Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Keivan Torabi et al.,

complainant,

and

Society of Professional Engineers and Associates,

respondent,

and

Candu Energy Inc.,

employer.

Board File: 30634-C
Neutral Citation: 2015 CIRB **781**
July 8, 2015

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

Parties' Representatives of Record

Mr. Keivan Torabi et al., representing himself and seven fellow employees;
Ms. Denise Coombs, for the Society of Professional Engineers and Associates;
Mr. Tim Lawson, for Candu Energy Inc.

These reasons for decision were written by Mr. Graham J. Clarke, Vice-Chairperson.

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] This case requires the Board to distinguish purely internal trade union matters from those which may fall within the scope of the duty of fair representation (DFR), found at 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. Keivan Torabi, on behalf of himself and seven fellow employees, filed this DFR complaint on September 10, 2014. The complainants work for Candu Energy Inc. (Candu). SNC-Lavalin had purchased Candu, the former Atomic Energy of Canada Limited (AECL), from the Government of Canada on October 2, 2011 (Transaction Date).

[3] In his complaint, Mr. Torabi alleged that his bargaining agent, the Society of Professional Engineers and Associates (SPEA), had violated its Constitution by taking over the management of its bargaining units' employees' pension plan. Mr. Torabi's complaint also contested employees' inability to leave their pension funds in a plan operated by Candu.

[4] Candu, in its November 27, 2014 submission, and in accordance with federal employers' general practice (see, for example, *Hrechuk*, 2015 CIRB 758), did not take a position on the merits of the DFR complaint. However, it did ask, if the Board later found that SPEA had violated the *Code*, to allow it to make submissions on the issue of remedy.

[5] The Board has accepted Candu's request to bifurcate the case, in accordance with its usual practice in DFR complaints.

[6] The Board has concluded that Mr. Torabi's complaint essentially contests purely internal union matters which fall outside the Board's DFR jurisdiction. The Board accordingly dismisses the complaint.

[7] These are the reasons for the Board's decision.

II. Facts

[8] The facts are generally not in dispute.

A. Mr. Torabi's Complaint

[9] Mr. Torabi contested SPEA's decision to create and administer a defined contribution pension plan (SPEA Plan). SPEA is the certified bargaining agent for two bargaining units at Candu: the "SE Unit" and the "TT Unit". Employees in these bargaining units are required to participate in the SPEA Plan.

[10] Mr. Torabi alleged that SPEA breached its Constitution. In his view, the SPEA Plan was a "commercial enterprise" which SPEA could only operate after first holding a referendum under the Constitution, *infra*.

[11] The *Public Service Superannuation Act* (PSSA) had applied to AECL employees. Employees of Candu, who were already working prior to the October 2, 2011 Transaction Date, continued to participate in the PSSA, but only until October 1, 2014.

[12] Conversely, new employees Candu hired after the October 2, 2011 Transaction Date would be covered by Candu's new defined contribution (DC) plan.

[13] Given that the employees' continued participation in the PSSA was time limited, SPEA and Candu negotiated a collective agreement provision regarding future employee pension plans. The parties agreed to pursue the goal of a "target benefit pension plan".

[14] However, if that goal could not be achieved, then article 13 of the collective agreement set out certain alternative pension options. One option, described in article 13.03(*c*)(iii), contemplated SPEA becoming the trustee for its own DC pension plan:

> ARTICLE 13 - PENSION PLAN
>
> 13.01 General
>
> (a) **Employees who transitioned from Atomic Energy of Canada Limited (AECL) to the Company, on October 2, 2011, ("Continuing Employees") shall continue to be covered by the Public Service Superannuation Act** (Parts I and III), the Supplementary Retirement Benefits Act, and the Statute Law (Supplementary Retirement Benefits) Amendment Act of 1973 and subsequent amendments thereto, the terms of which are not subject to collective bargaining, up to and including October 1, 2014.
>
> (b) **Employees hired after October 2, 2011 shall be members of the registered Defined Contribution (DC) Plan established by the Company**, the terms of which are outlined in this article.

(c) **The Company and SPEA shall form a joint working group whose mandate is to pursue the goal of a single or multi-employer Target Benefit (TB) Pension Plan**. The goal is to have such a Plan in place before the October 2, 2014 divestiture.

13.02 Transitional DC Plan Details

The terms applicable to employees hired after the effective date of this Agreement shall be as follows:

a) **Employees shall be required to contribute six and one-half percent (6.5%) of base salary including on-call and acting pay.** Employees shall be permitted to make additional voluntary contributions to the DC Plan, subject to the limits imposed by the Income Tax Act.

b) **The Company contributions to the DC Plan shall be equal to the following percentage of an employee's base salary, including on-call and acting pay:**

Years of Service	Contribution
0-3	6.5%
3-6	8.0%
6+	10.0%

Employees hired between October 2, 2011 and the effective date of this agreement shall be deemed to have six completed years of service for pension purposes only.

Employees hired on or after April 22, 2012 shall be required to join the DC Plan retroactive to their start date with the Company and to make retroactive contributions equivalent to 6.5% of base salary. The Company shall make a contribution into the DC Plan for these employees equivalent to 10% of their base salary, retroactive to their start date, less any Company pension contribution already made for that period.

Employees hired between October 2, 2011 and April 21, 2012 shall be required to join the DC Plan retroactive to the Plan effective date, April 22, 2012, and to make retroactive contributions equivalent to 6.5% of base salary. The Company shall make a contribution into the DC Plan for these employees equivalent to 10% of their base salary, retroactive to April 22, 2012 less any Company contribution already made for that period. In addition, the Company shall provide the employee with a lump sum payment equivalent to 10% of their base salary for the period from their start date to April 21, 2012, less any lump sum payment previously made for this purpose. Employees may choose to take the lump sum payment in cash, to apply it in whole or in part to any required retroactive employee contribution to the DC Plan, or to have it transferred to a personal RRSP if they have current year contribution room.

13.03 Transition to a Target Benefit Plan

Notwithstanding the fact that the Company and SPEA have agreed to implement a transitional registered DC Plan, both Parties shall continue to diligently pursue the option of a Target Benefit Pension Plan. To this end.

(a) The Parties agree to establish a Joint Working Group to diligently pursue an Ontario energy sector or other multi-employer TB Pension Plan and other options such as a single-employer TB Plan.

(b) The Joint Working Group shall include a pension expert appointed by SPEA (at SPEA's cost) and a pension expert appointed by the Company (at the Company's cost), two (2) Company Representatives and two (2) SPEA Representatives. The Group shall commence working within sixty (60) days of ratification of this Collective Agreement.

(c) **In the event that the Parties are unable, despite their best efforts, to establish or join a TB Pension Plan prior to October 2, 2014, SPEA shall have the option to:**

i. **Continue in the registered DC Plan described in Article 13.02 above;**

or

ii. **Continue in the registered DC Plan under the terms described in Article 13.02, with a sub-group created in the DC Plan for SPEA-represented employees** along with a joint SPEA / Company pension committee for the sub-group: or

iii. **Transfer employees into a separate registered DC Plan under the terms described in Article 13.02, with SPEA acting as the sole trustee of the DC Plan.**

…

(emphasis added)

[15] Mr. Torabi suggested that SPEA had failed to respect its Constitution when it decided to create the SPEA Plan. The matter is not financially insignificant, since an amount equivalent to 16.5% of an employee's base salary goes into the SPEA Plan (6.5% directly from the employee, supplemented by a 10% Candu pension contribution).

[16] Mr. Torabi referred to various provisions in SPEA's Constitution which he alleged had been ignored. For example, article 5.8 of SPEA's Constitution reads:

5.8 SPEA shall not establish or participate financially in any **commercial enterprise** without the approval of the membership by means of a referendum.

(emphasis added)

[17] Mr. Torabi argued that the SPEA Plan constituted a "commercial enterprise", as that term is used in article 5.8 of the Constitution.

[18] When SPEA decided to create the SPEA Plan, Candu no longer included SPEA-represented employees in its own existing DC plan.

[19] Mr. Torabi asked the Board to find i) that SPEA executives acted arbitrarily by taking over the pension plan and becoming trustees; and ii) that SPEA acted in violation of its Constitution.

[20] In terms of remedy, Mr. Torabi asked the Board to grant bargaining unit employees the option to choose their pension plan.

B. SPEA's Response

[21] SPEA argued that Mr. Torabi's complaint contested the interpretation of its governing Constitution, which was a matter falling outside the scope of the DFR. SPEA argued, solely in the alternative as a party is permitted to do, that even if the Constitution's interpretation were somehow relevant, a union-sponsored pension plan was not a "commercial enterprise", as that term is used in article 5.8 of its Constitution.

[22] SPEA and Candu negotiated the three future pension options found in article 13.03, *supra*. When they were unable to establish or join a "target benefit pension plan", SPEA adopted a voting process which culminated in its decision to create the SPEA Plan for members of its bargaining units (article 13.03(*c*)(iii)).

[23] SPEA described how, in its role as sponsor, it approved a Board of Trustees made up of SPEA Executive members and external pension experts. The Board of Trustees then went to market and selected Standard Life to invest bargaining unit employee contributions in accordance with an established investment policy.

[24] SPEA noted that Standard Life also administers Candu's DC Plan, a plan which continues to cover non SPEA-represented employees.

[25] SPEA argued it was not obliged to hold any type of membership vote prior to making its pension choice under article 13. However, in July 2014, due to the importance of the issue, SPEA decided to hold a vote. It restricted participation in that vote to actual SPEA members, as opposed to all employees in its bargaining units.

[26] SPEA advised that 70% (488) of its members voted and 66% (322) supported the option of a union-sponsored pension plan. Following the vote, SPEA finalized the SPEA Plan in accordance with applicable pension legislation. Mr. Torabi and his fellow complainants, all of whom were SPEA members at the material times, had an opportunity to participate in the pension vote.

[27] For Mr. Torabi's specific complaint, SPEA suggested that the Board did not need to examine SPEA's decision to exclude some bargaining unit employees from the pension vote due to their lack of union membership. The Board agrees. That particular issue has been raised in a separate and still pending complaint: Nadeau et al., file 30662-C. The instant decision will deal solely with Mr. Torabi's situation, i.e. that of a SPEA member who objected to SPEA creating a pension plan for employees in its bargaining units.

[28] SPEA contested Mr. Torabi's remedial request. It argued it could not allow its bargaining unit members to choose to remain in Candu's DC plan without harming its long-term pension goal of negotiating a target benefit pension plan.

III. Analysis and Decision

[29] The parties' pleadings raised the issue of the scope of the DFR under the *Code*. When is something a purely internal union matter? Conversely, when might trade union decisions attract DFR obligations?

A. The Scope of the Duty of Fair Representation

1. Section 37 of the *Code*

[30] For ease of reference, section 37 reads:

> 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.

[31] The Legislator used several of the *Code*'s defined terms when drafting section 37. They include: i) trade union; ii) bargaining agent; iii) bargaining unit; iv) collective agreement, and v) employee. We will review briefly those defined terms since they are essential to an understanding of the scope of the *Code*'s DFR. We will also comment on a small anomaly in the French version of section 37, *infra*.

a. Trade Union

[32] The *Code*'s DFR does not apply merely because an organization meets the definition of a "trade union":

> 3. (1) In this Part,
>
> "trade union" means any organization of employees, or any branch or local thereof, the purposes of which include the regulation of relations between employers and employees.

[33] Section 37 is clear that a trade union must take further explicit steps before it becomes subject to any DFR obligations.

b. Bargaining Agent

[34] It is only if a trade union has acquired the status of a "bargaining agent" under the *Code*, that it will become subject to the DFR:

> 3. (1) In this Part,
>
> "bargaining agent" means
>
> (*a*) **a trade union that has been certified by the Board as the bargaining agent** for the employees in a bargaining unit and the certification of which has not been revoked, or
>
> (*b*) **any other trade union that has entered into a collective agreement** on behalf of the employees in a bargaining unit
>
> (i) the term of which has not expired, or
>
> (ii) in respect of which the trade union has, by notice given pursuant to subsection 49(1), required the employer to commence collective bargaining.
>
> (emphasis added)

[35] The definition of bargaining agent includes both trade unions the Board has certified (SPEA's situation), as well as trade unions which an employer has voluntarily recognized in a collective agreement.

[36] A trade union's decision to obtain the rights and privileges of a "bargaining agent" under the *Code* leads to the imposition of the DFR statutory obligation. That DFR requires that the trade union/bargaining agent "… shall not act in a way that is arbitrary, discriminatory or in bad faith…" with respect to employees' collective agreement rights.

[37] Curiously, the French version of section 37 of the *Code* does not contain the defined term "bargaining agent" (agent négociateur):

> 37. Il est interdit au syndicat, ainsi qu'à ses représentants, d'agir de manière arbitraire ou discriminatoire ou de mauvaise foi à l'égard des employés de l'unité de négociation dans l'exercice des droits reconnus à ceux-ci par la convention collective.

[38] This anomaly might arguably raise an ambiguity regarding when a trade union becomes subject to the DFR. However, the "shared meaning rule" of bilingual interpretation demonstrates that the English version of section 37 provides a plain and unequivocal meaning. For a recent and comparable application of the "shared meaning rule", see *Reference* re *Supreme Court Act*, ss. 5 and 6, 2014 SCC 21, at paragraph 32.

c. Bargaining Unit

[39] The definition of a "bargaining unit" similarly illustrates that bargaining agents may be either certified by the Board or voluntarily recognized by an employer:

> 3. (1) In this Part,
>
> "bargaining unit" means a unit
>
> (*a*) determined by the Board to be appropriate for collective bargaining, or
>
> (*b*) to which a collective agreement applies.

[40] Section 37 limits the scope of a bargaining agent's DFR to the bargaining unit it represents. A bargaining unit specific DFR arises each time a trade union obtains bargaining agent status.

d. Employees

[41] Section 37 confirms that the DFR applies only "in the representation of any of the employees in the unit".

[42] The *Code* defines an employee as:

> 3. (1) In this Part,
>
> "employee" means any person employed by an employer and includes a dependent contractor and a private constable, but does not include a person who performs management functions or is employed in a confidential capacity in matters relating to industrial relations.

e. Collective Agreement

[43] Section 37 also notes that the DFR owed to bargaining unit employees comes from their "… rights under the collective agreement…". The *Code* defines a collective agreement as a document dealing with employees' terms and conditions of employment:

> 3. (1) In this Part,
>
> "collective agreement" means an agreement in writing entered into between an employer and a bargaining agent containing provisions respecting terms and conditions of employment and related matters.

[44] The explicit reference in section 37 to employees' "rights under the collective agreement" came from a 1985 *Code* amendment. From 1978 to 1984, the *Code* had described a bargaining agent's DFR in broader terms (former section 136.1):

> 136.1 Where a trade union is the bargaining agent for a bargaining unit, the trade union and every representative of the trade union shall represent, fairly and without discrimination, all employees in the bargaining unit.

[45] The addition of the explicit reference to "rights under the collective agreement" restricted the scope of the DFR. The 1985 amendment also added the new terms "arbitrary, discriminatory or in bad faith" to indicate the high threshold which would have to be crossed before a *Code* violation occurred.

[46] The limiting language in the amended section 37 demonstrated that bargaining agents generally had no obligation to represent bargaining unit employees before other administrative tribunals, such as workers compensation boards: *Dumontier*, 2002 CIRB 165.

[47] Similarly, the DFR does not generally oblige a bargaining agent to judicially review an arbitration award: *Leduc*, 2010 CIRB 495.

[48] In *Gill*, 2011 CIRB LD 2528, the Board, when considering a DFR complaint challenging a trade union's elections, examined the difference between collective agreement rights and internal union matters:

> Section 37 of the *Code* is tied to a bargaining unit member's rights under the collective agreement. These rights are different from a member's rights under a trade union's constitution and internal rules and procedures. While section 7 of the collective agreement, which is negotiated by the CAW and ASP, does refer to shop stewards, this reference is only about the CAW's obligation to notify ASP of the identity of its stewards.

> Section 7 of the collective agreement does not govern the CAW's internal election process for its stewards. Disputes about such things as steward votes do not fall within this Board's DFR jurisdiction. Remedies, if any, lie elsewhere.
>
> The election of health and safety representatives is similarly a matter governed by the CAW's constitution, internal rules and/or perhaps Part II of the *Code*. But it is not something that is governed by the collective agreement. The Gills made no allegation to this effect.
>
> Therefore, even if one assumes the Gills' factual allegations to be true under the *prima facie* case analysis, there would be no violation of section 37 of the *Code*. Internal union elections are not governed by the collective agreements that trade unions and employers negotiate. Without that essential link to the collective agreement, there can be no violation of section 37 of the *Code*.
>
> (pages 4 and 5)

B. The Impact of *Code* Obligations on a Trade Union's Constitution

[49] The Board generally does not involve itself with internal matters arising under a trade union's Constitution. Only in very limited internal trade union areas will the *Code* oblige the Board to intervene.

[50] Any Board involvement arises from the fact that the *Code* grants exclusive legal rights and privileges to trade unions/bargaining agents. The *Code* concurrently imposes corresponding legal obligations.

[51] For example, section 95 of the *Code* establishes certain trade union unfair labour practices. These provisions may oblige the Board to examine whether an otherwise internal union matter, including one involving its Constitution, impacted employee rights under the *Code*.

[52] In *Teamsters, Local Union 847*, 2011 CIRB 605, the Board concluded that discipline imposed in accordance with a trade union's Constitution, but against employees who had supported a rival union's raid application, violated their *Code* rights:

> [23] Applying the law to the facts of this case, which are not disputed, it is clear that the three employees were charged internally and disciplined for exercising their fundamental right under the *Code* to change unions. None of the three members held a position within the Guild. It was undisputed that the three members supported the Teamsters and campaigned on their behalf during the period leading up to the representation vote. The three individuals had a fundamental right to participate in a proceeding under the *Code*, in this case a raid (displacement) application. The Guild cannot penalize them for exercising their rights of association under section 8 of the *Code*. Clearly, the charges were a form of reprisal against the three individuals for their activities on behalf of the applicant. The Board finds that the charges are a clear violation of section 95(*i*)(i) of the *Code*. Given this finding, there is no need for the Board to determine whether the Guild breached sections 95(*f*) or 95(*g*), or section 96 of the *Code*.

[53] The Federal Court of Appeal, in *Canadian Merchant Service Guild* v. *Teamsters, Local Union 847*, 2012 FCA 210, upheld the Board's reasoning that employees cannot be punished for exercising their basic right to belong to the trade union of their choice:

> [16] Sub-paragraph 95(*i*)(i) of the *Code* prohibits a trade union from imposing "a financial or other penalty on a person, because that person…has…participated…in a proceeding under" Part I of the *Code*. Since the Guild acknowledged at the hearing before this Court that the Teamsters' application for certification was a proceeding under the *Code*, and that the three concerned individuals were fined or suspended by the Guild for participating in this proceeding, I fail to understand how the Board misinterpreted or misapplied sub-paragraph 95(*i*)(i). The fact that the Board applied the reasoning in its decisions of *Paul Horsley et al*, above, and of *Nathalie Beaudet-Fortin*, above, is not a reviewable error, since that reasoning is fully compatible with the terms of sub-paragraph 95(*i*)(i). These decisions recognize the basic right of individuals to belong to the trade union of their choice, the right of union members to attempt to change their bargaining agent from time to time in the manner and in accordance with the timelines provided for in the *Code*, and the right of such individuals not to be disciplined or penalized for exercising such rights.

[54] However, the Board does not generally get involved in matters involving a trade union's Constitution. In *Thibeault*, 2014 CIRB 711 (*Thibeault 711*), the complainant disputed the validity of certain amendments made to a trade union's Constitution. In Mr. Thibeault's view, the trade union could not impose discipline on him, since the relevant provisions in the Constitution had earlier been repealed. The complaint referred to section 95(*g*) of the *Code*:

> 95. No trade union or person acting on behalf of a trade union shall
>
> (*g*) take disciplinary action against or impose any form of penalty on an employee by applying to that employee in a discriminatory manner the standards of discipline of the trade union.

[55] Evidently, the "standards of discipline of the trade union" mentioned in section 95(*g*) are generally internal matters, though the Board has a limited jurisdiction if the situation impacts *Code* rights.

[56] The Board explained in *Thibeault 711* that it had no jurisdiction to examine disputes about the validity of amendments made to a trade union's Constitution:

> [62] Mr. Thibeault has not demonstrated that CUPW violated section 95(*g*). He has argued that CUPW abolished the LDCs established under article 8 of its national constitution at its convention in October 2011. He indicated to CUPW that any action taken by the LDCs after the amendments had been made were "*ultra vires*."
>
> [63] CUPW, on the other hand, has argued that it subsequently clarified that the LDCs would dispose of any pending complaints filed before the October 2011 amendments to the national constitution.

> [64] This contractual dispute between the parties concerns the validity and interpretation of certain provisions of CUPW's national constitution. The Board's role under section 95(*g*) does not extend to resolving these types of disputes (see *Conlin*, *supra*).
>
> [65] Mr. Thibeault has not presented any evidence that CUPW treated other members in similar situations differently from the way he was treated. Rather, the sole basis for his complaint is his view that CUPW abolished the LDCs in October 2011 and, consequently, no LDC had authority to impose any discipline on him.
>
> [66] That type of dispute, involving the proper interpretation of CUPW's national constitution, is for a court to decide. Indeed, there have been many court cases involving disputes about a trade union's authority under its national constitution (see, for example, *Birch* v. *Union of Taxation Employees, Local 70030*, (2008), 288 D.L.R. (4th) 424, upheld by the Ontario Court of Appeal in *Birch* v. *Union of Taxation Employees, Local 70030*, 2008 ONCA 809).

[57] In *Mallet*, 2014 CIRB 730 (*Mallet 730*), a DFR case like that of Mr. Torabi, the Board similarly concluded it had no jurisdiction to examine a harassment complaint process which was contained within a trade union's Constitution. The Board emphasized, in *Mallet 730*, that section 37 of the *Code* focused on an employee's rights under the collective agreement. Section 37 did not apply to rights arising from a trade union's Constitution:

> [63] Mr. Mallet's complaint makes reference to the Union's constitution and the harassment policy contained within it:
>
> > It is alleged that the respondent's have acted in an arbitrary way by refusing to exercise their jurisdiction and responsibility to assist its member and to **fulfill its constitutional requirement to its members in the investigation of discriminatory conduct in the workplace.**
> >
> > …
> >
> > **The union, CAW Canada by constitution established a policy that all workplaces under their jurisdiction were to be free from harassment and that the union created a policy equal to everyone that required the appointment of a representative of the union to investigate any and all alleged harassment within the workplace.** This policy was designed to cover and deal with all forms of harassment. I am a gay man who has been subject to extradorinary circumstances of sexual harassment and sexual assault within my workplace and I did provide a copy of the issues of harassment to my local union representatives and for whatever reason, they chose not to engage CAW's policy. **That policy is attached for the Board's reference and it requires the investigation of the circumstances central to the discriminatory practice, requires a written report with recommendations and delivered to the National President for action in accordance with the constitutional requirements of the union's constitution**
> >
> > [*sic*]
> >
> > (emphasis added; pages 4 and 10 of the complaint)

> [64] There seemed to be confusion at times in some of the pleadings, as well as at the oral hearing, about the Board's jurisdiction. The Board had attempted to describe the scope of the hearing in its November 1, 2013 letter, *supra*. Evidence about the Union's constitution led to relevancy objections during the hearing.
>
> [65] Section 37 is explicit that the duty of fair representation in the *Code* applies with regard to an employee's rights under the collective agreement:
>
> > 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.
> >
> > (emphasis added)
>
> [66] Except in very specific situations found in section 95 of the *Code*, the Board is not the forum in which to contest allegations that a trade union may not have followed its internal policies: see, for example, *Thibeault*, 2014 CIRB 711. A trade union's constitution is evidently distinct from any collective agreement it might negotiate with an employer.
>
> [67] The Board dismisses Mr. Mallet's argument that the Union violated section 37 of the *Code* by failing to conduct a harassment investigation pursuant to its constitution. Any issues related to this alleged failure fall outside the scope of a DFR complaint.

[58] The Board is not the appropriate body to consider Mr. Torabi's allegations regarding the interpretation of terms like "commercial enterprise" in article 5.8 of SPEA's Constitution. Rather, as the Board noted in *Thibeault 711*, disputes about the interpretation of a trade union's Constitution, arising in essence from a contractual dispute, fall within the jurisdiction of the courts.

[59] It is important to focus on the collective agreement when examining the scope of the DFR. The only collective agreement references the Board could identify in Mr. Torabi's complaint concerned the pension options under article 13. SPEA adopted a voting method to choose one of those pension options. Mr. Torabi et al. had the opportunity to vote, if they so desired.

[60] However, article 13.03(*c*)(iii) in the SPEA-Candu collective agreement did not clothe the Board with a general oversight jurisdiction to examine any and all issues arising from the SPEA Plan.

[61] Pensions are heavily regulated in Canada. The Board takes judicial notice of the fact that certain trade unions operate both pension plans and employee benefit programs. SPEA's decision to create a union-sponsored pension plan for bargaining unit members, in and of itself, does not raise DFR issues.

[62] The same can be said for SPEA's decision about the extent of the rights of laid-off employees to participate in the pension vote. SPEA explained at paragraph 12 of its response that it allowed employees on notice of layoff to vote, but not those whose notice period had expired:

> 12. The Complaint further alleges that members [*sic*] were already laid-off were allowed to vote. SPEA states that employees on notice of layoff were allowed to vote, but not those whose notice period had expired. Regarding the allegation that some bargaining unit members were not allowed to vote, SPEA submits that none of the Complainants were affected by SPEA's decision to restrict the vote to union members. Therefore this issue is not properly before the Board in the instant Complaint. We note that this matter is the subject of Board in File No. 30662-C.

[63] The issue is not whether SPEA could have come to a different conclusion regarding the voting status of laid-off employees. The Board does not sit in appeal of the myriad decisions a trade union must make when carrying out its statutory duties as a bargaining agent.

[64] Rather, the issue is whether Mr. Torabi demonstrated that SPEA acted in an arbitrary, discriminatory or bad faith manner when deciding how to treat laid-off employees. Mr. Torabi did not demonstrate that SPEA did anything other than decide the extent of the voting eligibility for these employees. That was a somewhat routine decision which trade unions may have to make on occasion for inactive bargaining unit employees.

[65] Given that Mr. Torabi's main complaint raised a purely internal union matter concerning the proper interpretation of SPEA's Constitution, the Board has concluded that the DFR does not extend to such issues and must therefore dismiss his complaint.

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

_____
Graham J. Clarke
Vice-Chairperson

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Robert Monette
Member

_____
Norman Rivard
Member