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

Dominic Gagné,

complainant,

and

Canadian Union of Postal Workers,

respondent,

and

Canada Post Corporation,

employer.

Board File: 31534-C
Neutral Citation: 2016 CIRB **834**
July 26, 2016

The Canada Industrial Relations Board (Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. Daniel Charbonneau and André Lecavalier, 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 determine the complaint without an oral hearing.

Parties' Representatives of Record

Mr. Dominic Gagné, on his own behalf;
Mr. Sylvain Lapointe, for the Canadian Union of Postal Workers;
Mr. Richard Pageau, for the Canada Post Corporation.

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

I. Nature of the Complaint

[1] On February 4, 2016, Mr. Dominic Gagné filed a complaint of a breach of the duty of fair representation (DFR), in which he alleges that his union, the Canadian Union of Postal Workers (CUPW), 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.

[2] Mr. Gagné alleges, *inter alia*, that CUPW violated the *Code* by refusing to go to arbitration to challenge his January 13, 2015, dismissal.

[3] On March 22, 2016, Mr. Gagné's employer, Canada Post Corporation (CPC), notified the Board that it was taking the position traditionally adopted by employers in this type of complaint and that it was not making any submissions concerning the merits of the complaint. However, the employer added that if the Board were to find that a *Code* violation did occur, the direct and indirect consequences of a violation should not be attributed to CPC.

[4] On April 15, 2016, CUPW submitted its response along with several supporting documents. CUPW described the actions it took in Mr. Gagné's case with regard to both the grievance filed in October 2013 against his dismissal for incapacity and the January 13, 2015, dismissal.

[5] On April 21, 2016, Mr. Gagné submitted his reply, in which he did not challenge most of the submissions made in CUPW's response.

[6] This case raises a question concerning a complainant's rights in an investigation conducted by the bargaining agent. Can a bargaining agent use information received from another employee in the bargaining unit about a key point without disclosing the identity of this individual to the complainant?

[7] For the reasons set out below, the Board has decided to dismiss Mr. Gagné's complaint.

II. Relevant Facts

[8] On December 24, 2014, CPC suspended Mr. Gagné pending an investigation to determine whether he had uttered death threats against his supervisor. Mr. Gagné denies saying what the supervisor claims he had said.

[9] On January 13, 2015, after completing its investigation, CPC decided to dismiss Mr. Gagné.

[10] At page 6 of his complaint, Mr. Gagné alleges that CPC did not meet with him to obtain his version of the facts. However, the dismissal letter from CPC dated January 13, 2015 (Response; Exhibit 3), indicates that Mr. Gagné refused to attend a meeting scheduled for January 12, 2015:

> This is further to the death threats you made against your superior...on December 24. You were suspended from your duties pending an investigation following these incidents. **As part of our investigation, we wanted to meet with you on January 12, but you clearly refused to meet with us in the telephone message you left in the station's voice mailbox, which we received on January 12. Therefore, we have no choice but to proceed unilaterally.**
>
> (translation; emphasis added)

[11] Mr. Gagné alleged that CUPW acted in bad faith by refusing to represent him. He alleges, among other things, that CUPW failed to return several of his telephone calls. These calls, like certain other incidents raised by Mr. Gagné in his complaint, were made after the complainant was notified of CUPW's formal decision on November 12, 2015 (Response; Exhibit 10), not to proceed to arbitration:

> The union is refusing to defend my case and has denied the grievance. I have provided police reports proving my innocence, and both my employer and my union argue the opposite. **I completed the form for access to personal information on 26/11/2015 and I have still not received anything from my union. I called several times to speak to the person handling my file...and he never returns my calls, even though I leave messages in his voice mailbox.**
>
> (translation; emphasis added)

[12] Mr. Gagné also indicated, at page 6 of his complaint, that he gave CUPW certain details about the events of December 24, 2014:

> On December 24, 2014, I filed a harassment complaint against my supervisor with Police Officer Charest. I gave this document to my union. Officer Charest is also the one who was called to go see my supervisor for his complaint against me. Officer Charest contacted me by telephone to give me the calling card number for the meeting between him and my supervisor. I made a request to the Longueuil police to get this document; this is the evidence that confirms that my supervisor did not file a complaint against me and that the complaint was denied. I also submitted this document with my grievance to my union and it was not taken into consideration.
>
> (translation)

[13] At the times relevant to this complaint, CUPW was already in contact with Mr. Gagné, given the existence of arbitration to challenge the complainant's dismissal for incapacity in 2013. The arbitration relating to his 2013 dismissal was scheduled for February 17, 2015. Under the collective agreement, Mr. Gagné was entitled to continue working while awaiting the results of this arbitration.

[14] In a letter dated February 12, 2015 (Response; Exhibit 6), CUPW described to Mr. Gagné the efforts it made to meet with him for both the arbitration and the 2015 dismissal:

> This letter is further to the two telephone conversations we had on February 10 and 11, 2015, concerning the arbitration of your grievance against your dismissal for incapacity (grievance no. 350-12-02244) taking place on February 17, 2015.
>
> As I mentioned to you on February 10, 2015, we must meet in person to prepare for the arbitration hearing. At that time, you informed me that you were no longer interested in pursuing the grievance because at any rate, you no longer wanted to work for Canada Post.
>
> I explained to you the importance of meeting in person rather than only over the telephone to ensure that your decision to leave Canada Post is well thought through and well-informed. Moreover, I indicated to you that after verifying with the Montréal Local, we still do not have a grievance investigation or documents challenging your second dismissal in January 2015 and that the meeting would also be an opportunity to provide these documents to us. During our conversation of February 10, 2015, we agreed to a meeting in my office which was to be held the next morning, on February 11, 2015, at 9:30 a.m.
>
> On February 11, 2015, you did not attend the meeting and I did not hear from you. I called you at 4:05 p.m., and at that time, you informed me that you were unable to attend. You again stated the same intention to not pursue the grievance. I reiterated my wish to meet with you in person to discuss your situation and I also informed you that we still had not received the documents challenging your second dismissal of January 2015. Again, we agreed to meet in my office the next day, on February 12, 2015.
>
> At the time of writing this letter, it is 3:00 p.m. I still have not heard from you and we still have not received your documents for the January 2015 dismissal.
>
> Therefore, I am informing you that a meeting has been scheduled with you in my office for Thursday, February 19, 2015, at 1:30 p.m. If you do not attend this meeting without a valid reason, we will consider it your wish that the union definitively abandon actions to challenge your two dismissals and we will inform the employer that grievance no. 350-12-02244 is being withdrawn under article 9.32 of the collective agreement.
>
> (translation)

[15] Following this letter, a meeting was held between Mr. Gagné and CUPW. CUPW then conducted its investigation.

[16] On November 12, 2015, CUPW wrote to Mr. Gagné (Response; Exhibit 10) confirming their telephone conversation of the same day. CUPW apprised him of the results of its investigation of his 2015 dismissal:

> This is further to our telephone conversation (9:55 a.m.) of November 12. During this conversation, I apprised you of the investigation we conducted following the filing of the grievance challenging your dismissal of January 13, 2015.
>
> **During our investigation, we obtained evidence that the comments you are accused of making in the dismissal letter of January 13, 2015, were in fact made**. Given this information, we concluded that we had no chance of succeeding before a grievance arbitrator.
>
> I am confirming to you, with this letter, that we will inform the employer of the withdrawal of the grievance pursuant to section 9.32 of the collective agreement.
>
> (translation; emphasis added)

[17] In his complaint, Mr. Gagné challenges the fact that CUPW did not provide him with a copy of the documents resulting from its investigation, including some testimony by his colleagues. Mr. Gagné also indicates that a major flood occurred in his apartment in the fall of 2015 and destroyed certain documents that were relevant to his case:

> I am missing the documents from the police and the testimony of my colleagues because my union refuses to give them to me and I had to make a request to have them reprinted for me. I expect them soon. **In the fall, a major flood occurred in our apartment and I lost several documents, not to mention that we were relocated for eight weeks during the renovations. The copies I had of this information were destroyed.**
>
> (translation; emphasis added)

[18] The Board notes that, in its February 12, 2015, letter—in other words, eight months before its final decision not to go to arbitration—CUPW explained to Mr. Gagné the importance of providing the documents relevant to his 2015 dismissal.

[19] Along with his complaint, Mr. Gagné filed copies of certain written requests he reportedly made to CUPW on November 26, 2015, two weeks after being notified of CUPW's final decision of November 12, 2015.

[20] In its response to the complaint, CUPW described several of the actions it allegedly took in the course of representing Mr. Gagné. For example, CUPW finally met with Mr. Gagné in person on February 16, 2015. During that meeting, CUPW convinced Mr. Gagné not to abandon

his right to challenge his 2015 dismissal. A grievance was filed the same day (Response; Exhibit 7).

[21] During the February 16 meeting, CUPW obtained a written statement from Mr. Gagné as well as certain documents. Mr. Gagné denies CPC's allegation that he told his unit head that he was going to kill him.

[22] During its investigation, CUPW obtained more information. More specifically, a witness who was also a member of the same bargaining unit as Mr. Gagné confirmed CPC's version of the facts. This witness, however, did not want his identity revealed. Therefore, the union did not disclose the identity of this witness to Mr. Gagné.

[23] CUPW nonetheless took the comments of this witness into consideration in its assessment of Mr. Gagné's grievance. CUPW also took into account the testimony that Mr. Gagné provided to it.

[24] CUPW concluded that an arbitrator would not decide in favour of Mr. Gagné. CUPW also obtained a verbal legal opinion to validate its conclusion.

III. Issues

[25] Based on the facts in the file, the Board raises the following two issues:

a. Can a bargaining agent withdraw a grievance based on a confidential interview held with another member of the unit, without providing details to the complainant?

b. Was the process followed by CUPW consistent with its duty of fair representation?

IV. Duty of Fair Representation

[26] The role of the Board is not to perform the work normally performed by a grievance arbitrator. The Board is not to decide whether Mr. Gagné's grievance contesting his dismissal for just cause could have been successful.

[27] Rather, in a DFR complaint, the Board reviews the process followed by a bargaining agent like CUPW. In another recent case involving CUPW, *Ménard*, 2015 CIRB 753 (*Ménard 753*), the Board described its role in a DFR complaint as follows:

> [5] Mr. Ménard's submissions in large part contest whether CPC had just cause to terminate him. It is important to describe the Board's role in a DFR complaint.

[6] When Parliament added the DFR to the *Code*, it did not intend for the Board to sit in appeal and pass judgment on the quality and reasonableness of a trade union's representation. Rather, a *Code* violation only occurs if a trade union's conduct reaches the high threshold in section 37 of being "arbitrary, discriminatory or in bad faith".

[7] As noted in *Singh,* 2012 CIRB 639, the Board examines the steps trade union officials took when representing a bargaining unit member's interests:

> [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*):
>
> > [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 *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 *Presseault*, 2001 CIRB 138).

[8] In *McRaeJackson,* 2004 CIRB 290, the Board commented on the types of procedural steps it might examine in a DFR case:

> [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.

[9] Recently, in *Heitzmann*, 2014 CIRB 737 (*Heitzmann 737*), the Board examined a trade union's process which had led to its decision to discontinue an arbitration hearing:

> [145] CUPW repeatedly advised Ms. Heitzmann of the legal challenges with her case and the steps she could take to improve her situation. Ms. Heitzmann refused to follow this advice. This refusal, *inter alia,* also prevented CUPW from pursuing the settlement discussions about which CPC had expressed a possible openness.
>
> [146] Ms. Heitzmann's failure to cooperate with CUPW's efforts included knowingly failing to show up at the first arbitration date. The written record between Mr. Mooney and Ms. Heitzmann demonstrated that she knew of that arbitration date.
>
> [147] Even after the initial fiasco before an experienced labour arbitrator, CUPW continued to attempt to represent Ms. Heitzmann's interests. However, Ms. Heitzmann maintained her attitude of non-cooperation.
>
> [148] Ultimately, after reviewing the situation with legal counsel, CUPW decided to withdraw Ms. Heitzmann's grievance. It further emailed Ms. Heitzmann the reasons for its decision.

> [149] The Board finds nothing arbitrary, discriminatory or in bad faith with CUPW's process throughout this case.
>
> [10] While Mr. Ménard's case is slightly different from the situation in *Heitzmann 737*, *supra*, since his case never proceeded to arbitration, the Board carries out the same analysis of CUPW's process.

[28] In the present case, the evidence provided by Mr. Gagné, like for example the calling card (CAD), supports the merits of the grievance. However, the Board must examine the process followed by CUPW, as it did in *Ménard 753*.

V. Analysis and Decision

[29] As mentioned above, the Board must address the two issues raised.

A. Can a bargaining agent withdraw a grievance based on a confidential interview held with another member of the unit, without providing details to the complainant?

[30] During its investigation, CUPW considered the evidence of a witness who, in the circumstances, wished to remain anonymous. The evidence provided by this witness supported CPC's position concerning the comments Mr. Gagné made to his supervisor. The November 12, 2015, letter confirms that CUPW did not accept the version of the facts as suggested by Mr. Gagné:

> During our investigation, we obtained evidence that the comments you are accused of making in the dismissal letter of January 13, 2015, were in fact made.
>
> (translation)

[31] In his reply dated April 21, 2016, Mr. Gagné did not challenge most of the facts raised by CUPW in its response. However, in the original complaint, he challenged the fact that CUPW did not give him access to the documents collected during its investigation, including the testimony of his work colleagues.

[32] Can a union keep the identity of a witness questioned during the investigation confidential, or is it required to disclose it to the member it is representing?

[33] This specific question is somewhat different from the situations the Board has examined in the past, where the union would have almost blindly accepted an employer's evidence. In *Singh*, 2012 CIRB 639 (*Singh 639*), the Board decided in favour of the complainant who did not have the opportunity to see the employer's evidence or comment on it:

[104] **In the Board's view, an agreement between the Teamsters and UPS not to show key documents to Mr. Singh, as a condition for Mr. Randall viewing them, deprived Mr. Singh of an important opportunity to know and comment upon the case against him**. At an arbitration hearing, any evidence in support of a just cause dismissal would have to be produced in its entirety, subject to any orders allowing limited redaction and admissibility.

[105] Experienced employers and trade unions often share information early in the grievance process. This process helps trade unions make the difficult judgment calls. But if an employer insists on confidentiality, and this demand hinders a grievor's ability to assist his or her union, then the union and the employer will have to live with the possible repercussions arising from this practice.

[106] **The Board has held in the past that the grievor is best situated to assist the union in analyzing the employer's evidence:**

> [17] In short, the Board will abide by the union's decision, whether or not it agrees with it, as long as the union undertook to conduct a reasonable investigation, fairly assessed the facts of the case and the impact of its decision on the grievor, and informed the grievor of the union's reasons for not referring the grievance to arbitration.
>
> ...
>
> [19] In the case at hand, the Board finds that the union did not conduct a serious or objective investigation of the grievance it filed on Mr. Baribeau's behalf and was thus unable to assess his chances of success at arbitration. The union failed in its duty of fair representation for the reasons that follow.
>
> [20] The evidence shows that the union relied solely on the employer's submissions in taking its position**.** Considering the issues raised by Mr. Baribeau's grievance and the long-term negative impact on his pension benefits, the union should have at least obtained reasonable explanations based on a factual or legal basis before deciding that his case had no chance of success at arbitration.
>
> *Baribeau*, 2004 CIRB 302; (emphasis added)

[107] A trade union will consider all the evidence, either prior to making its decision to go to arbitration or, if the employer refuses to disclose it in advance, on the eve of and during arbitration. Regardless of the timing when it receives the employer's evidence in support of termination, the trade union in many cases needs the assistance of the grievor to help it appreciate the employer's case.

[108] The facts demonstrate that Mr. Randall did not show Mr. Singh the various signed statements which made negative allegations about him. Mr. Randall also did not meet with all the individuals who signed statements, but still relied on them.

[109] Mr. Randall did not show Mr. Singh the $350.00 cheque.

> [110] **In the Board's view, a general comment to Mr. Singh on the phone about damaging evidence, without divulging the actual document or identifying the authors, prevented Mr. Singh from commenting knowingly on the case against him.**
>
> (emphasis added)

[34] In *Singh 639*, the union withheld a large portion of the employer's evidence from the complainant. For example, the union refused to show its member an investigation report by the employer concerning an alleged theft.

[35] In Mr. Gagné's case, however, only one piece of evidence was in dispute. CUPW met with Mr. Gagné concerning a very specific incident to determine whether he had uttered death threats against his supervisor. Mr. Gagné indicated unequivocally that he had not threatened his supervisor.

[36] During its subsequent investigation, CUPW met with several potential witnesses. Most of the witnesses did not have any useful information. However, one member of the bargaining unit confirmed the facts as alleged by CPC. This witness did not want his name disclosed to Mr. Gagné.

[37] The Board is of the view that CUPW was not required to disclose the identity of the witness to Mr. Gagné.

[38] The investigation process of a union is not the same as the legal proceedings of an administrative or civil tribunal. Procedural fairness and natural justice are not applicable to a union when it is deciding which of its members' grievances will be referred to arbitration.

[39] Rather, a union must, within its means, conduct an investigation and it must refrain from acting in a manner that is arbitrary, discriminatory or in bad faith, as required by the *Code*. It would be incorrect to impose the same standards on unions, in their day-to-day work, that apply to administrative tribunals or to police officers conducting criminal investigations.

[40] These comments by the Board are applicable only within the administration of collective agreements. Other standards may apply to a union in a process regulated by its own constitution.

[41] The Board agrees with the analysis conducted by the British Columbia Labour Relations Board (BCLRB) in a similar situation. In *Northern Health Authority (Prince Rupert Regional*

Hospital), [2012] B.C.L.R.B.D. No. 65 (*Northern Health*), the BCLRB dealt with a DFR complaint that also involved allegations of threats and confidential interviews.

[42] In *Northern Health*, the complainant challenged the fact that his union had not provided him with any details about the comments from other individuals in the unit:

> [21] Yates says he was denied the right to know his accusers or to know the particulars, which impaired his ability to defend himself against the actions of any wrongdoing. He says that relying on anonymous letters of complaint suffers from the same inherent unreliability as other types of hearsay evidence and should therefore be disregarded. He says this demonstrates bad faith behaviour on the part of the Union, and a discriminatory attitude towards him.
>
> ...
>
> [24] Yates says the appeal process of the Union's Executive Committee was defective because he was denied full particulars, and was not given the opportunity to cross-examine the people who made statements against him, which impaired his ability to defend himself. He says this was arbitrary, discriminatory and in bad faith. Yates says the Board should not rely on or give weight to an investigation in which accusers are allowed to remain anonymous.

[43] The BCLRB found that the union had no obligation to hold a formal hearing and to disclose everything to its member:

> [41] Neither the GAC nor the Executive Committee in the matter before me was under the obligation to hold a full trial resembling a criminal trial concerning the allegations against Yates. **While such rights do exist in a criminal or a civil court, a union's investigation into allegations against one of its members does not have the same requirements because it is an entirely different context.** In the criminal and civil contexts, procedures are highly formal and rigid with respect to process. **The Board will be deferential to a union's investigative process provided it constitutes a reasonable investigation in the context of the facts of the case.**
>
> [42] In the case before me, given that the nature of the allegations include violent language expressed towards other Union members, it is not surprising the Union interviewed the affected members separately to Yates. While Yates may have preferred to be able to directly confront or cross-examine such accusers, whom he clearly feels are lying, the Union was not obligated under Section 12 to provide him with a forum to do so.
>
> (emphasis added)

[44] In this case, CUPW also was not under any obligation to give Mr. Gagné the opportunity to challenge its investigation in fine detail. There was only one piece of evidence to verify and that was whether Mr. Gagné had threatened his supervisor. CPC's position was clear.

[45] CUPW obtained Mr. Gagné's version of the facts and spoke with other members of the unit. CUPW had the right, after consulting with other potential witnesses, to assess its chances of succeeding at arbitration. Given that there was only one piece of evidence to verify, CUPW was not in any way required to hold a formal hearing or to disclose the identity of the key witness to Mr. Gagné.

[46] The facts in Mr. Gagné's case differ from those in *Singh 639*, in which the employer's allegations and evidence were withheld from the complainant.

B. Was the process followed by CUPW consistent with its duty of fair representation?

[47] The Board is of the view that in the course of its investigation, CUPW fulfilled its duties under the *Code*.

[48] For example, CUPW convinced Mr. Gagné to challenge his 2015 dismissal. It then met with Mr. Gagné to obtain his version of the facts. Mr. Gagné reportedly signed a statement and provided certain documents to CUPW.

[49] CUPW met with potential witnesses, including a member of the unit who had heard the threats made.

[50] Counsel reportedly gave CUPW a verbal legal opinion on the chances of succeeding at arbitration. Then, in a telephone conversation, CUPW explained to Mr. Gagné the reasons for its decision not to go to arbitration. A letter confirming their discussion was sent to the complainant the same day.

[51] This decision-making process is fairly routine for a union. The Board is not to decide, in a situation like this, whether the union should have referred the grievance to arbitration. The Board does not review the unions' decisions that way. Rather, it looks at whether CUPW violated section 37 of the *Code*. Mr. Gagné, on whom the burden of proof rested, did not persuade the Board that CUPW acted in a manner that was arbitrary, discriminatory or in bad faith.

VI. Conclusion

[52] In the specific circumstances of this complaint, the Board finds that CUPW was not required to disclose to Mr. Gagné the identity of another member of the unit who reportedly confirmed a piece of key evidence as CPC alleged.

[53] CUPW also followed an appropriate process to arrive at its decision not to refer the grievance against Mr. Gagné's dismissal to arbitration.

[54] Consequently, the Board dismisses the complaint.

Translation

Graham J. Clarke
Vice Chairperson

Daniel Charbonneau
Member

André Lecavalier
Member