Canada Industrial Relations Board Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4e étage Ouest, Ottawa (Ont.) K1A 0X8

Reasons for Decision

Daniel Mallette,

complainant,

and

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

respondent,

and

VIA Rail Canada Inc.,

employer.

Board File: 29402-C
Neutral Citation: 2012 CIRB **645**
June 25, 2012

The Canada Industrial Relations Board (the Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, sitting alone pursuant to section 14(3) of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*).

Parties' Representatives of Record

Mr. Daniel Mallette, on his own behalf;

Mr. Joel Fournier, for the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada);

Mr. Edward J. Houlihan, for VIA Rail Canada Inc.

I–Nature of the Complaint

[1] On May 1, 2012, the Board received a duty of fair representation complaint (a DFR complaint) filed by Mr. Daniel Mallette, in which he alleged that his bargaining agent, the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (CAW), had breached section 37 of the *Code*. Section 37 reads as follows:

> 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. Mallette, an employee of VIA Rail Canada Inc. (VIA), was contesting the fact that the CAW had changed its interpretation of a seniority clause in the collective agreement, to his disadvantage.

[3] The Board has considered the complaint as well as the appended documents, and dismisses the complaint on the basis that it does not establish a *prima facie* case that the CAW violated the *Code*.

[4] The reasons for the Board's decision are set out herein.

II–Background and Facts

[5] The relevant facts are summarized below.

[6] Around February 2, 2011, Mr. Mallette filed a grievance respecting loss of seniority:

> Grievance under article 4.1. I declare that Via Rail Canada violated article 12.6, Appendix X and any other applicable article of the collective agreement by taking away some of my seniority on the basis of my having held a non-supervisory position within the corporation.
>
> The collective agreement covers 2010 to 2012 and I should have kept on earning seniority.
>
> I am seeking full remedy and compliance with Collective Agreement no. 3 through my return to my rightful position on the seniority list.
>
> (translation)

[7] Mr. Mallette's loss of seniority is due to the fact that, for a period of time, he held a position that was not included in the CAW bargaining unit. Article 12.6 of the collective agreement applied to such situations.

[8] The CAW, which originally supported Mr. Mallette's position, filed a letter dated April 15, 2011, in which it demanded that VIA correct Mr. Mallette's seniority ranking.

[9] In a letter dated August 31, 2011, VIA accepted the CAW's position:

> We do agree that, by not applying all the provisions in article 12.6 that were applicable during the period concerned, the corporation indirectly caused Mr. Mallette a certain amount of prejudice by making him lose some seniority.
>
> For your information, an internal memo has been issued to inform all those involved in this type of case, to ensure compliance with all of the new provisions of article 12.6.
>
> In closing, we agree to return Mr. Mallette to the seniority ranking that he held prior to the date on which the corporation introduced the seniority freeze in question.
>
> (translation)

[10] On January 25, 2012, a group grievance was filed to challenge Mr. Mallette's ranking on the seniority list. The following is an excerpt thereof:

> I declare that Via Rail Canada violated article 12.4 and any other applicable article of Collective Agreement no. 3 in that D. Mallette, who is in 16th place on the seniority list for 2012, should be in 21st place, as on the 2011 list.
>
> I am seeking full remedy and compliance with Collective Agreement no. 3 through his return to 21st place, as on the 2011 list.
>
> (translation)

[11] On March 22, 2012, the CAW sent Mr. Mallette a detailed explanation as to why his ranking on the seniority list could not be maintained:

> The union met with the employer on March 8, 2012, to reach a settlement in regard to your above-noted grievance.
>
> At that joint meeting and following a careful review of the situation that existed at the time and the documents on file. [*sic*]

In addition, it is important to point out that we sought an opinion from our national representative who specializes in this type of case, Mr. Brian Stevens, through our President, Mr. Bruce Snow, who was present, to help us make the fairest and most equitable decision possible.

The response you received from my predecessor was wrong and did not take into account article 12.6 of the 2007–2008–2009 collective agreement applicable at the start of your last assignment, that is, on March 31, 2008.

My predecessor's request was made for unknown reasons and was not warranted, since it created a precedent in the application of the collective agreement by allowing you to regain the ranking you had held prior to that last assignment.

...

As a result and in accordance with article 12.6 of the collective agreement for 2007 through 2009, you ceased earning seniority for a little over 10 months, from April 1, 2009, to January 27, 2010.

The collective agreement was amended in this respect only on September 15, 2010.

We do not understand why my predecessor would have granted you such a privilege without taking this into account.

It is for this reason that we had to rectify the situation. You are hereby advised that your ranking on the seniority list will be changed, effective today, March 22, 2012, to reflect your true situation pursuant to Collective Agreement no. 3, for the membership as a whole.
...

We want you to know, Mr. Malette, that the union is not happy about having to remove you from the rankings on the list.

The union is merely fulfilling its representation obligations toward its members.

(translation)

III–Analysis and Decision

[12] When the Board receives a DFR complaint, it determines whether the complaint establishes a *prima facie* case of a *Code* violation. The process in this regard was described in *Crispo*, 2010 CIRB 527 (*Crispo* 527):

[12] The Board conducts a *prima facie* case analysis for the numerous duty of fair representation cases it receives. This *prima facie* case analysis accepts a complainant's pleaded material facts as true and then analyzes whether those material facts could amount to a *Code* violation.

[13] The *prima facie* case analysis weighs the material facts as opposed to legal conclusions. A complainant who pleads a legal conclusion by alleging, for example, that certain conduct was arbitrary, discriminatory or in bad faith does not, by so doing, avoid the application of the *prima facie* case test.

[14] In *Blanchet* v. *the International Association of Machinists and Aerospace Workers, Local 712*, 2009 FCA 103, the Federal Court of Appeal endorsed the Board's use of a *prima facie* case analysis and its focus on the material facts:

> [17] As a general rule, when a court presumes the allegations to be true, they are allegations of fact. That rule does not apply in findings of law: see *Lawrence* v. *The Queen*, [1978] 2 F.C. 782 (T.D). It is for the court, not the parties, to determine questions of law: *ibidem*.
>
> [18] It is true that, in the passage quoted, the Board did not specify that it was referring to the applicant's allegations of fact. However, the reference to the applicant's allegations cannot be anything other than a reference to allegations of fact. Otherwise, a complainant would need only to state as a conclusion that his or her union's decision was arbitrary or discriminatory for the Board to be forced to find that there had been a violation, or at least a *prima facie* violation, of section 37 of the *Code* and rule on the merits of the complaint. Thus, the complaint screening process would become a thing of the past.

[13] Consequently, in the matter before it, the Board must ask itself this: if we were to accept all of Mr. Mallette's allegations of fact, could we find that the CAW violated the *Code*?

[14] The decision in *Crispo* 527 also coincidentally described the obligations of a union toward the members of the bargaining unit. At times, the interests of some members may be at odds with those of the membership as a whole, especially in matters involving ranking on a seniority list. Resolving this type of issue is difficult for a union, which must represent all members of the unit:

> [16] The duty of fair representation found in section 37 of the *Code*, *supra*, obliges the Board to examine a trade union's process in order to ensure that it did not act in an arbitrary, discriminatory or bad faith manner with regard to bargaining unit members' rights under the applicable collective agreement.
>
> [17] However, the Board does not sit in appeal of a trade union's decisions and does not decide whether the trade union was "correct" in the conclusions it reached.
>
> [18] A trade union often has to make difficult decisions which will benefit some members of the bargaining unit, with a corresponding detriment to others. **For example, when dealing with contested issues involving seniority, the trade union's decision will not please all members. As long as the trade union did not act in an arbitrary, discriminatory or bad faith manner in arriving at its determination, the Board will not intervene.**
>
> [19] The material Mr. Crispo submitted satisfied the Board that the CAW turned its mind to his specific situation. In balancing the interests of bargaining unit members, the CAW made a decision that was not in Mr. Crispo's favour, but which did, in the CAW's view, arrive at a resolution that was the most beneficial for the bargaining unit as a whole.
>
> [20] The Board is satisfied that the CAW understood the facts of Mr. Crispo's situation and negotiated a resolution with MTS which was in the bargaining unit's overall interest.
>
> (emphasis added)

[15] The Board can easily understand the disappointment felt by Mr. Mallette, who thought he had won his case regarding his ranking on the seniority list. Such ranking is extremely important for every member of the unit, since the rights and benefits provided for in the collective agreement are generally based on members' rankings on the list.

[16] However, Mr. Mallette's initially successful challenge of his ranking on the seniority list had a negative impact on the other members of the unit. This is, almost by definition, always the case where seniority is at play.

[17] In this matter, the CAW could not satisfy all members of the unit. It therefore reviewed the situation carefully.

[18] In its letter of March 22, 2012, the CAW provided a detailed explanation as to why, after considering the matter, it had chosen one interpretation of the collective agreement over another. There was also a question as to which collective agreement applied to Mr. Mallette's situation. The CAW was honest, admitting that its initial interpretation of the collective agreement in favour of Mr. Mallette had been wrong.

[19] The CAW's concern was to avoid setting a negative precedent for the unit as a whole.

[20] In a different situation not involving seniority, where there would not have been any impact on the other members of the unit, the CAW might have chosen not to correct its error. However, in this case, the CAW was facing a group grievance. It had to decide on the merits of the matter.

[21] In addition, the original decision concerning Mr. Mallette's ranking on the seniority list would have had an ongoing impact on the rights of the other unit members.

[22] The CAW accordingly decided to choose an official interpretation of the collective agreement and to resolve this issue with VIA. The outcome was not favourable for Mr. Mallette.

[23] As indicated in the excerpt from *Crispo* 527, *supra*, the Board accepts the fact that the bargaining agent has ultimate responsibility for deciding on its interpretation of the collective agreement. Such responsibility includes the discretion to correct its opinion regarding the interpretation of a particular clause.

[24] In his complaint, Mr. Mallette challenges the interpretation of the collective agreement. However, there is no evidence that the CAW arrived at its position based on arbitrary or discriminatory factors or bad faith. The facts set out indicate that the CAW had to rule on a question of seniority that involved several members of the unit.

[25] Settling the dispute by means of a detailed explanation concerning the application of the collective agreement to Mr. Mallette's case was a normal part of the bargaining agent's day-to-day work. The Board will not rule on an issue involving the "proper" interpretation of a collective agreement, including any differences of opinion regarding which collective agreement should apply to a given situation.

[26] Rather, in the case of a DFR complaint, the Board will determine whether the complaint establishes a *prima facie* case that the bargaining agent acted in an arbitrary or discriminatory manner or in bad faith in arriving at a particular decision. Mr. Mallette's complaint does not do so.

[27] For these reasons, the Board dismisses Mr. Mallette's complaint on the basis that it fails to establish a *prima facie* case of a *Code* violation.

Translation

Graham J. Clarke
Vice-Chairperson