



## Reasons for decision

Firmin Mallet,

*complainant,*

*and*

Unifor,

*respondent,*

*and*

VIA Rail Canada Inc.,

*employer.*

Board File: 29467-C

Neutral Citation: 2015 CIRB **800**

November 23, 2015

---

The Canada Industrial Relations Board (Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. Richard Brabander and Daniel Charbonneau, Members.

### **Counsel of Record**

Mr. Brian F.P. Murphy, Mr. Thomas A. Barron, Ms. Candace Salmon and Mr. Bradley D.J. Proctor for Mr. Firmin Mallet;

Mr. Anthony F. Dale, for Unifor;

Mr. William Hlibchuk, for VIA Rail Canada Inc.

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

### **I. Background**

[1] The Board must fix the amount of reasonable legal costs awarded to Mr. Mallet, a successful complainant in a duty of fair representation (DFR) complaint. Unifor represented Mr. Mallet's bargaining unit at VIA Rail Canada Inc. (VIA)

[2] In *Mallet*, 2014 CIRB 730 (*Mallet 730*), the Board summarized its conclusion:

[149] In the Board's view, the Union focussed on the mediation and carried out a perfunctory examination of Mr. Mallet's request to file an accommodation grievance. The Union's arbitrary process failed to meet the standards imposed by the *Code* in several key ways, including:

- i) Judging from its August 15, 2012 response, as compared with its position at the oral hearing, the Union seemingly did not have a clear understanding of Mr. Mallet's grievance. Its August, 2012 response suggested an arbitrator would dismiss Mr. Mallet's grievance on the merits. At the oral hearing, the Union argued that same grievance was premature;
- ii) The Union failed to request and examine relevant medical information after receiving a grievance requesting reasonable accommodation from a disabled employee;
- iii) The Union discussed accommodation with VIA, but never spoke to Mr. Mallet to get his views; and
- iv) The Union never told Mr. Mallet it would not proceed with his grievance following its April 3–5, 2012 consideration of the matter. It never provided him with any explanation of the reasons why it had decided not to proceed.

[150] Individually, or cumulatively, these items support a finding that the Union violated section 37 of the *Code* by acting in an arbitrary manner.

[3] The Board, in addition to other remedies, ordered compensation for Mr. Mallet's reasonable legal costs:

[152] Unless the three parties can find a mutually agreeable resolution themselves, the Board has decided to order the following remedies as a result of the Union's arbitrary conduct:

- i) The Union shall pay Mr. Mallet's reasonable legal costs incurred in the bringing of this complaint, either as agreed, as taxed (reviewed) or as assessed;

...

[153] The Board retains jurisdiction over any issues arising from the above remedies.

[4] The parties could not arrive at a mutually agreeable resolution.

[5] In *Mallet*, 2015 CIRB LD 3450 (*Mallet LD 3450*), the Board expressed concern that the issue of costs was causing additional expense to the parties:

During the CMC, the Board noted its concern that the issue of costs might be causing additional expense to the parties. The remedial order was designed, if the parties could not agree on an amount, to ensure a third party reviewed the issue of costs. Evidently, in the

absence of an agreement, Unifor could not be expected to pay any amount without some third party process to protect its interests.

(page 2)

[6] The parties agreed to have the Board determine Mr. Mallet's reasonable legal costs. The agreed-upon process included affidavit evidence and the right to cross-examine, if required.

[7] In *Mallet*, 2015 CIRB LD 3478 (*Mallet LD 3478*), the Board set out a timetable for the completion of the process and advised the parties that it would likely decide the amount owing based solely on the parties' written submissions.

[8] The Board has determined that reasonable legal costs amount to \$16,000.00, plus certain disbursements, and, due to subsequent events, has apportioned those costs between those who assisted Mr. Mallet with his complaint.

[9] These are the Board's reasons.

## **II. Costs**

[10] In successful DFR cases, a complainant is often made whole by having his or her grievance proceed to arbitration, sometimes, but not always, with the assistance of independent legal counsel. This remedy provides access to a process, rather than to any particular result. An arbitrator could decide to dismiss the complainant's original grievance.

[11] In addition to making the successful complainant "whole", it has been this Board's practice, as well as that of its predecessor, the Canada Labour Relations Board (CLRB), to award costs for those relatively rare cases where a complainant has succeeded on a DFR complaint and has incurred legal expenses as a result.

[12] The fact that the Board may award costs in successful DFR cases does not mean that a trade union will be obliged to pay for all of a complainant's costs. Representatives taking on a DFR complaint must still consider proportionality, just as they would for any other case.

[13] In *Scott*, 2014 CIRB 710 (*Scott 710*), the Board explained the longstanding rationale behind granting costs in DFR complaints:

[161] The Board's policy is generally not to award costs. This reflects in part the understanding and practice pursuant to which employers and trade unions each pay for their own representation costs in labour relations proceedings.

[162] Nonetheless, in exceptional situations, the Board may award costs to an employer or a trade union: see, for example, *Monarch Transport Inc. and Dempsey Freight Systems Ltd.*, 2004 CIRB 301.

[163] There is no similar understanding or practice between employees, and either their trade union or their employer, that each side will pay its own costs. This may explain why the Board tends to award some costs on the rather rare occasions when a complainant succeeds in a DFR complaint.

[164] The Federal Court of Appeal in *Canadian Air Line Pilots Assn. v. Eamor*, [1997] F.C.J. No. 859, confirmed that the Board may award costs in a DFR complaint:

5 As for the remedy ordered by the Board, with respect to which the same standard of review is applicable, we see no more reason to intervene. On the one hand, the award of costs was rationally connected to the section 37 breach and its consequences within the meaning of subsection 99(2). On the other hand, a potential award of damages, provided it be established as having a direct causal link to the breach, is not in itself insupportable under the broad remedial discretion conferred by subsection 99(2) as it is not punitive in nature, does not infringe the Canadian Charter of Rights and Freedoms, and does not contradict the purposes of the *Code* (cf. *Royal Oak Mines Inc. v. Canada* (Labour Relations Board), [1996] 1 S.C.R. 369).

[14] In the specific circumstances of *Scott 710*, the Board awarded a contribution to the costs incurred by the successful complainants:

[170] Rather than making this process more formal than should be the case in labour relations matters, and in order to avoid any further expense to the parties, the Board will simply fix the amount of this contribution. It is not intended to be an award of costs on either a party and party or solicitor and his/her own client basis. It is merely a contribution towards costs.

[171] Other processes exist to deal with the specifics of any legal fees actually invoiced to the Complainants.

[172] In arriving at the amount of the compensation to be ordered, the Board considered certain factors linked directly to the oral hearing in this case such as:

- i. the complexity of the matter;
- ii. the efficiency with which the case was pleaded;
- iii. the length of the hearing
- iv. delays and
- v. the result.

[15] In *Gill*, November 14, 1997 (LD 1760), the CLRB commented on why it awarded “reasonable” legal costs as opposed to all costs:

**It is with the greatest reluctance that the Board becomes involved in disputes between counsel with respect to payment of reasonable fees and costs pursuant to an order under section 99 of the *Code*.** One would hope that these matters would normally be

resolved by the parties themselves, without the Board's intervention. **Fortunately, instances where counsel revert the issue of fees to the Board are extremely rare.**

The purpose of section 37, and any relief granted pursuant to a violation thereof, is not to punish a respondent union, but rather to rectify the breach of the *Code* and, as far as possible, make the complainant "whole". **The Board's policy and practice of granting legal costs and disbursements to a complainant is a remedy ancillary to the main relief.** In the present case, the Board's decision awards "reasonable" legal costs as distinguished from all legal costs. The awarding of legal costs to an applicant who is successful in a section 37 complaint is not to be considered as a windfall for the complainant or his/her counsel. **The fundamental purpose for the granting of an order of costs is that they are given by the Board as indemnity to the person who is entitled to receive them and are not imposed as a punishment on the union who must pay them.**

(pages 2–3; emphasis added)

[16] In *Eamor* (1998), 107 di 103 (CLRB no. 1234), the CLRB explained its rationale for awarding reasonable legal costs well in excess of \$200,000.00 to a successful complainant for a series of matters it had heard.

[17] As noted, the Board's costs order in *Mallet 730* was designed to ensure that Unifor would have access to a local third party to decide the amount it would have to pay. In retrospect, given what transpired regarding Mr. Mallet's change in representation, *infra*, it would have been preferable for the Board itself to make this determination, as it did in *Scott 710*.

### III. Complicating Factors

[18] Mr. Mallet did not have just one person assisting him at the Board's hearing. In fact, he had three people, at least to start. Mr. Brian Murphy, a lawyer, filed Mr. Mallet's complaint and appeared at the hearing. Mr. Mallet had also retained the services of Barron T. Labour Relations Ltd (BTLR). BTLR's Mr. Tom Barron and Ms. Candice Salmon, a lawyer, assisted Mr. Mallet.

[19] Mr. Murphy, Mr. Barron and Ms. Salmon all appeared at the Board's hearing on March 18 and 19, 2014 in Halifax. Mr. Barron and Ms. Salmon, but not Mr. Murphy, appeared at the third day of the hearing on March 20, 2014. Mr. Barron, accompanied by Ms. Salmon, presented final argument for Mr. Mallet via video-conference on April 14, 2014.

[20] At some point, Mr. Mallet ceased to use the services of both Mr. Murphy and BTLR.

[21] Mr. Mallet subsequently retained Mr. Bradley Proctor as his counsel for Unifor's reconsideration application of *Mallet 730*, a matter which was heard by a differently constituted panel of the Board. That panel dismissed Unifor's reconsideration application. Mr. Mallet also

retained Mr. Proctor to take his grievance to arbitration in accordance with one of the remedies granted in *Mallet 730*.

#### **IV. Parties' Positions**

##### **A. BTLR**

[22] In its October 6, 2015 submission, BTLR requested fees in the amount of \$32,290.64, plus disbursements of \$3,729.00. BTLR advised that Mr. Mallet had already paid it \$3,101.00.

[23] BTLR contested Unifor's suggestion that the Board's order for "reasonable legal costs" disentitled it to compensation for the services it provided to Mr. Mallet. BTLR noted, *inter alia*, that Ms. Salmon, a lawyer, helped represent Mr. Mallet.

[24] BTLR noted that its offices were in Moncton, New Brunswick, whereas Mr. Mallet lived in Halifax where the Board held its hearing. This required significant disbursements for travel, accommodations and meals.

##### **B. Mr. Murphy**

[25] Mr. Murphy provided a printout of his fees and disbursements totalling \$34,663.75. This amount would be separate, and in addition to, the \$32,290.64 (plus disbursements of \$3,729.00) which BTLR had claimed.

[26] Mr. Murphy contested suggestions that the retainer agreement he had signed with Mr. Mallet disentitled him to any fees for the legal services he provided, *infra*.

##### **C. Mr. Mallet**

[27] Mr. Mallet's current legal counsel, Mr. Proctor, asked the Board to find that the amount it deems owing pursuant to its remedial order in *Mallet 730* constitutes the total amount Mr. Mallet owes to both BTLR and Mr. Murphy. Mr. Proctor also asked for costs arising from Unifor's reconsideration application for which he represented Mr. Mallet's interests.

[28] The Board already decided these issues in *Mallet 3478* at page 4.

[29] Mr. Proctor further argued that Mr. Mallet did not owe anything to Mr. Murphy under the terms of the latter's contingency fee agreement. Mr. Proctor noted that Mr. Mallet agreed BTLR was entitled to compensation, since he would never have known to file a DFR complaint without that assistance.

#### **D. Unifor**

[30] In its October 6, 2015 submission, Unifor argued that only Mr. Mallet and it were parties to the issue regarding costs.

[31] Unifor suggested that Mr. Murphy and BTLR erroneously believe the Board will make a definitive finding about their total invoices as “a replacement for processes that exist elsewhere to deal with the specifics of any legal fees actually invoiced to the complainant” (paragraph 9).

[32] Unifor referred to the factors the Board examined in *Scott 730*. It argued those factors determined the costs owing for Mr. Mallet’s DFR complaint, rather than the fairness of the accounts Mr. Murphy and BTLR had rendered. Unifor argued the case was not complex and that it took only 2.5 hearing days, not including the full day of mediation with the panel on March 18, 2014. Final argument took place by way of video-conference to reduce costs.

[33] Unifor suggested the evidence could have been even shorter had it been limited to the scope the Board had set for its oral hearing.

[34] Unifor argued that Mr. Barron was not a lawyer and that Mr. Mallet’s only payment to BTLR had been \$3,101.00.

[35] Unifor suggested that Mr. Murphy had withdrawn from the case and that, under the terms of his own retainer agreement, forfeited any entitlement to payment.

[36] Unifor argued that any costs should be made payable only to Mr. Mallet, and not to either BTLR or Mr. Murphy.

[37] Unifor also contested the significant duplication of work between BTLR and Mr. Murphy.

#### **V. Analysis and Decision**

[38] Each case is unique when the Board awards and, on rare occasions, calculates costs for a successful DFR complaint. The Board has to consider what transpired at the oral hearing it held in order to arrive at a proper determination. The Board has done just that in recent cases like *Scott 730* and *Pepper*, 2010 CIRB 551.

[39] Just as in the civil courts, the concept of proportionality impacts an award of costs. While the Board appreciates that laypeople may have no ability to enforce their *Code* rights without

the assistance of individuals like Messrs Murphy, Barron and Ms. Salmon, there must still be proportionality between the requested fees and the case.

[40] In this case, the Board agrees with Unifor that it ought not to be responsible for all the fees incurred by these three individuals, two lawyers and a labour relations expert. The case was relatively simple from a labour relations perspective.

[41] Indeed, in advance of the hearing, as noted in *Mallet* 730, the Board emphasized to all the parties and representatives the proper scope of its hearing under section 37. The Board had concerns about the relevance of allegations relating to internal VIA processes and matters arising under Unifor's constitution:

**[12] ... The Board considered the parties' pleadings and, in its letter dated November 1, 2013, described the focus of its oral hearing in Halifax:**

**The Board will hold a focussed oral hearing to examine Mr. Mallet's March 30, 2012 request for the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (CAW) to file a grievance on his behalf and the CAW's subsequent conclusion not to file a grievance.**

The Board has scheduled a hearing in this matter for March 18–20, 2014, in Halifax, Nova Scotia, at the Delta Halifax located at 1990 Barrington Street.

**The scope of a section 37 complaint is tied to Mr. Mallet's rights under the collective agreement. Therefore, the hearing will not examine in any detail, except possibly for context, any events under VIA Rail Canada Inc.'s (VIA) or the CAW's internal policies.**

The CAW and VIA will be free to argue the issue of timeliness, but it will be dealt with along with the merits of the section 37 complaint. The Board has concluded it will not be able to rule on the timeliness arguments without first hearing the evidence.

(emphasis added)

[42] While Mr. Mallet succeeded, in his main request, to have his duty to accommodate grievance taken to arbitration, the Board dismissed some of his other allegations. For example, Unifor was justified in not pursuing mediation after Mr. Mallet had filed a police complaint against the other person who would be involved.

[43] The Board does not accept Unifor's argument that any costs should be made payable to Mr. Mallet. Such a payment, given the changes in Mr. Mallet's representation, would only prolong this dispute.



[44] The Board accepts that BTLR has an entitlement to costs, even if Mr. Barron is not a lawyer. As far as the Board knew at the time, Mr. Murphy and BTLR were acting jointly as Mr. Mallet's representatives. Moreover, Ms. Salmon of BTLR was a lawyer. Both BTLR and Mr. Murphy provided services to Mr. Mallet, even if they were done in duplicate or even triplicate.

[45] Mr. Murphy contested Unifor's suggestion that he withdrew after the second day of the oral hearing and lost any entitlement to compensation under the terms of his retainer agreement. This potential factual dispute was never resolved, even though the parties had the ability to cross-examine on the affidavits.

[46] Ultimately, the Board was not convinced, having regard to section 9 of Mr. Murphy's retainer agreement, and paragraphs 6 and 7 of Mr. Murphy's August 31, 2015 affidavit, that the services he had been providing to Mr. Mallet somehow changed into *pro bono* work.

[47] The Board has restricted its costs award to the services falling within the specific scope of Mr. Mallet's DFR complaint. BTLR's representation for other matters falls outside the Board's remedial order. The same can be said for some of Mr. Murphy's services, such as the filing of a human rights complaint.

[48] The Board has determined, based on the pleadings, the pre-hearing processes and the oral hearing that a *per diem* of \$2,000.00 is appropriate for the services Mr. Mallet received. The Board awards four (4) *per dia* for the actual oral hearing. While final argument on day four (4) only took half a day, it is evident that representatives had to prepare for oral argument.

[49] The Board further awards four (4) *per dia* to cover mediation with Board staff, as well as the preparation of the pleadings and for the hearings.

[50] The total amount due for eight days of *per dia* for Mr. Mallet's case therefore comes to **\$16,000.00**. The Board has decided that BTLR will be entitled to three (3) of those days, while Mr. Murphy will be entitled to five (5). Unifor will pay, on Mr. Mallet's behalf, those respective amounts directly to BTLR and Mr. Murphy.

[51] The Board further orders that Unifor pay on account of certain disbursements the amount of \$1,500.00 for BTLR and \$1,500.00 for Mr. Murphy.

[52] Both Mr. Murphy and BTLR will provide Unifor and Mr. Mallet with a receipt for these amounts paid on Mr. Mallet's behalf.

[53] The Board has no comment on any other financial issues related to invoices, including Mr. Mallet's payment of \$3101.00 to BTLR.

[54] The Board retains jurisdiction over this remedial order and its enforcement.

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

---

Graham J. Clarke  
Vice-Chairperson

---

Richard Brabander  
Member

---

Daniel Charbonneau  
Member