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Reasons for decision

Mr. William D. Mitchell,

complainant,

and

National Automobile, Aerospace, Transportation
and General Workers Union of Canada
(CAW-Canada), Local 2002,

respondent,

and

Jazz Air Limited Partnership, carrying on business
as Air Canada Jazz,

employer.

Board File: 28378-C

Neutral Citation: **2010 CIRB 559**

December 30, 2010

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

Counsel of Record

Mr. William D. Mitchell, for himself;

Ms. Lesley Dias, for the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada);

Mr. Joseph D. Randell, for Jazz Air Limited Partnership, carrying on business as Air Canada Jazz.

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

I–Nature of the Complaint

[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 make a decision on this complaint without an oral hearing.

[2] On September 9, 2010 the Board received from Mr. William D. Mitchell (Mr. Mitchell) a duty of fair representation (DFR) complaint under 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.

[3] Mr. Mitchell alleged that his bargaining agent, the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 2002 (CAW), violated its duty by refusing to grieve a letter confirming his mandatory retirement. Mr. Mitchell's employer, Jazz Air Limited Partnership, carrying on business as Air Canada Jazz (Jazz), confirmed to Mr. Mitchell that he would have to retire when he turned 65 years of age.

[4] For the reasons which follow, the Board has decided to defer hearing this complaint, pursuant to section 16(1.1) of the *Code*.

II–Facts

[5] On or about July 23, 2010, Mr. Mitchell received correspondence from Jazz, advising that he would have to retire once he reached the age of 65.

[6] Mr. Mitchell advised a Jazz human resources manager that he wished to continue working past the age of 65. Jazz' human resources department confirmed to Mr. Mitchell that he would have to retire from his current position when he reached the age of 65.

[7] Mr. Mitchell contacted the Canadian Human Rights Commission (CHRC) and received an information kit on how to file a human rights complaint. The Board understands from Mr. Mitchell's letter dated November 8, 2010 that he has in fact filed a complaint with the CHRC.

[8] Mr. Mitchell asked the CAW to contest his forced retirement. The CAW advised him that it supported mandatory retirement at age 65.

[9] The CAW explained that it supports mandatory retirement given its focus on bargaining unit pension plans. The CAW has followed a negotiating strategy with the goal of providing bargaining unit employees with the opportunity to retire prior to the age of 65. The CAW argued it has acted at all times in accordance with the directions it received from bargaining unit members.

[10] The CAW also reminded the Board that the mandatory retirement issue is currently being debated in the courts.

III–Analysis and Decision

[11] Section 16(1.1) of the *Code* states as follows:

16. The Board has, in relation to any proceeding before it, power

...

(1.1) to defer deciding any matter, where the Board considers that the matter could be resolved by arbitration or an alternate method of resolution;

[12] The Board has exercised its power to defer in a case where a decision on the timeliness of a complainant's grievance was pending before an arbitrator: *Trevor William Emile Rees*, 2010 CIRB 499. That DFR complaint had requested, as a remedy, that the time limits in the collective agreement be waived and the grievance be taken to arbitration.

[13] One of the purposes of adding section 16(1.1) to the *Code* was to limit a multiplicity of proceedings occurring concurrently on the same or similar facts.

[14] In this case, the Board is satisfied that it should defer deciding Mr. Mitchell's DFR complaint. The concurrent human rights route he has decided to pursue constitutes an appropriate "alternate method of resolution". This expression in section 16(1.1) is intended to be broad as confirmed by the French version of section 16(1.1):

...ou par tout autre mode de règlement.

[15] There are several reasons motivating the Board's decision to defer this complaint.

[16] The Board sees the possibility of significant overlap between Mr. Mitchell's DFR complaint and his human rights complaint. While it is true that the Board's focus on the CAW's process could be different from the exact legal question Mr. Mitchell has raised in his human rights complaint, an analysis of the term "discriminatory" in section 37 would still be essential.

[17] In addition, the issue of mandatory retirement in the federal jurisdiction is currently before other administrative tribunals and courts.

[18] Even if the Board were to decide Mr. Mitchell's complaint, there is a virtual certainty that the Board's conclusion would be added to the other pending matters before the courts.

[19] Thus, while the Board might be able to hold a hearing and make a determination on the DFR complaint before the completion of Mr. Mitchell's human rights complaint, the final resolution of the matter would most likely not result from the Board's decision. Rather, any resolution would have to wait for decisions from the courts or legislative changes from Parliament.

[20] The Board is also of the view that Mr. Mitchell's DFR complaint might become moot once other cases contesting mandatory retirement have been determined.

[21] As a result, the Board believes it is appropriate to defer deciding this complaint. The matter will be re-listed depending on the developments in Mr. Mitchell's human rights complaint, decisions from the courts and future legislative changes.

[22] The Board would ask the parties to keep it advised of developments before the Commission as events warrant.

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

Graham J. Clarke
Vice-Chairperson

John Bowman
Member

André Lecavalier
Member