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

David Hrechuk,

*complainant,*

*and*

International Brotherhood of Electrical Workers,

*respondent,*

*and*

Canadian Pacific Railway Company,

*employer.*

Board File: 30690-C
Neutral Citation: 2015 CIRB **758**
January 29, 2015

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

**Parties' Representatives of Record**

Mr. David Hrechuk, for himself;
Mr. Brian J. Strong, for the International Brotherhood of Electrical Workers;
Mr. Ron Hampel, for the Canadian Pacific Railway Company.

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

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 issue this interim procedural decision without an oral hearing.

## I. Issue

[1] The Board has been asked for an order declaring that a trade union's written response to a duty of fair representation (DFR) complaint be treated as confidential and not disclosed to the employer. The Board has denied the request for the reasons set out in this decision.

## II. Facts

[2] On October 8, 2014, Mr. David Hrechuk filed a DFR complaint alleging that his bargaining agent, the International Brotherhood of Electrical Workers (IBEW), had violated 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. Hrechuk's complaint concerns his seniority and also referred to a violation of section 95(*g*) of the *Code*.

[4] Mr. Hrechuk's DFR complaint differs from the norm. Mr. Hrechuk has not asked the IBEW to file a grievance on his behalf. Instead, Mr. Hrechuk's complaint arises from a grievance that the IBEW had filed on behalf of the bargaining unit and which could have a negative impact on him.

[5] On August 15, 2014, the IBEW had filed a grievance alleging that the Canadian Pacific Railway Company (CP) violated the applicable wage agreement by assigning Mr. Hrechuk work on a "national and international basis":

> Please accept this as a step one grievance under article 12.7 of Wage Agreement No. 1 between I.B.E.W. System Council No. 11 and Canadian Pacific.
>
> This grievance is filed as a result of the violation of Wage Agreement No.1 by S&C Manager Mike Smith during the period of May 2013 to July 2014. The grievance is filed on behalf of all S&C Technician's [*sic*] affected by Mr. Smith's covert actions in all Seniority Districts.
>
> On July 29, 2014 Supervisor Mike Smith finally revealed to the Union that he dealt directly with and had assigned S&C Technician David Hrechuk various duties on a national and international basis. The Union will leave the internationally assigned duties to be investigated by the US Department of Labor and/or the IBEW System Council No.16 as the Union's jurisdiction is limited to Canada.
>
> Mr. Smith goes further and admits in his email response to the Union of July 31, 2014 that Mr. Hrechuk travelled to various locations outside of his District 3 Seniority territory and in fact outside of the limits of his job posting at the Winnipeg Radio Shop. Mr. Smith further

> alluded that there was nothing preventing him from assigning employees to work on other employees' assigned territories and other seniority districts.

[6] The IBEW's requested remedy involved compensating other bargaining unit members. The IBEW also advised CP it would assign Mr. Hrechuk a seniority date of July 31, 2014 on the next seniority list coming out no later than January 31, 2015:

> Therefore as a resolve to this grievance, the Union requires that all S&C Technicians on all territories affected by the action's [*sic*] of Mr. Smith be made whole for the loss of any wages and benefits realized by Mr. Hrechuk and the posting of his permanent position in the Radio Shop on the next available bulletin.
>
> Finally, the Union will be removing all Seniority in the classification of S&C Technician held by Mr. Hrechuk and assigning him a seniority date of July 31, 2014 in the classification of S&C Technician. This change will be made on the Union seniority list for District 3 that will be issued no later than Jan 31, 2015 to the relevant employees.

[7] The Board examined Mr. Hrechuk's DFR complaint, concluded that he had established a *prima facie* case, and asked the IBEW, as well as his employer, CP, for their submissions. The merits of the underlying DFR complaint are not in issue in this procedural decision.

[8] The IBEW filed its response to Mr. Hrechuk's complaint on November 14, 2014 and provided Mr. Hrechuk with a copy. CP provided its limited response on November 19, 2014.

[9] The IBEW's pleading asked the Board to declare its November 14, 2014 response confidential so that it would not be shared with CP:

> Mr. Hrechuk filed a complaint with the Canada Industrial Relations Board on October 7, 2014. This was done prior to any agreement being reached as per the grievance procedure that is out lined in the Collective Agreement that we will attach for your perusal. (Article 12 and 13).
>
> **With the above being said the Union is concerned with having to respond to the Board prior to the final disposition of the grievance. The legitimate concern is that the Union may prejudice our position with the company should they receive a copy of this submission.**
>
> **The Union has included all relevant information with a copy to Mr. Hrechuk. The Union respectfully requests that this submission remain confidential will not be shared with the Company under the provisions of Canada Industrial Relations Board Regulations, 2012 (SOR/2001-520),** Confidentiality of Documents Section 22. (2) which reads, The Board, on its own initiative or at the request of a party, may declare that a document is confidential.
>
> [*sic*]
>
> (emphasis added)

[10] The Board in its November 21, 2014 letter to the IBEW confirmed receipt of the confidentiality request and advised CP of the issue:

> We acknowledge receipt, via facsimile, of your letter dated November 14, 2014, with respect to the above-cited complaint.
>
> In your response, you have requested that your response be kept confidential pursuant to section 22 of the Board's Regulations.
>
> This request has been forwarded to the Board for its consideration. By copy of this letter, the employer has been advised of your request.

[11] CP objected to the IBEW's request for confidentiality. An extract from CP's November 26, 2014 letter provides a summary of its position:

> The fact that the Union request appears to be specifically intended to preclude the Company from seeing the Union's submission makes it impossible for the Company to respond further or potentially prepare for any hearing if scheduled. As such, the actions taken by the Union bring the issue of fairness and justice into question.
>
> **If the Company is not privy to the material before the Board how can it properly prepare for any hearing. Similarly how can the Company accept any finding by the Board if it has no knowledge of the material the Board may be considering in reaching a decision.** This request brings the administration of justice into disrepute with respect to this complaint.
>
> Indeed it would appear that the Union's request is based upon a flawed interpretation of Section 22 of the CIRB Regulations. Section 22(1) specifically requires that a document be placed on the record subject to Section 22(2) if it is relevant to the proceeding. Section 22(2) provides that the Board may on its own initiative or request of a party declare a document confidential. The purpose of this request is for the publication and reference within any written decision. It is not to preclude a party to the matter from seeing and responding to the material documentation. That is clearly evident from the provisions of Section 22(4) when a document is declared confidential.
>
> [*sic*]
>
> (emphasis added)

[12] The IBEW did not provide any further submissions in response to CP's objection.

## III. Analysis and Decision

### A. An employer's Limited Role in a DFR Complaint

[13] An employer generally has an observer's role in a DFR complaint. A DFR complaint is between a trade union and its member. In this case, CP, as do most federal employers, filed a

limited response, since it had no information concerning Mr. Hrechuk's allegations against the IBEW.

[14] However, CP did maintain, as do most employers in DFR cases, that it should not be held liable for any remedy the Board might order against the IBEW, if a *Code* violation occurred. An employer has a clear interest in any remedy ordered for a DFR violation.

[15] In *Singh*, 2012 CIRB 639 (*Singh 639*), the Board explained an employer's limited role in a DFR matter:

> **C–Role of the Employer**
>
> [91] Due to the Board's focus on the process the trade union actually followed, as opposed to what it might or could have done, the employer usually has a limited observer role on the merits of a DFR complaint. However, since an employer can be impacted by any remedy ordered, it is able to participate fully for issues related to remedy.
>
> [92] Occasionally, the Board may allow an employer to participate to a greater extent on the merits of a DFR complaint, as was recently described in *Canada Post Corporation*, 2010 CIRB 558 (*CPC 558*):
>
> > [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.

[37] The Board previously held in *James H. Rousseau* (1995), 98 di 80; and 95 CLLC 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:

> 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.

[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 CLLC 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.

[93] While the Board can understand UPS' interest in demonstrating it had just cause to terminate Mr. Singh, the *Code* has mandated the Board to review trade unions' exclusive authority to represent members of the bargaining unit. The Board does not examine whether an employer had just cause to terminate an employee. Other than for exceptional situations such as those mentioned in *CPC 558*, an employer is usually limited to an observer role when it comes to how a trade union represented one of its members.

[16] As noted in *Singh 639*, an employer may go beyond its usual observer role in a DFR case, *inter alia*, if there is the possibility of collusion between a trade union and an employee, if it is uniquely situated to clarify certain facts or if the Board's jurisdiction is in issue.

**B. Can the Board Limit an Employer's Access to the Pleadings in a DFR Complaint?**

[17] The IBEW did not persuade the Board to limit CP's access to its response to Mr. Hrechuk's complaint.

**i. Section 22 of the *Canada Industrial Relations Board Regulations, 2012* (*Regulations*)**

[18] The IBEW raised section 22 in support of its request. Section 22, whose heading is "Confidentiality of Documents", reads:

> CONFIDENTIALITY OF DOCUMENTS
>
> 22**.** (1) Subject to subsection (2), **the Board must place a document on the public record if the document is relevant to the proceeding.**
>
> (2) **The Board**, on its own initiative or at the request of a party, **may declare that a document is confidential.**
>
> (3) **In determining whether a document is confidential, the Board must consider whether disclosure would cause specific direct harm to a person and whether the specific direct harm would outweigh the public interest in disclosure.**
>
> (4) If the Board declares that a document is confidential, the Board may
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> > (*a*) order that the document or any part of it not be placed on the public record;
> >
> > (*b*) order that a version or any part of the document from which the confidential information has been removed be placed on the public record;
> >
> > (*c*) order that any portion of a hearing, including argument, examination or cross-examination, which deals with the confidential document, be conducted in private;
> >
> > (*d*) order that the document or any part of it be provided to the parties, or only to their legal counsel or representative, and that the document not be placed on the public record; or
> >
> > (*e*) make any other order that it considers appropriate.
>
> (emphasis added)

[19] Various provisions of the *Regulations* make it clear that the word "document" includes parties' written pleadings. For example, the definitions of "response" and "reply" read:

> 1. The following definitions apply in these Regulations.
>
> …
>
> "reply" **means the document** by which the applicant replies in writing to a response and that is the final step in the application process.
>
> "response" **means the document** by which a respondent responds in writing to an application.
>
> (emphasis added)

[20] Similarly, section 7 includes pleadings along with "other documents" which require filing and service:

> 7. (1) If an application, response, reply, request to intervene **or other document** is required to be filed with the Board or served on any person, it must be filed or served on the person, the person's legal counsel or the person's representative
>
> (*a*) by delivery by hand;
>
> (*b*) by mail at the address for service, as defined in subsection (2);
>
> (*c*) by fax that provides a proof of receipt of the document; or
>
> (*d*) by any other means authorized by the Board.
>
> (emphasis added)

[21] While section 22 is broad enough to cover pleadings, there is a fundamental difference between public access to the pleadings and access for the parties themselves.

[22] Section 22 allows a party to protect documents, including pleadings, from public disclosure. The party would have to convince the Board that disclosure of the documents would cause specific direct harm and that the direct harm would outweigh the public interest in disclosure (section 22(3)).

[23] Requests for confidentiality often arise if a document is alleged to contain sensitive business information. As between the parties to the proceeding, the Board then considers whether parts of a document may be redacted if they are not relevant.

[24] However, as between one or more parties and the general public, the Board may broaden its order and declare an entire document confidential, if its disclosure to third parties could cause prejudice.

[25] The IBEW's request goes much further than the above two common situations. The IBEW has requested a confidentiality order to prevent CP, which has a legal interest in this proceeding, from receiving a copy of its written response to Mr. Hrechuk's complaint.

[26] The Board has trouble imagining how it could respect the duty of fairness, as well as natural justice, if it prevented one party in a complaint or application from having access to another party's written pleading.

[27] It is true that an employer mainly has an observer's role in a DFR complaint. But that role can sometimes expand, depending on the facts of the case. If CP were denied access to the IBEW's pleading, then it would have no way to evaluate whether to ask for an expanded role.

[28] The Ontario Labour Relations Board in *R. Baun Construction Inc*., [2009] O.L.R.D. No. 2648 (QL) faced a similar request and refused to consider pleadings on a confidential basis:

> 3 The Board cannot make determinations on a confidential basis. It is an administrative tribunal whom parties appear before to litigate disputes. **The determinations have legally binding effect and cannot be made without the benefit of disclosure of the case to all parties and submissions on that disclosure.**
>
> 4 As the parties are not doubt aware, the information and documents produced to the Board are to be used only for the purposes of the litigation for which they are produced. The parties can, where appropriate, redact information that is not relevant to the proceeding. Too, a party may request that the Board not identify an individual in its decision which request the Board will do, if appropriate.
>
> 5 **The request for the Board to consider pleadings on a confidential basis is denied**. The applicant shall have until August 14, 2009 to advise as to whether it wishes to pursue this application in which event all pleadings must be delivered to the other parties in accordance with the Board's Rules of Procedure, or if it wishes to withdraw the reconsideration request.
>
> (emphasis added)

[29] In applying section 22(3) of the *Regulations* to the IBEW's request, the Board has not been convinced that there is any "specific direct harm" arising from the IBEW's response to Mr. Hrechuk's complaint. The IBEW's limited submission seems to suggest the harm arises from having to set out its arguments or position regarding its August 15, 2014 grievance against CP. Since the grievance process is designed to elicit full and frank discussions about

grievances prior to arbitration, the IBEW's submission did not illustrate how this could constitute a "specific direct harm" for the purposes of section 22(3) of the *Regulations*.

[30] Even if the IBEW had identified or demonstrated that type of harm, the Board is satisfied that it could not adjudicate Mr. Hrechuk's complaint if CP were denied access to an essential written pleading. Thus the harm, even if assumed, would not outweigh the public interest in disclosure of the IBEW's pleading in response to Mr. Hrechuk's complaint.

**ii. Pleadings Which Might Prejudice a Complainant's Eventual Arbitration**

[31] The Board noted earlier that this case did not involve a situation where a trade union asked the Board for a confidentiality order so that its obligation to respond to a DFR complaint did not inadvertently prejudice a grievor's potential or scheduled arbitration.

[32] Such questions have been raised in the past, though the Board has not yet been called upon to adjudicate this interesting issue.

[33] Since the IBEW's request concerned prejudicing its own grievance against CP, rather than one filed on behalf of Mr. Hrechuk, the issue did not arise in this case.

**IV. Disposition**

[34] The Board will not declare the IBEW's response confidential under section 22 of the *Regulations*. The IBEW will have **fifteen (15)** days from the date of this decision to consider whether to amend and submit a revised response. If no amended response is received within that time period, the Board will forward a copy of the IBEW's original response to CP.

[35] CP will then have **fifteen (15) days** from its receipt of the IBEW's response in order to file any additional submissions. Mr. Hrechuk will have **ten (10) days** from receipt of CP's amended response to file his reply, if any.

[36] The Board further requests that Mr. Hrechuk confirm whether he intends to pursue an alleged violation of section 95(*g*) of the *Code*. If he does, the Board will require, within **fifteen (15) days** of this decision, the grounds he alleges for that violation, given that section 95(*g*) of the *Code* involves the "standards of discipline of the trade union":

> 95. No trade union or person acting on behalf of a trade union shall
>
> …

> (*g*) take disciplinary action against or impose any form of penalty on an employee by applying to that employee in a discriminatory manner the standards of discipline of the trade union;

[37] If Mr. Hrechuk pursues his section 95(*g*) complaint, the IBEW will have fifteen (15) days to file its response. Mr. Hrechuk would then have ten (10) days to file a reply, if necessary.

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

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Graham J. Clarke
Vice-Chairperson

_____
Gaétan Ménard
Member

_____
Robert Monette
Member