Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Canada Post Corporation,

applicant,

and

Association of Postal Officials of Canada *and* Ruby Sapra,

respondents.

Board File: 28328-C
Neutral Citation: 2010 CIRB **558**
December 29, 2010

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

Counsel of Record

Mr. Chris Meaney, for Canada Post Corporation;
Mr. George Rontiris, for Association of Postal Officials of Canada;
Mr. Kenneth Alexander, for Ruby Sapra.

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

I–Nature of the Application

[1] Section 16.1 of the *Canada Labour Code* (*Part I–Industrial Relations*) (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 reconsideration application without an oral hearing.

[2] On August 13, 2010, Canada Post Corporation (CPC) raised a concern it had that a Board decision had failed to address an issue it raised in its written pleadings.

[3] In *Ruby Sapra*, 2010 CIRB 533 (*Sapra 533*), the Board upheld a duty of fair representation (DFR) complaint. The Board ordered that Ms. Sapra's grievance proceed to arbitration and that her bargaining agent, the Association of Postal Officials of Canada (APOC), assume the reasonable costs of her legal counsel. The Board also waived any time limits in the collective agreement for referring Ms. Sapra's grievance to arbitration.

[4] The reconsideration panel has decided that *Sapra 533* did omit to consider and decide the issue that CPC had raised in its written pleadings. In the interest of expediency, the reconsideration panel will make the appropriate remedial order and thus finally dispose of this matter.

II–Facts

[5] On July 23, 2010, the Board's decision in *Sapra 533* found that APOC had acted arbitrarily when it withdrew Ms. Sapra's grievance. Ms. Sapra had sought to contest a resignation she had given to CPC. The Board concluded in *Sapra 533* that APOC's sole reliance on a privileged legal opinion did not provide a satisfactory explanation of the process it followed in determining whether or not to send Ms. Sapra's matter to arbitration:

> [64] In the Board's view, the cases in *David Coull*, *supra,* and *Terry Griffiths*, *supra*, can be distinguished from the case at hand on the basis that APOC admits that its sole consideration in withdrawing the grievance was the legal opinion. Despite being afforded numerous opportunities to explain why it withdrew the grievance, by way of written submissions, at the case management conference, and at the hearing, APOC maintained it withdrew the grievance based solely on the legal opinion over which it

claimed solicitor-client privilege. As indicated above, the fact that APOC obtained a legal opinion does not absolve it of its obligation pursuant to section 37 to turn its mind to the merits of the matter and make a reasoned decision based on the circumstances of the complainant's case. The evidence indicates that APOC did not do so.

[6] In *Sapra 533*, the Board described CPC's position:

> [36] The employer took no position on the merits of the complaint. It submitted in writing that it should be entitled to the benefit of the time limits negotiated with the union for filing and referring grievances to arbitration, should the Board find that a breach of the *Code* has occurred. The employer declined the opportunity to provide submissions at the hearing.

[7] After finding that APOC had violated the *Code*, the Board ordered the following remedy:

> [66] By way of remedy for the association's breach of section 37 of the *Code*, as previously noted, the complainant's counsel requested that the resignation be rescinded and that the complainant be reinstated. However, the Board's mandate is not to determine the merits of a grievance.
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> [67] As a result of the Board's finding that the association violated section 37 of the *Code*, the Board hereby orders that APOC refer the complainant's resignation grievance to arbitration and that it assume the reasonable costs of legal counsel of the complainant's choice for the grievance hearing. The Board waives any time limits which might otherwise prevent the grievance from proceeding to arbitration.

[8] CPC's August 13, 2010 letter referenced its April 24, 2009 written submission about a potential increased liability for damages:

> Thank you for your letter dated April 23, 2009. Canada Post takes no position on the merits of the complaint against the union. If the Board finds that a breach of the Code has occurred, Canada Post submits that it should not be held liable for any direct or indirect consequence arising from the breach and should be entitled to the benefit of any and all time limits negotiated with the union for the filing and referral of grievances to arbitration.
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> (emphasis added)

[9] CPC's April 24, 2009 submission raised two distinct points:

i) the extent of its liability in the event of a *Code* breach; and

ii) the negotiated time limits for referring grievances to arbitration.

[10] On August 16, 2010, CPC wrote again and clarified its main request that the original panel review *Sapra 533*. Alternatively, CPC asked the Board to reconsider *Sapra 533*.

[11] In its October 12, 2010 letter, APOC took the position that CPC had failed on two occasions to comment about its potential liability. The first arose when CPC did not comment on APOC's response dated April 23, 2009. The second occasion arose during the oral hearing held on February 25-26, 2010.

[12] In its October 21, 2010 reply, CPC referred once again to its April 24, 2009 letter. In its view, it had put forward its position on the issue of liability for any damages awarded and suggested instead that APOC had failed to respond to its position.

[13] CPC argued that the Board could review *Sapra 533* on the basis of an error of policy and/or a denial of natural justice.

III–Analysis and Decision

[14] In *Ted Kies*, 2008 CIRB 413 (*Kies 413*), the Board examined the reconsideration process. Reconsideration is not an appeal, but is instead an exceptional process. The Board in *Kies 413* suggested the various elements that an applicant would have to plead in support of a reconsideration application.

[15] In the Board's view, this reconsideration application must be analyzed having due regard to the Board's longstanding practice with regard to an employer's role in DFR complaints.

[16] Generally, an employer has an observer's role on the merits of a DFR complaint.

[17] A DFR complaint involves a bargaining unit member and his or her trade union. The dispute focusses on the trade union's internal decision-making process, an inquiry that generally does not concern the employer.

[18] Moreover, the Board does not want employers taking over the trade union's obligation to defend its process. Most DFR complainants are lay people; the trade union has the obligation to comment on its process, whether via its own representatives or outside legal counsel.

[19] The Board recently summarized its longstanding practice in *Ronald Schiller*, 2009 CIRB 435:

> [36] Employers have a limited role in duty of fair representation complaints. The Board summarized the reasons for this at paragraph 47 of *Virginia McRae Jackson et al.*, *supra*:
>
> > [47] The employer is not a principal party to a section 37 proceeding. Its actions are not at issue and it has no case to defend. As a matter of practice, it is added as an affected party since its interest could be affected by the outcome of the complaint, that is, the remedy imposed by the Board if the complainant is successful. For this reason, the Board provides the employer with the opportunity of presenting its submissions on the question of remedy. The employer's role with respect to the merits of the complaint is restricted to that of an observer.
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> [37] The Board previously held in *James H. Rousseau* (1995), 98 di 80; and 95 CLC 220-064 (CLRB no. 1127) that "The Board will not accept the employer acting as a second defence for the union". In *André Gagnon* (1986), 63 di 194 (CLRB no. 547), the Board explained that it limited the employer's role in order to avoid improper collaboration between the union and the employer during a duty of fair representation complaint:
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> > It is Board practice, in the name of minimum fair play toward the complainant, to ask the employer to keep a very low profile in cases involving a contravention of section 136.1 (now section 37), at least with respect to the merits of the complaint. On the other hand, it will be asked to come to the fore in the matter of remedies that will counteract the negative consequences of such an unfair labour practice, if the Board were to grant such relief.
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> [38] In limited situations, the Board may allow the employer to submit certain information on the merits in order to clarify the facts, but generally the role of the employer should be limited to that of an observer. It is up to the trade union alone to defend its actions.

[20] The Board may grant an employer limited standing on the merits of a DFR complaint if there is an allegation that the complainant and the trade union have collaborated to use the Board to send an untimely grievance to arbitration - *Mireille Desrosiers*, 2001 CIRB 124:

> [40] The employer, although impleaded, may appear, but its right to intervene in the proceeding is, in principle, limited and restricted. It might, however, be granted leave to raise objections of jurisdiction, limitation, and even participate actively in the inquiry should there be a risk of collusion between the employee and the union: *Brenda Haley* (1980), 41 di 295; [1980] 3 Can LRBR 501; and 81 CLC 16,070 (CLRB no. 271).

[21] Other than in these exceptional situations, however, an employer's usual role is limited to making submissions on the issue of remedy. This arises because its potential liability can be directly impacted by having an otherwise untimely grievance proceed to arbitration.

[22] In its April 24, 2009 letter, CPC advised, as do many employers in the federal jurisdiction, that it had no position on the merits of Ms. Sapra's DFR complaint. However, it clearly put before the original panel its concern that its liability could increase if the Board accepted Ms. Sapra's DFR complaint.

[23] Essentially, if the Board upheld the complaint, CPC suggested that, but for APOC's violation of the *Code*, the matter would have proceeded before an arbitrator much earlier. As a result, CPC argued that APOC should be responsible for any additional damages caused by the need for Ms. Sapra to pursue a DFR complaint.

[24] The reconsideration panel has concluded that *Sapra 533* did not consider CPC's specific submission with regard to remedy.

[25] *Sapra 533* at paragraph 36 only reproduced CPC's comment "that it should be entitled to the benefit of the time limits negotiated with the union for filing and referring grievances to arbitration...". *Sapra 533* did not refer to CPC's second position that "it should not be held liable for any direct or indirect consequence arising from the breach...".

[26] CPC clearly acted in accordance with the Board's policy regarding the limited role of an employer on a DFR complaint. It understood its limited role and simply reminded the Board that it should not be prejudiced if APOC violated the *Code*.

[27] The reconsideration panel is of the view that the original panel in *Sapra 533* inadvertently did not turn its mind to CPC's submission about the impact of any remedy on its interests. This innocent omission has convinced the reconsideration panel to intervene.

[28] CPC ought not to be responsible for any increased damages, if any, awarded by the arbitrator, for the period during which Ms. Sapra came before the Board and pleaded her DFR complaint.

[29] As a result, the Board modifies its original decision on remedy by clarifying that CPC shall not be responsible for any damages awarded by the arbitrator, if any, from the date Ms. Sapra filed her complaint with the Board (March 3, 2009) to the date of the *Sapra 533* decision (July 23, 2010). APOC will be responsible for any damages awarded to Ms. Sapra for this time period.

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

Graham J. Clarke
Vice-Chairperson

Norman Rivard
Member

André Lecavalier
Member