



## Reasons for Decision

Jean-Philippe Duchemin,

*complainant,*

*and*

Teamsters Canada Rail Conference,

*respondent,*

*and*

Canadian National Railway Company,

*employer.*

Board File: 31285-C

Neutral Citation: 2015 CIRB 805

January 7, 2016

---

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

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 the complaint without an oral hearing.

### **Parties' Representatives of Record**

Mr. Jean-Philippe Duchemin, on his own behalf;

Mr. Sylvain Beauchamp, for the Teamster Canada Rail Conference; and

Ms. Jacynthe Girard, for the Canadian National Railway Company.

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

## **I. Nature of Complaint**

[1] On September 2, 2015, Mr. Jean-Philippe Duchemin filed a complaint with the Board in which he alleged that his union, the Teamsters Canada Rail Conference (TCRC), had breached 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.

[2] Mr. Duchemin subsequently requested that the matter involving his complaint before the Board be held in abeyance. The TCRC was agreeable to the request, but Mr. Duchemin's employer, the Canadian National Railway Company (CN), objected.

[3] On November 30, 2015, Mr. Duchemin withdrew his request to have the matter held in abeyance.

[4] The Board decided that the instant matter would be held in abeyance for the reasons set out below.

## **II. Facts**

[5] According to Mr. Duchemin, his union representative assured him that several grievances had been filed and were being dealt with through the grievance procedure in accordance with the collective agreement. However, Mr. Duchemin later learned that some grievances had never been brought to the attention of the immediate supervisor.

[6] CN terminated Mr. Duchemin's employment in May 2015 as the threshold for automatic dismissal was 60 demerit points and the complainant had a total of 75 demerit points against him.

[7] The TCRC did not deny that its representative had not filed four of Mr. Duchemin's grievances. As soon as it discovered this, the TCRC took action.

[8] For instance, the TCRC filed the four grievances. Since CN later rejected the four grievances on the basis that they had been filed after the time for filing them, the TCRC indicated that it would ask the arbitrator to extend the time in accordance with section 60(1.1) of the *Code*.

[9] In its response of November 13, 2015, CN indicated that it would not intervene in regard to the merits of the dispute between Mr. Duchemin and the TCRC. It objected to the request that the matter be held in abeyance and asked the Board to dismiss Mr. Duchemin's complaint.

[10] On November 30, 2015, Mr. Duchemin asked the Board to disregard his request to have his case held in abeyance and to allow his complaint.

### **III. Analysis and Decision**

[11] The amendments to the *Code* enacted in 1999 provided arbitrators and the Board with new powers. Under section 60 (1.1) of the *Code*, an arbitrator may extend the time set out in a collective agreement:

**60(1.1)** The arbitrator or arbitration board may extend the time for taking any step in the grievance process or arbitration procedure set out in a collective agreement, even after the expiration of the time, if the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the other party would not be unduly prejudiced by the extension.

[12] Under section 16(l.1) of the *Code*, the Board has the power to defer deciding a matter if it could be resolved by arbitration:

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

...

**(l.1)** to defer deciding any matter, where the Board considers that the matter could be resolved by arbitration or an alternate method of resolution.

[13] The Board often raises the issue of the potential application of section 16(l.1) itself. Mr. Duchemin's decision to withdraw his request that the matter be held in abeyance therefore does not prevent the Board from considering the issue.

[14] Section 16(l.1) introduces the concept of "judicial economy" into the *Code*. The concept is a relevant consideration when administrative tribunals must decide how to allocate their finite resources (see, for example, *Air Canada*, 2012 CIRB 624).

[15] In its response of November 13, 2015, CN suggested that the decision in *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SSC 52, is applicable in this matter and that the Board should not exercise its discretion under section 16(l.1):

As long as the Union filed grievances on behalf of the Complainant, the outcome of those grievances should not affect the Board's decision regarding the allegations made by the Complainant. If the Complainant is successful at arbitration, his Complaint becomes moot; if he is unsuccessful, this will not affect the facts at the basis of his Complaint or the Board's analysis under section 37 of the *Code*.

With respect, section 37 cannot serve as a fallback position for complainants who may be dissatisfied with the eventual outcome of grievances already filed. CN is entitled to expect that the finality of arbitral awards issued by the CROA will not be challenged.

(translation)

[16] This argument had failed to convince the Board. The issue before the arbitrator is different from the issue before the Board. An arbitrator exercises the power to extend a time limit pursuant to section 60(1.1) of the *Code*. Depending on the ruling made, the arbitrator may have to interpret the collective agreement in considering the four grievances.

[17] The issues considered by the Board are not the same. The role of the Board would potentially be to analyze the facts in order to determine whether there was a violation of section 37 of the *Code* in this case.

[18] The Board dealt with a similar situation in *Bell Mobility Inc.*, 2012 CIRB 626:

[14] The principles flowing from *Figliola* do not apply to the CEP's complaint.

[15] Firstly, BMI cannot point to a pre-existing decision from another tribunal which has already resolved the same legal issue before the Board. The decisions in *Figliola* and *Air Canada* both focussed on relitigating an already-decided human rights legal issue.

[16] Secondly, both *Figliola* and *Air Canada* dealt with a human rights issue over which two different administrative tribunals had jurisdiction. The issue in the current case does not concern human rights.

[17] Thirdly, even if the principles in *Figliola* and *Air Canada* extend beyond identical human rights questions, an adjudicator under Part III (if one is appointed) examines a different issue from the one before the Board.

[18] A Part III adjudicator will analyze whether BMI's decision to terminate Mr. Doherty was "unjust". In essence, the analysis will focus on whether BMI had just cause to dismiss Mr. Doherty.

[19] By contrast, the Board in a Part I ULP complaint limits its analysis to the question whether anti-union animus played any part in BMI's decision to terminate Mr. Doherty's employment. The Board does not consider the merits of the termination, including whether just cause existed: *National Pagette* (1991), 85 di 1 (CLRB no. 862).

[19] In *Rees*, 2010 CIRB 499, the Board chose to defer deciding an issue because the Canadian Union of Postal Workers was planning to apply to an arbitrator to extend the time under the collective agreement on the basis of section 60(1.1) of the *Code*:

[20] The Legislator added section 16(l.1) for just this type of case. Mr. Rees' discharge grievance is proceeding before an arbitrator. The arbitrator has the authority under section 60(1.1) of the *Code* to consider whether to extend the collective agreement's time limits and hear the merits of Mr. Rees' grievance.

[21] The Board prefers not to preempt the arbitrator. More importantly, while the arbitrator will consider the simple question of whether to extend time limits, the case before the Board is more complex. Stated succinctly, this case involves a determination whether a bargaining agent's failure to observe a collective agreement time limit constitutes a violation of the duty of fair representation.

[22] The Board would likely require oral submissions on that issue since its case law does not hold that every error a trade union makes necessarily constitutes a violation of the duty of fair representation. The Board does not hold trade unions to a standard of perfection.

[23] Rather than start a process that could end up academic or moot, and given that the Board's hearing might not conclude before the anticipated arbitration date, the Board prefers to defer deciding the DFR question and allow the arbitrator to decide whether to extend the time limit for Mr. Rees' grievance under section 60(1.1) of the *Code*.

[20] In the instant matter, an arbitrator will not consider the TCRC's conduct and responsibilities under section 37 of the *Code*. Given that Mr. Duchemin's complaint "could be resolved by arbitration," in the sense in which that expression is used in section 16(l.1), the Board finds it appropriate to defer its decision in this matter.

[21] In this way, the Board will prevent two legal proceedings involving different issues from being held concurrently. This approach is consistent with the concept of judicial economy under section 16(l.1) of the *Code*.

[22] The Board directs the parties to provide it with a report on the arbitration of Mr. Duchemin's grievances by **June 15, 2016**, at the latest.

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

***Translation***

---

Graham J. Clarke  
Vice-Chairperson

---

Richard Brabander  
Member

---

Daniel Charbonneau  
Member