Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Wayne Robert Smith,

complainant,

and

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers),

respondent,

and

Canadian National Railway Company,

employer.

Board File: 30458-C
Neutral Citation: 2014 CIRB **733**
July 21, 2014

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

Parties' Representatives of Record

Mr. Wayne Robert Smith, on his own behalf;
Mr. Robert Champagne, for the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers);
Ms. Jacynthe Girard, for the Canadian National Railway Company.

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

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

I. Nature of the Complaint

[2] On May 16, 2014, the Board received from Mr. Wayne Robert Smith a duty of fair representation (DFR) complaint alleging a violation of section 37 of the *Code* by his trade union, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Steelworkers):

> 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] The issue at the heart of Mr. Smith's complaint concerned the Steelworkers' refusal to contest at arbitration the Canadian National Railway Company's (CN) decision to pull him from service in his safety sensitive position and place him on sick leave. His income decreased as a result.

[4] CN's decision resulted from Mr. Smith failing a breathalyser test and receiving a roadside suspension.

[5] Mr. Smith provided a helpful summary of his situation, both through his comments on the Board's DFR form and with his attached documents. His efforts provided the Board with a clear description of events.

[6] Mr. Smith apparently has also filed a complaint with the Canadian Human Rights Commission contesting CN's actions.

[7] After reviewing the materials Mr. Smith provided, the Board concluded that he had not established a *prima facie* case that the Steelworkers violated section 37 of the *Code*.

[8] These reasons explain the Board's conclusion.

II. *Prima Face* Case Test

[9] The Board has adopted a *prima facie* case test for DFR complaints. A complainant's pleading must pass this initial step before the Board will call on the other parties to provide a response.

[10] If a complaint does not establish a *prima facie* case, then the Board will dismiss it without requiring the respondents to expend any resources on the complaint.

[11] The Board explained its *prima facie* case process in *Browne*, 2012 CIRB 648 (*Browne 648*):

> **D–*Prima facie* case analysis**
>
> [20] In section 37 cases, the Board conducts a *prima facie* case analysis when it considers a new complaint. Unless the complainant makes out a *prima facie* case of a *Code* violation, the Board will not call on the trade union and, to a lesser extent, the employer, to file a response. This process was recently explained in *Crispo*, 2010 CIRB 527:
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> > [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.
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> > [14] In *Blanchet* v. *the International Association of Machinists and Aerospace Workers, Local 712*, 2009 FCA 103 [*Blanchet*], the Federal Court of Appeal endorsed the Board's use of a *prima facie* case analysis and its focus on the material facts:
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> > > [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.**
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> (emphasis added)

> [21] The quote from the FCA in *Blanchet*, in the extract above, emphasizes that it is not enough to claim arbitrariness or discrimination in order to bypass the *prima facie* analysis. The Board does not assume as true a complainant's legal conclusions, but instead analyzes the material facts in order to determine whether a *prima facie* case exists.
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> [22] The Board will accordingly ask itself in this case whether the material facts Ms. Browne pleaded demonstrate a *prima facie* violation of section 37 of the *Code*.

[12] Just as in *Browne 648*, *supra*, the Board asked itself the same question when conducting its analysis of Mr. Smith's complaint: did the material facts Mr. Smith pleaded establish a *prima facie* violation of the *Code*?

III. Facts

[13] On or about September 6, 2013, Mr. Smith received a roadside suspension when driving his truck on his own time.

[14] As a result, CN removed him from his safety sensitive position service. CN explained the reasons for its actions in a November 26, 2013 letter to Mr. Smith. Out of respect for Mr. Smith's privacy, the Board will not reproduce the text of CN's letter in this decision.

[15] By letter dated April 11, 2014, the Steelworkers informed Mr. Smith that they would not proceed to arbitration. This letter summarized the process they had followed in coming to a decision. For example, the Steelworkers reviewed the policy CN relied on to take the actions it did. It further examined a July 19, 2005 arbitration award from arbitrator Michel Picher about a similar situation where the Steelworkers had attempted to contest CN's policy and practice.

[16] Arbitrator Picher commented on both a 90+ day period to monitor an employee's medical fitness for a safety sensitive position, as well as a resulting loss of income while that employee was on sick leave:

> What the material before the Arbitrator discloses is a relatively normal reaction on the part of any employer responsible for safety sensitive operations when faced with information that an employee has suffered a seizure and has been placed on anti-convulsant medication for a period of one year. While Dr. Forgel's initial restrictions imposed upon the grievor were reconsidered in light of the further information which came to his attention, partly by reason of the efforts of the grievor and his Union, the case at hand discloses no arbitrary or discriminatory treatment on the part of the employer. On the contrary, it is clear that faced with the questions which were raised in the grievor's case the Company quite properly retained its own expert physician to evaluate Dr. Griebel's assessment of Mr. Weboweski's condition. Only upon receipt of that opinion, issued by Dr. Remillard on June 10, 1999, did the Company then take the necessary steps to return the grievor to work on the conditions established. **In the Arbitrator's view the period of three and one-half months to deal with an examination of the circumstances of the grievors' illness was not unreasonable. I cannot agree with the suggestion of counsel for the Union that the whole matter should have been disposed of in a period of not more than three weeks. During all of the time period in question the grievor was in receipt of sick leave benefits. While it may be that his overall income may have suffered, that is not a result which can be attributed to any violation of the collective agreement or of any statutory obligation owed to the grievor by the Company.** I am satisfied that given the uncertainty which the Company encountered concerning the grievor's condition, and the time period involved, there was no violation of the duty of accommodation.
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> (emphasis added)

[17] The Steelworkers further summarized for Mr. Smith the information they had obtained from the medical professionals involved in the case. In February, 2014, Mr. Smith had provided the Steelworkers with his written consent to speak with those medical experts. For privacy reasons, the details of that information in the Steelworkers' letter will not be reproduced in this decision.

[18] Mr. Smith's complaint revealed that he advised the Steelworkers of the income loss he suffered while on sick leave. He also contested the fact that CN had not assigned him alternative duties, something that its policy allows. Mr. Smith further told the Steelworkers that his personal lawyer was of the view that CN's stance violated the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6.

[19] Despite Mr. Smith's request to go to arbitration, the Steelworkers concluded his grievance would not succeed. They also informed him of his right to appeal their decision internally:

> The forgoing facts and evidences revealed clearly demonstrate that a grievance would not be successful and therefore without merit.
>
> After considering all circumstances surrounding this issue the Union is satisfied that due process was adhered to.

> The Union now considers this file to have been properly dealt with and closed.
>
> *In Accordance with the by-laws of local 2004, you have the right to appeal this decision in* ***writing, within 30 days*** *of receipt of this letter, stating the reason for the appeal and any changes in the facts of the grievance to;*
>
> …
>
> [*sic*]
> (italics in original)

IV. Analysis and Decision

[20] The *Code* assigns the Board a specific role when evaluating a DFR complaint. The Board does not second guess a trade union's analysis on whether to proceed to arbitration. The Board is not an appeal body for internal union matters.

[21] As the Board described in *Scott*, 2014 CIRB 710 (*Scott 710*), the *Code* requires it to examine the trade union's process at the material times when it assisted a bargaining unit employee:

> [93] If the Board sat in appeal of a trade union's decision whether to go to arbitration, then it would not matter what the union actually did, or did not do, when it made its original decision about arbitration. Any and all arguments, whether new or not, could be reviewed in order to decide the "correctness" of the union's conclusion.
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> [94] **But the Board does not sit in appeal of a trade union's decisions. The Board only concerns itself with the trade union's process and the steps it demonstrates it took in arriving at its decision.** The correctness of the union's decision is irrelevant if its process violated the DFR duty it owed to the bargaining unit member.
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> [95] In *Singh* 639, *supra*, the Board described this principle:
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> > [81] Since the Board focusses on the trade union's process, rather than on the correctness of its decision, a section 37 inquiry is limited to the actual steps the trade union took in reaching its decision not to take a matter to arbitration. The Board commented on the scope of its analysis in *Cheema*, 2008 CIRB 414 (*Cheema 414*):
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> > > [12] The Board's role in the context of a duty of fair representation complaint is to examine the union's conduct in handling the employee's grievance (see *Vergel Bugay*, 1999 CIRB 45). A section 37 complaint cannot serve to appeal a union's decision not to refer a grievance to arbitration, or to assess the merits of the grievance, but it is used to assess how the union handled the grievance (see *John Presseault*, 2001 CIRB 138).

> [82] The Board's hearing is not the forum for a trade union to demonstrate that, if it had examined the matter more thoroughly, its original conclusion would still be correct.
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> [83] The Board raised this issue during the hearing several times because of concerns over the relevance of certain questions being asked.
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> [84] **In this case, the Board was interested in precisely what the Teamsters did, mainly through Mr. Randall, in order to arrive at its March 15, 2010 conclusion not to go to arbitration. A DFR hearing is not the place for the trade union to do a new investigation of the matter, via cross-examination by highly-skilled counsel, in order to justify the correctness of its original conclusion.**
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> [85] There are two problems if a trade union is permitted to do its investigation a second time during a DFR hearing. Firstly, it loses sight of the Board's obligation to concentrate on the actual process which took place. Secondly, it invites the Board to delve into the correctness of the trade union's decision. That is not the Board's role. The Board will respect a trade union's judgment calls on these issues, provided its process met the standards imposed by section 37 of the *Code*.

(emphasis added)

[22] The Board in *McRaeJackson*, 2004 CIRB 290 at paragraph 37 described the information it considers when evaluating whether a trade union has met its DFR duty:

> [37] Accordingly, the Board will normally find that the union has fulfilled its duty of fair representation responsibility if: a) it investigated the grievance, obtained full details of the case, including the employee's side of the story; b) it put its mind to the merits of the claim; c) it made a reasoned judgment about the outcome of the grievance; and d) it advised the employee of the reasons for its decision not to pursue the grievance or refer it to arbitration.

[23] The Board recognizes that Mr. Smith disagrees with the Steelworkers' decision not to proceed to arbitration. Many DFR complaints involve a member's disagreement with this type of difficult decision.

[24] But it is the trade union which has carriage of grievances. It decides how its members' resources will be spent. Mr. Smith's complaint had to demonstrate, on a *prima facie* basis, that the Steelworkers acted in a manner that was "arbitrary, discriminatory or in bad faith" with regard to his collective agreement rights.

[25] In this case, it is clear that the Steelworkers investigated the circumstances of Mr. Smith's situation. Mr. Smith advised them of his removal from his safety sensitive position. He further provided his consent so that the Steelworkers could discuss the specific facts of his situation with the medical professionals involved in the matter.

[26] The Steelworkers' investigation, as well as their further research into their own past arbitration cases, demonstrated that they turned their mind to the facts and legal merits of Mr. Smith's case.

[27] The Steelworkers' April 11, 2014 letter provided Mr. Smith with a clear explanation why they would not take the case to arbitration. It similarly informed Mr. Smith that he could appeal the decision internally.

[28] The Board can find nothing in the Steelworkers' thorough process which comes anywhere near the high threshold section 37 establishes concerning conduct which can be described arbitrary, discriminatory or carried out in bad faith.

[29] A trade union is not obliged to take a grievance to arbitration merely because a member raises a human rights argument. To accept that proposition would oblige trade unions always to take certain types of cases to arbitration if a member raised, for example, a human rights or a Charter argument.

[30] It is rather up to a trade union to decide if, and when, it will proceed to arbitration with such arguments. As long as its process in coming to a reasoned decision regarding arbitration does not violate section 37 of the *Code*, then the Board's involvement ends.

[31] The complaint is accordingly dismissed.

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