Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Gilles Talbot et al.,

applicants,

and

International Association of Machinists and Aerospace Workers,

respondent,

and

Air Canada,

employer.

Board File: 037112-C
Neutral Citation: 2024 CIRB **1115**
March 13, 2024

The panel of the Canada Industrial Relations Board (the Board) was composed of Ms. Louise Fecteau, Vice-Chairperson, and Mr. Daniel Thimineur and Ms. Barbara Mittleman, Members.

Counsel of Record

Mr. Bruno-Pierre Allard, for Mr. Gilles Talbot et al.;
Ms. Amanda Pask, for the International Association of Machinists and Aerospace Workers;
Ms. Alexandra Meunier, for Air Canada.

These reasons for decision were written by Ms. Barbara Mittleman, Member.

[1] Section 16.1 of the *Canada Labour Code* (the *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 application without an oral hearing.

I. Nature of the Application

[2] On October 20, 2023, Mr. Gilles Talbot et al. (the applicants) filed an application for reconsideration of the Board's decision in *Longo*, 2023 CIRB 1073 (RD 1073).

[3] The Board issued a bottom-line decision dismissing the application on December 19, 2023 (see *Longo*, 2023 CIRB LD 5237). These are the reasons for that decision.

II. Background and Facts

[4] On May 23, 2023, the Board rendered its decision in RD 1073.

[5] That decision involved three complaints alleging that the International Association of Machinists and Aerospace Workers (the IAMAW or the union) had breached the duty of fair representation (DFR) it owed to 155 former employees of Air Canada (the employer) who had transitioned to employment with Aveos Fleet Performance Inc. and who had subsequently withdrawn their pension funds from Air Canada's pension plan. The complainants argued that the IAMAW had acted arbitrarily and in bad faith with regard to a Pension Memorandum of Understanding concluded in 2009 (PMOU) and the agreement reached in 2021 (Share Trust Repurposing Agreement (STRA)) to repurpose funds held in trust under the PMOU.

[6] Air Canada had entered into the PMOU with its unions and its retirees' organization due to serious financial difficulties, which included a $2.835 billion solvency deficit in Air Canada's Canadian defined benefit pension plans. To offset part of the unfunded solvency liability that defined benefit pension plan members assumed through the solvency funding deficit, and in lieu of having to make the full amount of its required solvency funding payments between 2009 and 2014, the employer granted a number of common shares to a joint trust. If sold, the proceeds could only be deposited into the eligible defined benefit pension plans to cover any owed solvency deficit. Any disputes as to the interpretation of the PMOU were to be decided by the Honourable James Farley.

[7] As the defined benefit pension plans had come into surplus funding in 2014, which has continued to increase every year since then, an alternate arrangement had to be agreed to by all parties to unlock the value of the PMOU. Further to a great deal of effort by the parties involved, the STRA was entered into, which would ultimately result in various benefits to pension plan members, including an immediate retroactive payment and a series of future lump sum payments.

[8] In November 2021, one of the complainants in RD 1073, the decision at issue in the present application for reconsideration, sent a message to the union asking it to confirm that he, and others who had withdrawn their funds from the pension plan, would be entitled to those benefits. The union responded that they would not, as they were no longer pension plan members. This resulted in the DFR complaints that were dismissed in RD 1073.

[9] In RD 1073, the Board found that none of the evidence demonstrated that the IAMAW had acted in an arbitrary or discriminatory manner or in bad faith with respect to the negotiation and interpretation of the PMOU, the negotiation of the STRA or the fact that the IAMAW had not provided information to the complainants on the potential consequences of withdrawing their funds from the pension plan. The Board also stated that contrary to the complainants' assertions, the union was under no obligation to submit the matter to the Honourable James Farley for dispute resolution, as there was no dispute between the parties as to the interpretation of the PMOU. The Board therefore dismissed the complaints.

[10] On October 20, 2023, the applicants filed the present application for reconsideration of RD 1073 pursuant to section 18 of the *Code*.

[11] The applicants also filed an application for judicial review of RD 1073 with the Federal Court of Appeal (FCA) prior to filing the present application.

[12] On October 23, 2023, the applicants filed a motion with the FCA to place the judicial review proceedings in abeyance pending the outcome of this application for reconsideration.

[13] On November 23, 2023, the FCA granted the motion and suspended the judicial review proceedings until December 19, 2023, "to allow the applicants to inquire with the Board as to the timeframe within which it foresees determining the application for reconsideration of the decision and to inform the Board of the importance of a prompt decision on that application" (translation).

[14] As a result, the Board issued a bottom-line decision on December 19, 2023, and now provides full reasons for its decision.

III. Positions of the Parties

A. The Application

[15] The applicants claim that on October 20, 2023, Mr. Talbot, one of the original complainants and an applicant in this matter, obtained the following new information from Mr. Jean Poirier, who was the President of the union's Transportation District 140 until September 2012:

a. During the summer of 2012, when the union and the employer were attempting to implement the Heavy Maintenance Separation Program (the Program), which had been incorporated into Board order no. 9996-U issued on January 31, 2011, a dispute arose regarding the inclusion of retired Air Canada employees in the Program.
b. At the time, the union decided to defend the retired employees' position before Arbitrator Martin Teplitsky, who was seized of all disputes related to the interpretation or application of the Program.
c. The dispute was heard, and Arbitrator Teplitsky issued an arbitral award on September 12, 2012.

[16] The applicants state that this information and the arbitral award were provided to their legal counsel on the same day they obtained it (October 20, 2023). They further claim that had this information been obtained during the initial case before the Board, the Board may have rendered a different decision because of the similarity between that situation and the present file, as both cases involve the distribution of an asset managed by the union.

[17] The applicants argue that in light of the above, there are two new elements that could have been raised in the complaints before the Board had this information been obtained beforehand:

a. First, this shows discriminatory conduct in the distribution of asset amounts in the share trust. While the union defended the rights of retired employees (who were specifically excluded from the Program), it was uncaring when faced with a similar concern in the applicants' case.

b. Second, this reinforces the argument contained in the applicants' complaints that the union owed them a duty of representation that should have been fulfilled by having the Honourable James Farley, a retired judge, decide the issue of their inclusion in the 2009 PMOU.

[18] The applicants further argue that even though the application for reconsideration was filed beyond the 30-day time limit for filing such an application, it was impossible for them to act sooner as the application is based on new evidence and new facts that were only obtained on the date of filing.

[19] They submit that this constitutes an exceptional situation that requires the Board to exercise its discretion to extend the time limit for filing their application. Otherwise, they argue that they would be forced to exercise their rights based on new facts before they actually had any knowledge of these facts. They claim that they were more than diligent in that they filed their application the same day they learned of the new facts that justified it.

B. The Union's Response

[20] The key points of the union's position are as follows:

a. The existence of the 2012 award is manifestly not "new information" to the applicants, a significant number (35) of whom were also parties in earlier DFR complaints, a reconsideration application and a judicial review application concerning the same 2012 award. Furthermore, the IAMAW issued five bulletins from October 2014 to November 2015 about the 2012 award and the legal proceedings concerning its interpretation and application. These bulletins were published on the website of IAMAW Transportation District 140, in both French and English, and were reproduced on the websites of many IAMAW locals with directions to "Copy, Post and Circulate." All the bulletins were headed "Important Message" and expressly referred to the 2012 award. The bolded subject line in each case was: "Distribution of Excess Funds Under CIRB Order 9996-U and the September 12, 2012 Arbitration Decision."
b. The existence of the 2012 award is information that was known or available to the applicants at the time of the original complaints and therefore does not meet the tests set

out in the Board's case law for embarking on a reconsideration based on "new information."

c. The application is untimely since it could have been filed during the 30-day time limit provided under section 45(2) of the *Canada Industrial Relations Board Regulations, 2012* (the *Regulations*).
d. In any event, the 2012 award is wholly irrelevant to the determination of the issues in this case and could not in any way have changed the Board's decision had it been put before it in the original proceeding.

C. The Employer's Response

[21] The employer states that after a thorough reexamination of the file, it has no further comments to make.

D. The Applicants' Reply

[22] On the filing of the application outside the prescribed time limit, the applicants state that the Board recognizes that section 18 of the *Code* is sufficiently broad to include reconsideration situations based on new evidence or facts that could not be brought to its attention beforehand. Nevertheless, Parliament clearly did not consider this avenue in enacting section 45(2) of the *Regulations* and establishing the 30-day time limit from the issuance of the reasons for the decision.

[23] The applicants submit that applications for reconsideration based on new evidence cannot systematically be filed within this time limit, in that it is not known when the new evidence (or new facts) will be brought to the applicants' attention. Therefore, section 46 of the *Regulations*, which allows the Board to vary or exempt a party from complying with any rule of procedure under the *Regulations* (particularly with respect to time limits), is necessary to alleviate this issue. The applicants submit that the test for doing so is the proper administration of the *Code*.

[24] In this case, the applicants cannot conceive that their application for reconsideration would be dismissed simply because it did not comply with the time limit under section 45(2) of the *Regulations*, when they filed it the same day they learned of the new facts and evidence they wanted to bring to the Board's attention. They argue that such a decision would be unreasonable

as it would signal that, despite a high level of diligence, the time limit set out in the *Regulations* must be rigidly applied, even when it was impossible to respect it.

[25] On the admissibility of the new evidence, the applicants argue that Mr. Talbot had very limited knowledge of the content of the earlier complaints and did not participate in the proceedings before the Board in that regard. They add that he had limited knowledge regarding the applications for reconsideration and for judicial review of the decisions on those complaints. They also argue that collectively filing complaints, including designating representatives, can lead to a number of communication issues. These submissions were supported by an affidavit sworn by Mr. Talbot.

[26] The applicants argue that Mr. Talbot's affidavit establishes that had these new facts been known earlier, they would have been brought to the Board's attention at the stage of the initial complaints, and discriminatory conduct would have been pled at that time.

[27] The applicants go on to make further arguments in support of their contention that the union's actions in this file were discriminatory because it treated them differently than those who had been involved in the litigation concerning the distribution of funds from a separation program incorporated into Board order no. 9996-U. In that case, according to the applicants, the union defended the position of retired employees who were clearly excluded from the Program and submitted the matter to Arbitrator Teplitsky, who had been seized with handling any conflict related to that Program. However, in the instant case, the union refused to exercise any recourse for the applicants, who were clearly included in the PMOU, and did not refer the matter to the Honourable James Farley, which was the mechanism for dispute resolution under that agreement.

IV. Analysis and Decision

[28] The Board would initially like to point out that while it has carefully reviewed all the submissions and documentation before it, it is not required to address every allegation or argument contained therein (see *Newfoundland and Labrador Nurses' Union* v. *Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at paragraph 16; and *Construction Labour Relations* v. *Driver Iron Inc*., 2012 SCC 65, at paragraph 3).

A. Timeliness

[29] Section 45(2) of the *Regulations* provides that an application for reconsideration of a decision must be filed no later than 30 days after the decision was issued. In this case, the application was filed nearly five months after the issuance of the decision in question and was thus not filed within the prescribed time limit.

[30] However, section 46 of the *Regulations* provides that the Board may extend the time limit where doing so is necessary to ensure the proper administration of the *Code*. According to section 22(1) of the *Code*, Board decisions are considered final, and the Board exercises its discretion to extend this time limit sparingly and only in exceptional circumstances, where there are compelling reasons to do so. In deciding whether to extend the time limit for filing an application for reconsideration, the Board will consider whether the applicant acted with due diligence (see *Canadian Broadcasting Corporation* (1994), 93 di 214 (CLRB no. 1056)). Furthermore, the applicant bears the onus of providing sufficient justification for requiring an extension (see *VIA Rail Canada Inc.*, 2007 CIRB 381).

[31] The applicants claim that it was impossible for them to file the application sooner, as it is based on new evidence and new facts that were only obtained on the date of filing. The Board has great difficulty accepting the contention that neither Mr. Talbot nor any of the other applicants who were also parties in the prior matters concerning the 2012 award did not know of that award or the circumstances surrounding it. Not only were they involved in the matters, but clear bulletins on the topic were issued and distributed. These bulletins also referred to the distribution of funds that would affect them.

[32] In the highly unlikely event that they did not know of the award, they certainly should have. The information was available when the complaints were filed, and the applicants have not demonstrated that they acted with due diligence to obtain this information. Furthermore, as will be set out below, even if they had, this information would not have caused the Board to arrive at a different conclusion. They have thus not met the onus of providing sufficient justification for requiring an extension of the 30-day time limit, and granting the extension is not necessary to ensure the proper administration of the *Code*.

[33] The Board therefore finds that the application is untimely.

B. Merits

[34] Even if the application had been timely, the Board would have dismissed it.

[35] As its decisions are meant to be final (section 22(1) of the *Code*), the Board will only exercise its power of reconsideration in exceptional circumstances (see *Rana* v. *Teamsters, Local Union No. 938*, 2020 FCA 190 (*Rana*); and *Melville*, 2021 CIRB 987).

[36] To seek reconsideration of the Board's decision, the onus is on the applicant to establish one of the following grounds:

> [9] …
>
> > (1) new facts that the applicant could not have brought to the attention of the original panel and which would likely have caused the Board to arrive at a different conclusion;
> >
> > (2) an error of law or policy that casts serious doubt on the interpretation of the *Code* or Board policy; and
> >
> > (3) a failure of the Board to respect a principle of natural justice or procedural fairness.
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> (*Rana*; also see *Buckmire*, 2013 CIRB 700, at paragraphs 37–45)

[37] In the instant case, the applicants plead the first ground listed above, for which two requirements must be met: (1) there must be new facts that they could not have brought to the original panel's attention; and (2) those new facts must likely have caused the Board to arrive at a different conclusion.

[38] For the reasons set out in the "Timeliness" section above, the Board finds that the first requirement has not been met. The "new facts" on which the applicants rely could have been obtained and put to the Board earlier through reasonable effort and diligence.

[39] In any event, for the reasons set out below, even if those facts had been put to the Board during the complaint proceedings, they would have had no impact on that decision. The applicants have therefore not met the second requirement of this ground either.

[40] The applicants claim that the union acted in a discriminatory manner because both cases involved the distribution of an asset it managed and that, while it defended the rights of retired employees who had been specifically excluded from a separation program in 2012 and submitted their dispute to Arbitrator Teplitsky, it was uncaring when faced with such a concern in the applicants' case. The applicants claim that this reinforces their argument that the union had an obligation to submit the question "of [their] inclusion in the [PMOU]" (translation) to the Honourable James Farley, who was designated to resolve disputes under that agreement.

[41] The definition of discriminatory conduct in the context of a DFR complaint was set out in *Blakely*, 2003 CIRB 241, as follows:

> [32] Discriminatory conduct occurs when a union distinguishes between employees on illegal, arbitrary, or unreasonable grounds (see *Vergel Bugay et al.*, *supra*). In *Frank Eibl et al.*, [2002] CIRB no. 200; and 89 CLRBR (2d) 119, the Board adopted the following definition of discrimination as provided by the Nova Scotia Labour Relations Board in *Daniel Joseph McCarthy*, [1978] 2 Can LRBR 105:
>
> > In our opinion the word "discriminatory" in this context means the application of membership rules to distinguish between individuals or groups on grounds that are illegal, arbitrary or unreasonable. A distinction is most clearly illegal where it is based on considerations prohibited by the *Human Rights Act*, S.N.S 1969, c. 11, as amended; a distinction is arbitrary where it is not based on any general rule, policy or rationale; and a distinction may be said to be unreasonable where, although it is made in accordance with a general rule or policy, the rule of policy itself is one that bears no fair and rational relationship with the decision being made. The classic example is a rule excluding all applicants with red hair from some position.
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> (page 108)

[42] Contrary to the applicants' assertions, the fact that the union interpreted and applied completely different documents differently in entirely distinct circumstances is in no way an illegal, arbitrary or discriminatory distinction. One situation involved applying a separation program contained in a 2012 Board order to a group of retirees, and the other involved applying a 2021 STRA to a group of individuals who were no longer members of the pension plan. These are two entirely different situations. Unions represent the interests of different members or former members of the bargaining unit in different fashions all the time. Just because there is a tangential similarity in the cases, as they both involve the distribution of assets, this does not suggest that the union had an obligation to act in the same way in both cases.

[43] In assessing the merits of the DFR complaints in this matter, the original panel carefully analyzed the union's conduct in light of the particular facts and agreements involved. The union's conduct in relation to a 2012 separation program has no relevance to the instant matter.

[44] To sum up, the Board finds that this application does not establish new facts that could not have been brought before the original panel and that would likely have caused the Board to arrive at a different conclusion.

V. Conclusion

[45] For all the reasons stated above, the Board finds that this application for reconsideration is untimely and that, even if it were not untimely, the applicants have not demonstrated any exceptional circumstances that would cause the Board to change its original decision.

[46] The application is therefore dismissed.

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

Louise Fecteau
Vice-Chairperson

Daniel Thimineur
Member

Barbara Mittleman
Member