



Reasons for decision

Norm Seward,

complainant,

and

Amalgamated Transit Union, Local 279,

respondent,

and

City of Ottawa,

employer.

Board File: 31407-C

Neutral Citation: 2016 CIRB 815

March 10, 2016

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

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 decision without an oral hearing.

Counsel of Record

Mr. D. Bruce Sevigny, for Norm Seward;

Mr. John McLuckie, for Amalgamated Transit Union, Local 279;

Mr. Steve McCardy, for City Of Ottawa.

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

I. Background

[1] On November 26, 2015, the Board received from Mr. Norm Seward a complaint alleging that his bargaining agent, the Amalgamated Transit Union, Local 279 (ATU), had violated its duty of fair representation 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.

[2] On January 27, 2016, the Board requested that the respondents respond to Mr. Seward's complaint.

[3] On February 1, 2016, Mr. Seward's legal counsel, Mr. Bruce Sevigny, advised the Board of the very sad news that Mr. Seward had passed away. The Board expresses its sincere condolences to Mr. Seward's family.

[4] After reviewing the subsequent submissions, the Board has decided to set out a time limit within which Mr. Seward's estate must advise of its position on this file. If the estate wants to proceed, then legal submissions will be required on how it intends to meet its burden of proof.

[5] If the estate does not respond within the set time limit, the complaint will be dismissed in accordance with the *Canada Industrial Relations Board Regulations, 2012 (Regulations)*.

[6] These are the reasons for the Board's decision.

II. Parties' Positions

[7] In his February 1, 2016 submission to the Board, Mr. Sevigny proposed an interim solution:

I must report that, tragically, the Applicant passed away last week.

In the circumstances, it makes sense for the Board to suspend the deadline for the Responding Parties to file their responses. Perhaps, as well, it makes sense for the Board to indicate that, having regard to the Applicant's passing, this matter will be deemed abandoned at some stated point in the future, unless the Board receives confirmation of some other intention from a representative of the Applicant's estate.

[8] The ATU's counsel, Mr. John McLuckie, wrote to the Board on February 2, 2016 requesting a slightly different resolution:

I am writing further to Mr. Sevigny's letter to you of February 1, 2016 wherein he advised the Board of the unfortunate recent passing of his client, Mr. Norm Seward. In his correspondence Mr. Sevigny suggests that the Board should keep this file open pending some review of this matter by the executor of Mr. Seward's estate.

In the Union's view the only appropriate course of action in light of the nature of this complaint and the personal remedies sought by Mr. Seward would be for the Board to dismiss it at this time. There is simply no way that a complaint that seeks, as its prime remedy, an arbitration hearing to determine whether or not Mr. Seward will be restored to his employment at OC Transpo can possibly continue in light of his untimely death.

[9] Mr. McLuckie was willing to make written submissions if the Board required them, but we prefer to limit the parties' costs as much as possible at this stage while Mr. Seward's estate's intentions remain unknown.

[10] In *Seward*, 2016 CIRB LD 3557, the Board put on hold the timeline for the parties' responses to the complaint. The Board asked if Mr. Sevigny could make a few inquiries in the interim:

The timelines for submissions are stopped.

The Board has previously dealt with an estate's legal entitlement following the unfortunate passing of a complainant. There is also a significant practical element when the key witness is no longer available.

Given the circumstances, would Mr. Sevigny kindly consult with Mr. Seward's estate and advise, by **February 19, 2016**, if the parties will need to file submissions about the Board's next steps.

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[11] Mr. Sevigny wrote to the Board on February 19 indicating he could not obtain instructions, since there was no executor for Mr. Seward. Mr. Sevigny suggested a resolution:

In the circumstances, perhaps it makes sense for the Board to issue a decision, indicating that a representative of Mr. Seward's estate has ninety (90) days to confirm an intention to attempt to proceed with this complaint, failing which the Board will consider the matter frustrated/terminated, as a result of Mr. Seward's unfortunate passing. I could pass such a decision on to Mr. Seward's family for their consideration.

I appreciate that the other parties would probably prefer a more expeditious outcome, but I am also confident that there is a shared concern that Mr. Seward's family be given a reasonable opportunity to sort through these complicated and clearly unexpected issues.

III. Analysis and Decision

[12] From a legal perspective, a complainant's death does not automatically terminate a Board proceeding. But, depending on when that death occurs, it can have a significant practical effect on any complaint.

[13] In *Snively* (1985), 62 di 112; and 12 CLRBR (NS) 97 (CLRB no. 527), the complainant had passed away after the Board had upheld his duty of fair representation complaint and just one day before his reinstatement date. Notwithstanding Mr. Snively's passing, the Board was able to complete the remedial part of its hearing and determine certain questions, including those related to interest, legal costs for counsel, and mitigation.

[14] The situation is quite different when a party passes away before any finding of liability. The matter does not automatically disappear, but there are practical questions about the merits of any case where the key witness is no longer available. The Ontario Labour Relations Board commented on this practical issue in *Rutley v. Ontario Public Service Union, Local 417*, 2012 CanLII 448:

2. It appears the applicant has died. On review of the file it appears there is no benefit that could accrue to the applicant's estate were the application to proceed and, even if there was, it would be challenging for the estate to prove the case. Under the circumstances it is difficult to see what purpose would be achieved by continuing the application. However, if the estate wishes the application to continue, the applicant's estate shall have thirty (30) business days to file submissions in support of its position. If no submissions are filed, the application will be terminated.

[15] The Board is prepared to accept Mr. Sevigny's suggestion of a 90-day time period for Mr. Seward's estate to file any submissions. Those submissions will advise the Board of the legal basis it believes it has to continue the current proceeding. The deadline for submissions will be **June 10, 2016**.

[16] Section 47(1) of the Board's *Regulations* states:

47 (1) If a party fails to comply with a rule of procedure under these Regulations, after being allowed an opportunity for compliance by the Board, it may

(a) summarily refuse to hear or dismiss the application, if the non-complying party is the applicant; or

(b) decide the application without further notice, if the non-complying party is the respondent.

[17] Should Mr. Seward's estate decide, after reflection, not to file any submissions during the time period, then the Board will dismiss this complaint pursuant to section 47 of the *Regulations: Shmig*, 2014 CIRB 724.

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

Graham J. Clarke
Vice-Chairperson

André Lecavalier
Member

Norman Rivard
Member