Canada Industrial Relations Board Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4e étage Ouest, Ottawa (Ont.) K1A 0X8

Reasons for decision

Stephen Frayling,

complainant,

and

Unifor,

respondent,

and

Canadian National Railway Company,

employer.

Board File: 30742-C
Neutral Citation: 2015 CIRB **757**
January 28, 2015

The Canada Industrial Relations Board (Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. André Lecavalier and Norman Rivard, Members.

Parties' Representatives of Record

Mr. Stephen Frayling, for himself;
Mr. Lewis Gottheil, for Unifor;
Ms. Jacynthe Girard, for the Canadian National Railway Company.

Section 16.1 of the *Canada Labour Code (Part I–Industrial Relations)* (*Code*) provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed all of the material on file, the Board is satisfied that the documentation before it is sufficient for it to determine this complaint without an oral hearing.

I. Nature of the Complaint

[1] On October 29, 2014, Mr. Stephen A. Frayling filed a duty of fair representation (DFR) complaint alleging that his bargaining agent, Unifor, had violated section 37 of the *Code*:

> 37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.

[2] Mr. Frayling contested Unifor's decision to settle his grievance, rather than proceed to arbitration.

[3] The Board has concluded from its review of Mr. Frayling's complaint that he did not establish a *prima facie* case that Unifor violated the *Code*. These are the Board's reasons.

II. The Duty of Fair Representation

A. *Prima Facie* Case Analysis

[4] In DFR complaints, the Board first examines the complaint, along with its appended documents, in order to determine whether the complainant has established a *prima facie* case supporting a possible *Code* violation. If a *prima facie* case has not been made out, the Board does not require any action from the respondent trade union or from the employer.

[5] The Board summarized the screening process it follows in *Browne*, 2012 CIRB 648 (*Browne 648*), paragraphs 20–22:

> [20] In section 37 cases, the Board conducts a *prima facie* case analysis when it considers a new complaint. Unless the complainant makes out a *prima facie* case of a *Code* violation, the Board will not call on the trade union and, to a lesser extent, the employer, to file a response. This process was recently explained in *Crispo*, 2010 CIRB 527:
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> > [12] The Board conducts a *prima facie* case analysis for the numerous duty of fair representation cases it receives. This *prima facie* case analysis accepts a complainant's pleaded material facts as true and then analyzes whether those material facts could amount to a *Code* violation.
> >
> > [13] The *prima facie* case analysis weighs the material facts as opposed to legal conclusions. A complainant who pleads a legal conclusion by alleging, for example, that certain conduct was arbitrary, discriminatory or in bad faith does not, by so doing, avoid the application of the *prima facie* case test.
> >
> > [14] In *Blanchet* v. *the International Association of Machinists and Aerospace Workers, Local 712*, 2009 FCA 103 [*Blanchet*], the Federal Court of Appeal

endorsed the Board's use of a *prima facie* case analysis and its focus on the material facts:

> [17] As a general rule, when a court presumes the allegations to be true, they are allegations of fact. That rule does not apply in findings of law: see *Lawrence* v. *The Queen*, [1978] 2 F.C. 782 (T.D.). It is for the court, not the parties, to determine questions of law: *ibidem*.
>
> [18] It is true that, in the passage quoted, the Board did not specify that it was referring to the applicant's allegations of fact. However, the reference to the applicant's allegations cannot be anything other than a reference to allegations of fact. **Otherwise, a complainant would need only to state as a conclusion that his or her union's decision was arbitrary or discriminatory for the Board to be forced to find that there had been a violation, or at least a *prima facie* violation, of section 37 of the *Code* and rule on the merits of the complaint. Thus, the complaint screening process would become a thing of the past.**
>
> (emphasis added)

[21] The quote from the FCA in *Blanchet*, in the extract above, emphasizes that it is not enough to claim arbitrariness or discrimination in order to bypass the *prima facie* analysis. The Board does not assume as true a complainant's legal conclusions, but instead analyzes the material facts in order to determine whether a *prima facie* case exists.

[22] The Board will accordingly ask itself in this case whether the material facts Ms. Browne pleaded demonstrate a *prima facie* violation of section 37 of the *Code*.

[6] Accordingly, do the material facts Mr. Frayling pleaded demonstrate a *prima facie* case for a *Code* violation?

B. Carriage of a Grievance

[7] The trade union has carriage of grievances. As noted in *Brown 648*, this means it is up to the trade union to decide, among other things, whether to proceed to arbitration or instead to settle a particular grievance:

> [17] Another important factor in a DFR case concerns who has carriage of a grievance. In almost all cases, it is the trade union which has carriage and decides whether to take the matter to arbitration and/or to settle the case at some point.
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> [18] The trade union remains subject to section 37 of the *Code* in carrying out this gatekeeper role. However, a grievor's disagreement with a trade union's exercise of its discretion does not, by itself, constitute a *Code* violation as the Board described in *Kasim*, 2008 CIRB 432:
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> > [19] The duty of fair representation in the *Code* ensures that a bargaining agent respects the significant rights that come with certification. A bargaining agent

> cannot act in a manner that is arbitrary, discriminatory or in bad faith with regard to an employee's rights under the applicable collective agreement.
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> [20] However, this duty does not mean that every employee has a right to have his or her grievance taken to arbitration. Rather, the bargaining agent can determine which grievances will go to arbitration and which grievances will be settled.
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> [21] In order to analyze whether a bargaining agent respected the duty imposed by the *Code*, the Board examines the process it followed in its representation of an employee. A bargaining agent is not comparable to a private sector lawyer who is obliged to follow the specific instructions of the client. Rather, in almost all cases, the bargaining agent has carriage of the grievance and, while it needs to communicate with the employee in question, retains the discretion to decide what to do with the grievance.
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> [22] The Board does not sit in appeal of how a trade union exercises this discretion. The Board will only intervene if a complainant is able to demonstrate that a bargaining agent acted in an arbitrary, discriminatory or bad faith manner.

> [19] CUPW advised Ms. Browne on several occasions that it retained carriage of the grievance. This occurred, for example, when Ms. Browne asked CUPW to change its choice of legal counsel.

[8] While the trade union has carriage of the grievance, it is still subject to the obligation in section 37 of the *Code* not to act in a way that is arbitrary, discriminatory or in bad faith, with regard to a bargaining unit member's rights under the collective agreement.

C. Role of the Board

[9] Given that a trade union has carriage of a grievance, the Board does not second guess its decisions. Rather, the Board examines the process that the trade union followed in arriving at those decisions. As long as that process did not demonstrate the union acted in an arbitrary, discriminatory or bad faith manner, then no *Code* violation will occur.

[10] The Board described its focus in *Singh*, 2012 CIRB 639:

> [81] Since the Board focusses on the trade union's process, rather than on the correctness of its decision, a section 37 inquiry is limited to the actual steps the trade union took in reaching its decision not to take a matter to arbitration. The Board commented on the scope of its analysis in *Cheema*, 2008 CIRB 414 (*Cheema 414*):
>
> > [12] The Board's role in the context of a duty of fair representation complaint is to examine the union's conduct in handling the employee's grievance (see *Vergel Bugay*, 1999 CIRB 45). A section 37 complaint cannot serve to appeal a union's decision not to refer a grievance to arbitration, or to assess the merits of the grievance, but it is used to assess how the union handled the grievance (see *John Presseault*, 2001 CIRB 138).

> [82] The Board's hearing is not the forum for a trade union to demonstrate that, if it had examined the matter more thoroughly, its original conclusion would still be correct.
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> [83] The Board raised this issue during the hearing several times because of concerns over the relevance of certain questions being asked.
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> [84] In this case, the Board was interested in precisely what the Teamsters did, mainly through Mr. Randall, in order to arrive at its March 15, 2010 conclusion not to go to arbitration. A DFR hearing is not the place for the trade union to do a new investigation of the matter, via cross-examination by highly-skilled counsel, in order to justify the correctness of its original conclusion.
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> [85] There are two problems if a trade union is permitted to do its investigation a second time during a DFR hearing. Firstly, it loses sight of the Board's obligation to concentrate on the actual process which took place. Secondly, it invites the Board to delve into the correctness of the trade union's decision. That is not the Board's role. The Board will respect a trade union's judgment calls on these issues, provided its process met the standards imposed by section 37 of the *Code*.

[11] It is with these principles in mind that the Board will examine the material facts Mr. Frayling pleaded.

III. Facts

[12] Mr. Frayling alleged that Unifor violated the *Code* when it decided not to proceed with a scheduled arbitration, but instead negotiated a settlement with his employer, the Canadian National Railway Company (CN):

> After waiting 2½ yrs. for this grievance to get to arbitration the union "dropped" my grievance because I would not sign an [*sic*] "letter of agreement" that did not address issues that the union had promised would be addressed.

[13] At page 4 of his complaint, Mr. Frayling stated that his grievance involved an issue of discrimination under the *Canadian Human Rights Act*. Mr. Frayling had also filed a human rights complaint on November 26, 2012. One of Mr. Frayling's requested remedies in his DFR complaint asked that if the "Human Rights Commission" took the case then Unifor should pay his reasonable costs associated with that other hearing (Complaint page 9).

[14] The documents to Mr. Frayling's complaint provide some helpful context for this matter.

[15] Document #1 describes the subject matter of his grievance. Document #2 contains CN's July 30, 2012 letter setting out its reasons for declining Mr. Frayling's grievance.

[16] Document #3 indicates that Mr. Frayling's arbitration was scheduled to start on July 15, 2014 before arbitrator Howard D. Brown.

[17] A July 10, 2014 email (Document #4) from Mr. Frayling's Unifor representative, Mr. Stevens, concerned a "suggested counter offer to company". The subject line of the email is "frayling math". That email attached extracts from a calendar, as well as Mr. Stevens' calculation of Mr. Frayling's alleged losses.

[18] Unifor postponed Mr. Frayling's arbitration from July 15 to August 14, 2014 given, *inter alia,* that the parties were involved in settlement discussions (Document #5). Mr. Stevens wrote to Mr. Frayling on July 21 (Document #6) indicating that Unifor had been successful in obtaining from CN what it considered appropriate in order to allow it to settle the grievance.

[19] Mr. Frayling did not find the terms acceptable (Document #7). Mr. Frayling's reaction prompted Mr. Stevens to write him a letter explaining that he would recommend that Unifor accept CN's offer. Mr. Stevens encouraged Mr. Frayling to accept his recommendation (Document #8).

[20] Mr. Frayling provided Mr. Stevens with a counter-offer. If CN did not accept it, then Mr. Frayling urged Mr. Stevens to proceed to arbitration (Document #10).

[21] Mr. Frayling ultimately refused to accept the settlement. CN and Mr. Stevens, on behalf of Unifor, nonetheless signed a July 30, 2014 settlement letter (Document #9) which set out the terms of the settlement for Mr. Frayling's grievance.

[22] Mr. Frayling asked his local union president to intervene on his behalf. The president advised Mr. Frayling of his appeal rights under the applicable bylaws (Document #11).

IV. Analysis and Decision

[23] Mr. Frayling has not demonstrated that Unifor acted in a manner which meets the threshold of being arbitrary, discriminatory or in bad faith.

[24] Unifor, as represented by Mr. Stevens, was clearly aware of the facts behind Mr. Frayling's allegations. For example, Mr. Stevens provided Mr. Frayling with a damages calculation (Document #4).

[25] Mr. Stevens further negotiated settlement terms with CN and obtained what Unifor considered to be an acceptable arrangement.

[26] These events do not support Mr. Frayling's suggestion in his complaint that Unifor "dropped" his grievance without providing him with any reasons. Rather, Unifor obtained what it considered to be a reasonable compromise.

[27] Unifor had carriage of Mr. Frayling's grievance. It decided that the negotiated settlement was better than proceeding to arbitration. Trade unions constantly conduct this type of analysis when determining whether to settle a grievance or to go to arbitration.

[28] It is not the Board's role to determine whether that settlement ought to have included the further terms Mr. Frayling demanded. The Board instead examines Unifor's process. The documentation is clear that Unifor understood the facts and issues, represented Mr. Frayling's interests and decided to accept a settlement of the grievance, even though Mr. Frayling refused to sign the documentation.

[29] Unifor was entitled to act in this way as the certified bargaining agent. While Mr. Frayling, like almost all grievors, would have preferred to go to arbitration, ultimately that decision rested solely with Unifor.

[30] Mr. Frayling suggested that Unifor's decision to settle the grievance "aided and abetted" the discrimination he alleged had occured. The Board notes that Mr. Frayling's allegations in this regard against CN remain pending in another forum.

[31] For the above reasons, the Board finds Mr. Frayling has not demonstrated a *prima facie* case of a *Code* violation. The Board dismisses his complaint.

[32] This is a unanimous decision of the Board.

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Graham J. Clarke
Vice-Chairperson

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André Lecavalier
Member

_____
Norman Rivard
Member