supreme Court held that the Employer was required to disclose the confidential information, including Ms. Bernard's. Their analysis, in relevant part, was as follows:

> Ms. Bernard's position was that disclosure of her home telephone number and address breached her privacy rights and her right not to associate with the union. The Board addressed all of the privacy concerns raised by Ms. Bernard and the Commissioner. It concluded that work contact information was insufficient to allow a bargaining agent to meet its obligations to represent all employees in the bargaining unit. In its view, "a bargaining agent has a right to contact all employees directly — relying on employees going to a website or talking to a steward does not meet that obligation": 2011 PSLRB 34 (CanLII), at para. 164.[18]
>
> ...
>
> It is important to understand the labour relations context in which Ms. Bernard's privacy complaints arise. A key aspect of that context is the principle of majoritarian exclusivity, a cornerstone of labour relations law in this country. A union has the exclusive right to bargain on behalf of all employees in a given bargaining unit, including Rand employees. The union is the exclusive agent for those employees with respect to their rights under the collective agreement. While an employee is undoubtedly free not to join the union and to decide to become a Rand employee, he or she may not opt out of the exclusive bargaining relationship, nor the representational duties that a union owes to employees.
>
> The nature of the union's representational duties is an important part of the context for the Board's decision. The union must represent all bargaining unit employees fairly and in good faith. The *Public Service Labour Relations Act* imposes a number of specific duties on a union with respect to employees in the bargaining unit. These include a duty to provide all employees in the bargaining unit with a reasonable opportunity to participate in strike votes and to be notified of the results of such votes (s. 184). According to the Board, similar obligations apply to the conduct of final-offer

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[17] 2014 SCC 14 (CanLII) (*Bernard*)

[18] *Ibid* at para. 15

votes under s. 183 of the Act.[19]

...

Moreover, an employee cannot waive his or her right to be fairly–and exclusively–represented by the union. Given that the union owes legal obligations to all employees — whether or not they are Rand employees — and may have to communicate with them quickly, the union should not be deprived of information in the hands of the employer that could assist in fulfilling these obligations.

This brings us to the intersecting privacy concerns. The Privacy Act imposes a ban on disclosure of government-held personal information, which includes home addresses and telephone numbers, subject to a number of exceptions listed in s. 8(2), including the consistent use exception:

> 8. . . .
> (2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed
>
> (a) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose;

A use need not be identical to the purpose for which information was obtained in order to fall under s. 8(2)(a) of the *Privacy Act*; it must only be consistent with that purpose. As the Federal Court of Appeal held, there need only be a sufficiently direct connection between the purpose and the proposed use, such that an employee would reasonably expect that the information could be used in the manner proposed.

The Board concluded that the union needed employee home contact information to represent the interests of employees, a use consistent with the purpose for which the government employer collected the information, namely, to contact employees about the terms and conditions of their employment. The information collected by the employer was for the appropriate administration of the employment relationship. As the Board noted, "[e]mployees provide home contact information to their employers for the purpose of being contacted about their terms and conditions of employment. This purpose is consistent with the [union]'s intended use of the contact information in this case": para. 168 (emphasis added).

In our view, the Board made a reasonable determination in identifying the union's proposed use as being consistent with the purpose of contacting employees about terms and conditions of employment and in concluding that the union needed this home contact information to carry out its representational obligations "quickly and effectively": para. 167.[20]

[60] I find the circumstances here to be analogous to those in *Bernard*. Even where an employee has expressed a clear desire not to provide information to the Union, something that is not presented here, that information must nonetheless be provided where that information is necessary to allow the Union to carry out its representation of the bargaining unit. I further note that, although the *Privacy*

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[19] *Ibid* at para. 21-22

[20] *Ibid* at para. 29-33

Act has no application here, and no Freedom of Association argument was made in this Grievance, the compelled disclosure was found to be consistent with both of those protections.

[61] An employee may not waive his or her right to be represented by the Union in a broader sense, which would fundamentally undermine the CBA. Article 7.02 provides only that an employee may waive their right to Union representation at a particular disciplinary meeting. As the representative of all employees in the bargaining unit, there exists no privacy interest as between the employee and the Union when it comes to matters of discipline.

[62] The Employer argues that the ability for employees to opt-out of Union representation was an issue of direct bargaining between the parties. They assert that this was a compromise provision and that the Union is trying to achieve, through this grievance, what they have been unable to obtain through collective bargaining–the elimination of the waiver provision in Article 7.02.

[63] This position is inconsistent with the reality of the CBA, which allows only for employees to waive their right to have a Union representative present at a disciplinary meeting. Whatever the position of the parties with respect to future bargaining, the Union here concedes that employees may waive those rights. By conceding as much, the Union cannot be said to be undermining the waiver provision.

[64] The Employer argues that the Union could have obtained the information it seeks by approaching its members directly, and that it could access any disciplinary documents or waivers with employee consent pursuant to Article 19.01.

[65] The Employer's argument on this point is unconvincing. Where an Employer refuses to provide the Union with basic information relating to employee discipline, it is difficult to understand how the Union would even know to investigate a matter that has not been brought to its attention. This will necessarily create problems of timeliness in resolving disputes as the Union may only become aware of discipline long after it has been administered. Even frequent interaction with members of the bargaining unit will not consistently provide the necessary information for the Union

to carry out its essential function. As discussed previously, a Union may also need to proceed with an investigation or grievance even where an employee is not willing to cooperate with the Union, so Article 19.01 is not a solution here.

[66] The purpose of the waiver requirement in Article 7.02, and the clear intention of the parties, was to ensure that employees had been informed of their right to Union representation and that the Union would be able to rely on those waivers as evidence of the same. Refusing to provide those waivers, or to inform the Union of the discipline against employees, frustrates that provision by making it impossible for the Union to know whether employees were informed of their representation rights and whether they waived them.

[67] I find that the Employer violated Article 7.02 of the CBA by failing to provide copies of the employee waivers to the Union. I further conclude that the Employer violated the implied terms of the CBA by failing to inform the Union of discipline related to members of the bargaining unit who signed waivers.

2. Whether the Union is Estopped from Pursuing This Grievance

[68] The Employer argues that the Union should be estopped from pursuing this Grievance. It cites *Insurance Corp. of British Columbia* v *OPEIU, Local 378*[21] to articulate the modern doctrine of estoppel:

> The purpose of the modern doctrine is to avoid inequitable detriment. An estoppel may arise where: (a) intentionally or not, one party have unequivocally represented that it will not rely on its legal rights; (b) the second party has relied on the representation; and (c) the second party would suffer real harm or detriment if the first party were allowed to change its position. The requirement of unequivocal representation is a question of fact and may arise from silence where the circumstances create an obligation to speak out. The notion of reliance must be assessed in a labour relations context, the element of detriment may be satisfied by a lost opportunity to negotiate…[22]

[21] 2002 CarswellBC 3320

[22] *Ibid* at para. 40

[69] The Employer also refers to *Manitoba (Department of Family Services & Housing)* v *CUPE, Local 2153*[23] for the proposition that there is an onus on the Union to demonstrate how and why they could not raise an objection sooner:

> It would be reasonable to expect a Union challenge to be raised, at some point during the three or more years' duration of the practice, since individual employees were periodically being shorted on their take home pay. From the Employer perspective, silence by the Union on a direct pocketbook issue would reasonably lead management to conclude that there was no problem. This in fact was the evidence, at least on the management side. Despite estoppel being raised as an issue by the Employer during the current arbitration proceedings, however, the Union chose to call no evidence explaining its silence. I agree with the Employer that the evidentiary onus lies on the Union, in these circumstances, to show why it did not and could not raise an objection sooner.

[70] I agree with the standard articulated by the Employer with regard to estoppel, but I find that the Union has carried its burden here.

[71] To begin, the Employer did not inform the Union that they were choosing to withhold the employee waivers or disciplinary documents. The Employer cannot fault the Union for being unaware of information that it was simultaneously concealing from them.

[72] Later, when the Union became aware of the Employer's practice through informal conversations with its members, it made inquiries with the Employer where it requested access to these documents on multiple occasions and was refused.

[73] Nothing about the Union's response implies an "unequivocal representation" that they did not intend to rely on their rights. To the contrary, the Union has consistently taken the position, since it became aware of the Employer's practice, that the same was a violation of the CBA and that it was entitled to those documents. That they first attempted to resolve the issue through informal conversations with the Employer is not to their disadvantage.

[74] I am satisfied that the Union should be permitted to proceed with the Grievance.

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[23] 2005 CarswellMan 536

3. Whether the Union is Entitled to Relief Against Time Limits

[75] I note that the typical remedy imposed by arbitrators where the Employer is found to have violated a Union representation clause is that any discipline imposed is set aside. A thorough review of cases in which the discipline or discharge was held to be void, as well as a series of cases in which other remedies were imposed, can be found in *Labatt Breweries Ontario Canada (Lboc) Division of Labatt Breweries of Canada LP (London, Ontario)* v *SEIU Local 2*.[24] I agree with Arbitrator Levinson's conclusion in that case:

> While a breach of article 13.03 can potentially void a dismissal, it is not an automatic consequence. Rather, consideration must be given to all the material circumstances surrounding the breach, when determining the appropriate remedy. In reaching the foregoing conclusions, I find the Court's reasoning in *Re Limestone District School Board and Ontario Secondary School Teachers' Federation* (*supra*) to be instructive, along with the persuasive reasoning in *Re Hamilton Health Sciences and Ontario Nurses' Association* (*supra*) and in *Re Procor Ltd. and International Brotherhood of Boilermakers, Local 75 (Teixeira)* (*supra*), as further examples.[25]

[76] Having regard to the circumstances of this case, I find that it would be inappropriate to hold that any discipline imposed by the Employer is void. The Union has not requested that remedy and no information regarding the circumstances of the discipline for the individuals who signed waivers has been presented to me.

[77] A declaration that the Employer has breached the CBA, as well as an Order that they provide the documentation in the future, is the appropriate remedy. However, the Union also seeks an extension of any time limits so that it may file any disciplinary grievances that may arise from the disclosure of previously withheld materials form the Employer.

[78] As noted by the Union, I am empowered under s. 6-49(3)(f) of *The Saskatchewan Employment Act* to relieve against time limits set out in the CBA. The proper questions to consider in choosing whether to exercise that discretion are summarized in *Health Sciences Association of*

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[24] 2020 CanLII 14440

[25] *Ibid* at para. 41

Saskatchewan v *Saskatchewan Health Authority*:[26]

> The parties rely on different cases setting out the factors to be considered. SHA relies on those set out by Arbitrator Stevenson in *BFI Constructors*, *supra*. HSAS relies on those set out by Arbitrator Rennie in *Re Abitibi-Price*, *supra* and reviewed by Arbitrator Hood in *Advance Engineered Products*, *supra*. While expressed in different ways, the cases presented set out the following factors to be considered and I will review each factor:
>
> (1) Reason for the delay;
> (2) Length of the delay;
> (3) Responsibility of the grievor for the delay;
> (4) Language of the collective agreement regarding process and time limits;
> (5) Was the SHA "surprised by the existence of the dispute"; and
> (6) Nature of the grievances and consequences, including prejudice to the SHA, of relief being granted (or not)[27]

[79] The Union argues that:

a) the reason for the delay is attributable to the Employer's refusal to disclose discipline as it occurred, even as the Union requested that it do so;

b) the length of the delay would vary, but would not go back further than 2018;

c) the responsibility of the grievors is of limited relevance since the discipline was not disclosed to the Union, the employees could not reasonably have been expected to bring this to the Union's attention and it is not known why Union representation was waived in any particular case;

d) the language of the CBA does not specify any consequence for failing to meet the timelines it establishes, so there is no conflict with the CBA beyond extending the timelines themselves;

e) the Employer cannot claim to be surprised by this dispute given its refusal to provide the requested information; and

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[26] 2022 CanLII 139164

[27] *Ibid* at para. 103

f) the Employer will not be prejudiced by any untimely grievances that may be filed, since it is in possession of all the relevant information–the impact on individual employees from having their Union representation rights abrogated is the greater interest.

[80] The Employer argues that:

a) the Union has made no effort to advance any potential grievances, or to contact any affected employees, since the names of the employees who signed waivers were provided to it by my Order in October 2023; and

b) the Union has not requested the waivers or copies of any discipline from those employees over the same timeframe.

[81] I find that this is an appropriate circumstance in which to exercise my discretion to relieve against the time limits imposed in the CBA.

[82] The reason for the delay in bringing any grievance is attributable to the Employer's decision not to provide the information necessary to bring those grievances forward in a timely fashion to the Union.

[83] Although the length of the delay may be significant, the Union bears little or no responsibility for any delay. The Union acted appropriately by waiting until the conclusion of this proceeding before attempting to advance any grievance on the basis of the disclosure made in my previous Order in October 2023. That information was provided to facilitate this proceeding and the Union could not know whether it would be permitted to proceed with any further grievances in relation to these employees until the receipt of this decision, alongside the waivers and disciplinary documentation that it has requested from the Employer.

[84] The CBA applies mandatory time limits, but those may be varied pursuant to *The Saskatchewan Employment Act* and there is no other language in the CBA providing for an alternative

procedure to extending the relevant time period.

[85] The Employer cannot be surprised by this dispute, as the Union clearly communicated its position to the Employer regarding this policy when it was brought to its attention long ago.

[86] There is no information before me regarding the individual employees, the discipline they received and any potential prejudice to the Employer. I find that it is appropriate, given the circumstances, to provide the Union with the opportunity to advance these grievances, if there are any, through the procedure identified in the CBA.

4. Whether the Union is Entitled to an Order for Damages

[87] The Union argues that it is entitled to an award for damages in the requested amount of $20,000.00. It claims this is justified because:

a) the rights at stake are fundamental;

b) the Employer's actions strike at the heart of the Union's capacity and duty to represent its members;

c) the Employer's breach was wilful, affected numerous employees, and involves core employee interests; and

d) an award of damages is necessary to provide sufficient incentive for the Employer to respect its employees rights in the future.

[88] The Union cites *Seaspan ULC* v *Canadian Merchant Service Guild*[28] for the relevant factors that should be considered in assessing the quantum of damages:

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[28] 2017 CanLII 5259

As the applicable caselaw makes clear, the factors relevant to quantum include:

- The nature of the invasion: The consensus is that removing bodily fluids (urine) constitutes a highly invasive search and is a severe breach of the individual's privacy rights;
- The policy is one which Seaspan knew or ought to have known was unlawful and unreasonable. Instead of ending it when the Guild filed its grievances, Seaspan continued to expand it;
- The consequences of refusing testing—no ability to work on a vetted vessel—is significant.

  The evidence supports the Guild's argument that the decision to nominate a boat as a vetted vessel is within Seaspan's control; increasing the number of vetted vessels provides Seaspan with greater operational flexibility; and Seaspan could potentially decide to have all vessels vetted.
- The relationship between the offending party and the victim is one of employer/employee rather than, for example, offender/stranger. The employment relationship has long been viewed as one that has a significant trust element: Loomis Armored Car Service Ltd., Re [1997] B.C.C.A.A.A. No. 697 (Kelleher).
- Seaspan made no admission of wrongdoing nor did it issue an apology or offer in any way to make amends; and
- Impact on employee sense of well-being and security: Both the threatened consequence of non-compliance and the lack of a timely admission of error or apology must be taken to have exacerbated the presumed mistrustful environment caused by the improper testing.

These factors, taken together, point to a significant damage award. In the circumstances, and taking into account comparable awards and decisions in this regard, I set the amount payable to each of the affected officers at $3,000.00.[29]

[89] The Employer argues that any award for damages would be inappropriate because:

a) the Union has demonstrated through its inaction that it has no intention of representing any of the named employees who signed waivers, and thus no damages suffered by the Union; and

b) the Union has failed to articulate its damages, providing only general statements about abstract harms.

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[29] *Ibid* at para. 160-161

[90] *ABCZ Ltd.* v *Union*[30] provides an effective summary of an arbitrator's power to award damages:

> I turn now to a resolution of the first issue mentioned above.
>
> I have reviewed the carefully presented arguments of the Parties and have reached the conclusion that, so long as my jurisdiction under Article 13 is intact (namely, not spent or exhausted as the Union claims), I have the authority as an arbitrator to issue remedial orders, including an order of damages in appropriate circumstances.
>
> ...
>
> Although the answer to this question can be found in or gleaned from virtually all of the cases submitted by the Employer on this point, the simplest statement is that found in *Green Grove Foods*. There, relying on what Arbitrator Crane referred to as the "seminal case" of Arbitrator Bora Laskin (and nominees) in *Polymer Corporation Ltd. and O.C.A.W.* (1959) 10 L.A.C. 51 (Laskin), aff'd (1962), 1962 CanLII 3 (SCC), 33 D.L.R. (2d) 124 (S.C.C.), Arbitrator Crane noted that:
>
> > "It has long been settled law that arbitrators have inherent authority to award damages for breach of the collective agreement." (my emphasis)
>
> Arbitrator Crane noted that in *Polymer*, Arbitrator Laskin (as he then was) assessed damages against the union for an unlawful strike notwithstanding that the collective agreement did not expressly provide for such a remedy. In explaining the basis for the authority exercisable by arbitrators in labour litigation, Arbitrator Laskin's holding was that:
>
> > ... *ubi jus, ibi remedium* is no less applicable to characterize the affirmative authority of labour arbitrators than it is to characterize the affirmative authority of the ordinary courts in contract matters.
>
> The authority of judges obviously came from many sources but one of them was *ubi jus, ibi remedium*, which, translated from the Latin, means: "where there is a right, there must be a remedy": see *British Columbia Public School Employers' Assn* v *British Columbia Teachers' Federation (Parental Leave Grievance)*, [2017] BCCAAA No 6 (Lanyon, Q.C.). I take Arbitrator Laskin as making it clear in his seminal award that labour arbitrators, like judges, have the tools inherently to ensure that where in a contract there is a right, there is also a remedy.
>
> ...
>
> The Laskin Board went on to point out that the assessment of damages consequent upon a finding of a breach of obligation resulting in compensable loss was a matter of the board's powers. This did not require an express grant of authority. Nothing else had to be said about it to ensure arbitrators had the powers. It came with the territory:
>
> > "The silence of a collective agreement on a board's remedial authority can no more be taken as excluding such authority than can its silence on procedure be taken to thwart the board in proceeding with a hearing on the merits of a case committed for its determination." [Para 3]

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[30] 2020 CanLII 108146

As noted in the case, Arbitrator Laskin assessed damages against the union for an unlawful strike notwithstanding that the collective agreement did not expressly provide for such a remedy.

The Laskin Board also went on to explain why the common interpretative technique of seeking to construe language in a settlement agreement by pointing to the "intention of the parties" played a much diminished role in cases dealing with jurisdiction and authority than otherwise:

> 15 ... Once the parties have submitted themselves to the jurisdiction of a board of arbitration authorized to adjudicate on an alleged violation of a collective agreement obligation, they have accepted the full range of the tribunal's adjudicative powers (unless expressly limited) which are immanent in such adjudication. To seek to thwart their exercise by appeal to a fictional intention of the parties is to seek indirectly to nullify the duty of observance and performance of collective agreement terms. Nor is the situation changed by any explicit reference to remedial authority in particular cases. To say that this excludes the general power of reparation is again to try to destroy the collective agreement by a sidewind. The very claim of the company in this case shows how fictional is any appeal to the intention of the parties; and this can be matched by reference to claims made by the union in other cases where reparation on behalf of employees is sought. Indeed, our Courts have exploded the notion of "intention of the parties" by holding contractors to the objective manifestation of what they have said. Thus, again we are remitted to the import conveyed by an agreed resort to final and binding arbitration. (my emphasis)

[91] Based on the foregoing, I conclude that I have the authority to make an appropriate award of damages if the circumstances provide sufficient justification to do so. I turn now to whether that would be appropriate in this case.

[92] *Saskatchewan Health Authority* v *SEIU-West*[31] is a recent Saskatchewan decision that considered whether to award general, punitive or aggravated damages. Its reasoning was as follows:

> (4) Is the union entitled to general, punitive or aggravated damages?
>
> The grievance document filed on December 6, 2018, in addition to seeking loss of opportunity compensation for affected employees, sought general, punitive and aggravated damages. The union submitted that the employer undermined the status of the union when it contracted out work without using the full capacity of in-scope employees (including overtime) in violation of the work assignment provisions of the collective agreement. It was submitted the employer's actions warrant an award of damages to the union as a whole. The union referred to *Blouin Drywall 1975* and *TFL Forest 2007*. Further, the union submitted that the employer's conduct in this case has been high-handed, reprehensible, intentional and flagrant. The Employer told the Union that there would not be enough work for all in-scope employees at regular rates, thus "priming" the Union for no overtime being offered, all the while having the work done by external contractors and depriving employees of their rights under the collective agreement. It was argued that the employer did so

[31] 2022 CanLII 5052

> under the guise of a "collegial" process in which SEIU-West engaged in good faith. It was submitted the union made significant concessions to permit work of one bargaining unit to be performed by another bargaining unit, and the employer responded by using the movement as a cover for removing significant and ongoing portions of the work from the bargaining unit entirely. The employer responded by contracting out, rather than posting in-scope positions or posting overtime opportunities when the Employer required the work to be done. It was submitted that it is just and reasonable to hold the employer accountable for this harm whether the damages are characterized as general damages for improperly contracting out and undermining the bargaining unit, or punitive damages.
>
> The employer response was that general, punitive or aggravated damages are extremely rare and should be reserved for the most extreme situations. Mere failure or success in a labour arbitration concerning a disagreement between the parties about the meaning of provisions of a collective agreement is not a situation that justifies general, punitive or aggravated damages.[32]
>
> ...
>
> Looking at it from today's perspective, there is nothing in the employer's actions leading up to the 2018 grievance, or subsequent thereto, that justifies an award of monetary damages beyond those that are compensatory. General, punitive and aggravated damages are reserved for a small number of situations where an arbitration board deems an employer's conduct to be egregious. Such conduct includes intentional misrepresentations meant to deceive, high-handed actions and infringement of employees' privacy, dignity and human rights interests. None of that has occurred here. We make no order for general, punitive or aggravated damages.[33]

[93] Another recent Saskatchewan decision, *United Food and Commercial Workers, Local 1400 v Compass Group Canada Ltd.*,[34] considered this same issue:

> Would a declaration be a sufficient remedy in this case?
>
> The Employer acknowledged that it failed to provide retroactive pay to its employees on or before the deadline fixed by ratification of the Collective Agreement. Its neglect was not intentional, part of a larger pattern, or the result of heavy-handed or any other bad behavior. The Union acknowledged this and withdrew its claim for aggravated or punitive damages at the outset of the hearing. Thus, the evidence establishes it is unlikely the Employer will repeat the conduct which gave rise to this grievance. That said, deterrence is not the only reason damages may be awarded over declaratory relief.
>
> Another important consideration is whether "rights which have been interfered with" and "harm has been caused". Identifying "rights" and "harm" is connected to recognizing the "reality that wages are of the essence of the contract of employment.... [and] the payment of the money is fundamental to the maintenance of the relationship".[4] I find that the breach in this case, inadvertent as it was,

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[32] *Ibid* at para. 25-26

[33] *Ibid* at para. 60

[34] 2023 CanLII 25394

bruised the relationship. While by no means a fatal blow, its very occurrence caused harm.[35]

...

Under what circumstances may an arbitrator award damages for breach of a collective bargaining agreement?

The *Winnipeg (City)* and *WPA* case contains an overview of principles distilled from jurisprudence which, if present, may support awarding damages for a breach of a collective agreement. Though not an exhaustive list, these principles are:

1. There is acceptance that arbitrators have jurisdiction to award general damages to both Unions and their members for breaches of a collective agreement and in instances where their rights are infringed.

2. Damages will be awarded when a declaration is considered insufficient and the purpose of the damages is to discourage such conduct in the future, and to indicate the rights which have been interfered with.

3. It is not necessary for a union or its members to prove a specific monetary loss where a declaration is not sufficient and harm has been caused.

4. A finding of bad faith, which is a factor to be taken into account in determining quantum of damages, does not preclude the awarding of damages when there have been breaches of the collective agreement.

5. A case of first instance does not preclude an award of damages in a particular case. It is not necessary to prove a history of breaches. Each case must be assessed on its own particular facts. Arbitrator Hamilton's decision in New Flyer is not an authority to the contrary.

6. If liability is established, the quantum of damages payable to a union will vary depending on the facts of each case. Factors to be considered include the seriousness of the misconduct, the nature of the harm caused to the Union, and the quantum which is necessary to give an employer a meaningful incentive to comply with the collective agreement. An employer's savings flowing from the breach has been used as a starting point to assess quantum keeping in mind an award should not be punitive in order to achieve its goals.

7. The quantum of damage awards to individual members will depend, as well, on the facts of each case. Damage awards vary from hundreds of dollars per member to thousands of dollars per member depending on the harm suffered and whether individuals suffered specific harm due to individual circumstances.[8]

Interpretation and application of these principles involves resolving questions of fact and weighing evidence. Monetary damages, where the compensation is based on a "make whole" remedy, are relatively straightforward. Assessing or quantifying non-monetary damages is a more nuanced and, to some extent, a subjective exercise. To illustrate this point, I note Arbitrator Asbell's finding in *CLAC, Local 56 and OEM Remanufacturing* - that "while the Employer's actions were heavy-handed, they were not so egregious or harmful to the Union as to justify an award of damages.".[9] Attaching an amount of money to assessment of behavior is a distinctly different task

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[35] *Ibid* at para. 32-33

than calculating actual income loss.[36]

[94] I agree with these authorities and will apply the principles they identify in determining whether this is an appropriate case in which to make an award of damages.

[95] This case is one where the Employer interfered with the representation rights of Union members. However, there is no evidence to suggest that a declaration would be inadequate to alter the Employer's behavior in the future.

[96] The Union is not required to prove a specific monetary loss in order to be entitled to damages as the Employer's argument suggested.

[97] I do not believe this to be a case in which the Employer has acted in bad faith. While the Employer's actions were heavy-handed, they appear to be based on the Employer's mistaken belief that they were not required to provide the requested information to the Union. There is no evidence to suggest that the Employer deliberately violated the terms of the CBA. I note that the collective bargaining relationship between the parties is relatively new, and that the Employer's conduct was consistent with its stated interpretation of the CBA.

[98] The Employer has identified at least four instances in which it withheld employee waivers and disciplinary materials from the Union. Although this establishes a history of breaches, they are all related to a single policy adopted by the Employer.

[99] Having considered the facts of this case, I find that it is unnecessary to make an award of damages. I am satisfied that a declaratory award is sufficient to discourage any further breach of the CBA.

[100] I therefore Order that:

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[36] *Ibid* at para. 38

a) the Employer provide to the Union a copy of any employee waivers signed pursuant to Article 7.02 of the CBA;

b) the Employer provide to the Union copies of any disciplinary documents placed on an employee's file and which have not been previously disclosed as a result of an employee's waiver;

c) the Employer provide to the Union confirmation and particulars of any discipline that was rendered on an employee that signed a waiver;

d) any time limit to engage in pre-grievance discussion and to file a grievance under Article 8.02 and 8.03 of the CBA commence, regarding a particular employee, at the time the Union receives copies of the relevant disciplinary documents and notice of particulars of discipline;

e) the Employer will, in future, provide to the Union copies of any waivers that may be signed by Union members pursuant to Article 7.02 of the CBA, and particulars of any discipline imposed upon such members and copies of any disciplinary documents that may be placed on any employee's file.

[93] I retain jurisdiction should the parties require additional guidance regarding the within grievance.

Dated on September 6, 2024.

T. F. (Ted) Koskie, B.Sc., J.D.,
Sole Arbitrator