Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Roger Abdo,

complainant,

and

Public Service Alliance of Canada,

respondent,

and

Aéroports de Montréal,

employer.

Board File: 32470-C
Neutral Citation: 2019 CIRB **897**
February 12, 2019

The panel of the Canada Industrial Relations Board (the Board) was composed of Ms. Louise Fecteau, Vice-Chairperson, and Messrs. Richard Brabander and Daniel Thimineur, Members.

Counsel of Record

Mr. Jean-Philippe Ponce, for Mr. Roger Abdo;
Ms. Lindsay Cheong, for the Public Service Alliance of Canada;
Mr. Luc Beaulieu, for Aéroports de Montréal.

These reasons for decision were written by Ms. Louise Fecteau, Vice-Chairperson.

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 issue this decision without an oral hearing.

I. Nature of the Complaint

[1] This unfair labour practice complaint was filed by Mr. Roger Abdo (the complainant) on February 9, 2018, pursuant to section 97(1) of the *Code*, and alleges violation of section 37 of the *Code* by the Public Service Alliance of Canada (the union). Mr. Abdo criticizes his union for not referring his grievance to arbitration within the time limits set out in the collective agreement. He alleges that the union acted in an arbitrary, superficial, careless and discriminatory manner in dealing with grievance no. 2016-22.

II. Facts

[2] Mr. Abdo has been employed by Aéroports de Montréal (the employer or ADM) since January 9, 2012, and is currently working as a mechanical engineer.

[3] On October 14, 2016, Mr. Abdo was given a written disciplinary notice regarding inappropriate and disrespectful comments he had allegedly made to his supervisor. In this disciplinary notice, the employer asked the complainant to, among other things, immediately change his behaviour and communicate respectfully.

[4] On December 5, 2016, the union filed a grievance challenging the disciplinary action. Mr. Abdo's grievance (no. 2016-22) was considered by the grievance committee at a meeting held on February 27, 2017. Without any commitment on the part of the employer, it was agreed at that time that the union would propose an amendment to the content of the disciplinary notice issued to Mr. Abdo on October 14, 2016, in order to resolve his case. On March 15, 2017, Ms. Josée Dubois, President of the Unité des cols blancs (white collar unit) of ADM, Local 10157 of the Public Service Alliance of Canada, sent an e-mail to the employer reiterating the union's wish to have an amendment made to the content of the written notice given to Mr. Abdo on October 14, 2016. The e-mail also stated that Mr. Abdo was prepared to acknowledge that some of the comments he had made were inappropriate and disrespectful. On April 11, 2017, the employer invited the union to propose an amendment and indicated that it would consider it.

[5] On May 4, 2017, Ms. Dubois sent the employer the proposed amendment to the written notice of October 14, 2016. The very next day, on May 5, 2017, the employer refused the union's proposed amendment.

[6] On or about October 10, 2017, having not referred Mr. Abdo's grievance to arbitration within 30 days of the grievance committee meeting of February 27, 2017, the union asked the employer to grant it a time limit extension, among other things, with respect to Mr. Abdo's grievance file. The employer refused this request and considered the grievance abandoned.

[7] On January 13, 2018, the union informed Mr. Abdo that following the grievance committee meeting of February 27, 2017, its acting representative had failed to refer his grievance to arbitration within the 30-day period set out in the collective agreement, and that the grievance was therefore considered abandoned, as the employer had refused to extend the time limit. At that point, the union suggested to Mr. Abdo that he file a duty of fair representation complaint with the Board under section 37 of the *Code*.

III. Positions of the Parties

A. The Complainant

[8] The complainant argues that the union did not act diligently or promptly between the February 27 meeting and May 2017, and that its inaction on grievance no. 2016-22 reflects a cavalier attitude towards him, which resulted in the loss of his rights. The complainant adds that the union's carelessness and lack of communication caused him to forfeit his right to arbitration. He considers the union's incompetence and attitude to be a serious breach of the duty of fair representation. He asks that the Board allow his complaint, that his grievance be referred to arbitration and that the expenses be paid by the union.

B. The Union

[9] The union admits that the complainant's grievance was not referred to arbitration as it should have been. It argues that simply failing to refer grievance no. 2016-22 to arbitration does not amount to discriminatory behaviour. It submits, among other things, that Mr. Vincent Carl Leriche, the union representative who was assigned to Mr. Abdo's case, had no experience and was working as an acting regional representative. The union notes Mr. Leriche's lack of experience in the union's Local 10157 and his unfamiliarity with the collective agreement in force.

[10] According to the union, in May 2017, Mr. Leriche attempted to forward the grievance to the head office in Ottawa, which is responsible for referring grievances to arbitration; however, his mailout was not received. The union adds that it asked the employer to extend the time limit

despite the delay, but the employer refused. The union considers that neither the complaint nor the facts demonstrate discriminatory behaviour towards the complainant.

[11] Nor does the union believe, ultimately, that it acted in an arbitrary manner towards the complainant. In support of its arguments, it cites *Haley* (1980), 41 di 295; [1980] 3 Can LRBR 501; and 81 CLLC 16,070 (CLRB no. 271) (*Haley 271*), to argue that grievance no. 2016-22 is not sufficiently serious to conclude that there was a breach of the duty of fair representation in respect of the complainant. The union mentions a sunset clause in the collective agreement that will ensure that the disciplinary action will not permanently remain on Mr. Abdo's record. In addition, the union maintains that the written notice has no financial impact on the complainant. It considers that the Board must take certain factors into account when deciding on the arbitrary conduct of a union, including the importance and seriousness of the grievance, the impact on the complainant and the union representative's level of expertise. Based on the circumstances described above, the union asks that Mr. Abdo's complaint be dismissed.

C. The Employer

[12] The employer does not view the situation in the same way as the union. In short, it argues that there was collusion in this case between the union and the complainant surrounding the filing of Mr. Abdo's complaint. In particular, it refers to Ms. Dubois' e-mail to Mr. Abdo suggesting that he "file a duty of representation complaint under section 37 of the *Canada Labour Code* in order to restart the time limits" (translation). In the same e-mail, Ms. Dubois provided the complainant with a link to the Board's duty of fair representation complaint form.

[13] The employer adds, in light of the circumstances mentioned above, that it is entitled to intervene both on the merits of the complaint and on any remedies that may be ordered by the Board.

[14] The employer is therefore asking that it be allowed to intervene actively in the complaint file and also that the complaint be dismissed.

D. The Complainant's Reply

[15] In reply to the union's submissions, the complainant argues that following the disciplinary notice of October 14, 2016, which is the subject of grievance no. 2016-22, the employer took further disciplinary action against him in March 2017, a one-day suspension, such that the

union's inaction was seriously prejudicial to him. He adds that this more recent disciplinary action was the subject of a grievance that was referred to arbitration.

[16] In his reply to the employer's submissions, the complainant categorically denies the allegations of collusion between him and the union. Further, he believes that the employer is trying to downplay the severity of the disciplinary notice of October 14, 2016, and maintains that this written notice is an attack on his integrity since it calls his ethics into question.

IV. Analysis and Decision

[17] Section 37 of the *Code* reads as follows:

> **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.

[18] The case law on the union's duty of fair representation is well established. In *Canadian Merchant Service Guild* v. *Gagnon et al.*, [1984] 1 S.C.R. 509, the Supreme Court of Canada stated the principles of this duty as follows:

> The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.
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> 1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.
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> 2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.
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> 3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.
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> 4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.
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> 5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.
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> (page 527)

[19] The Board's case law provides that a union acts in a discriminatory manner when it does not treat all of its members equally, for reasons that are illegal, arbitrary or unreasonable (see

Bayers, 2008 CIRB 416). The case law also specifies that a union acts in an arbitrary manner when its actions or omissions go beyond simple negligence and amount to gross negligence (see *Griffiths*, 2002 CIRB 208).

[20] In *Adams*, 2000 CIRB 95, upheld on reconsideration in *Adams*, 2001 CIRB 121, the Board allowed Mr. Adams' complaint and found that his union, the Canadian Council of Railway Operating Unions, had breached its duty of fair representation under section 37 of the *Code* by not representing him adequately in relation to the grievance and arbitration procedure. The Board concluded that Mr. Adams' case had been handled in an offhand manner, without the necessary rigour. This decision provides a good summary of the Board's role in a complaint under section 37 of the *Code* and the criteria that apply when determining whether a union has been grossly negligent or even arbitrary in its conduct:

> [49] The Board has repeated on many occasions that its role is not to sit in appeal of decisions taken by union representatives, but rather to remedy abuses of the exclusive bargaining authority of unions. In this case, the Board must determine whether the union acted in an arbitrary or discriminatory manner, or in bad faith towards Mr. Adams with respect to the representation of his grievance at arbitration.
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> [50] The Board has ruled on the very broad discretion accorded to the union when deciding to refer a grievance to arbitration. The Board does not have to scrutinize how the union operates, whether it be its choice to refer a grievance to arbitration or its actual presentation of the grievance at arbitration. The issue the Board must determine is whether the union seriously considered the matter referred to arbitration.
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> [51] In *Haley* (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 (CLRB no. 304), the Board described certain **prohibited behaviours** that go against the union's duty of fair representation:
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> > It is not the Board's task to reshape the union's priorities, allocate union resources, comment on leadership selection, second guess its decisions, or criticize the results of its bargaining. It is our task to ensure it does not exercise its exclusive majoritarian based authority unfairly or discriminatorily. Union decision makers must not act fraudulently or for improper motives such as those prohibited by human rights legislation or out of personal hostility, revenge or dishonesty. They must not act arbitrarily by making no or only a perfunctory or cursory inquiry into an employee's grievance. The union's duty of fair representation does not guarantee individual or group union decision makers will be mature, wise, sensitive, competent, effectual or suited for their job. ...
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> > **But the law does not condone all good faith action. Some action or inaction is such a total abdication of responsibility it is no longer mere incompetence—it is a total failure to represent... Some conduct is so arbitrary or seriously (or grossly) negligent it cannot be viewed as fair. ...**
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> > (pages 324–325; 131–132; and 615)
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> [52] In *Cloutier* (1981), 40 di 222; [1981] 2 Can LRBR 335; and 81 CLLC 16,108 (CLRB no. 319), the Board dealt with the three criteria for assessing a section 37 complaint: the nature or

> seriousness of the grievance; the degree of sophistication of the bargaining agent; and the steps taken by the union in considering the grievance. **First, the Board recognized that a grievance that affects the career of a worker must of course be dealt with more rigorously by the union and by the Board. Second, the Board's decision concerning the reasonable steps taken by the union will take into account the union's experience and resources. Third, the Board will look at the practices, policies and criteria applied by the union in settling the grievance "compared to similar ones which regularly come before it"** (see pages 226–230; 338–341; and 698–701).
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> [53] In *Gagnon* (1992), 88 di 52 (CLRB no. 939), the Board also considered that the poor state of communications between the union and the complainant did not in itself constitute a breach of duty of fair representation. What must be established is that there has been gross negligence on the part of the union in its handling of the complainant's grievance. However, in *Brideau* (1986), 63 di 215; 12 CLRBR (NS) 245; and 86 CLLC 16,012 (CLRB no. 550), the Board did not definitively eliminate the possibility that a breakdown in communications could not lead to a violation of section 37. Thus, inadequate communication between the union and the complainant prejudicial to the latter's position could lead to a breach of duty of fair representation. In *Shanks* (1996), 100 di 59 (CLRB no. 1157), the Board found that the central issue "is by no means simply poor communication but rather one of sustained neglect and inaction on the part of the Union in the exercise of its exclusive authority" (page 71). On this jurisprudence is founded the principle that even if poor communication does not inevitably lead to a violation of section 37, the union's actions should be assessed in each case.
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> (emphasis added)

[21] In light of the above-noted principles, the Board must therefore determine whether, in this case, the union acted in an arbitrary or discriminatory manner towards the complainant. From the outset, there is no evidence in this matter that would allow the Board to conclude that the union acted in a discriminatory manner towards Mr. Abdo.

[22] The remaining issues are as follows: did the union, as a result of the failure of one of its representatives to refer the complainant's grievance to arbitration, breach its duty of fair representation? Did the union treat the complainant's case with the necessary rigour between February 27, 2017—the date of the grievance committee meeting—and the month of May 2017? In response to these questions, and as the case law in similar matters has indicated, each case must be analyzed on the basis of the relevant facts.

[23] The facts show that a grievance was filed on December 5, 2016, challenging the disciplinary action taken against Mr. Abdo by the employer on October 14, 2016. On February 27, 2017, at the grievance committee meeting, the employer was open to the union's proposal to review the content of the written disciplinary notice of October 14, 2016. It appears from the evidence that the Local President, Ms. Dubois, was in charge of this process. She sent an e-mail to the employer on March 15, 2017, reiterating that the union wanted to have the content of the notice amended, but for reasons that were not explained, the proposed amendment was not sent to the employer until May 4, 2017. Had the proposed amendment

been sent on or about March 15, 2017, and then refused by the employer, the union could have referred the grievance to arbitration since it would still be within 30 days of the grievance committee's meeting. In addition, it was not until about October 10, 2017, more than five months after the employer refused to amend the disciplinary notice, that the union asked the employer for an extension of the time limit to refer Mr. Abdo's grievance to arbitration. The employer refused. The union did not provide any explanation to justify all of these delays.

[24] The union raises the union representative's lack of experience in order to excuse its failure to refer the complainant's grievance to arbitration. It also argues that the grievance in question is not serious enough and that the impact on the complainant is mitigated by the fact that there is a sunset clause to minimize the potential repercussions. However, the facts show that the employer imposed further discipline on the complainant equivalent to a one-day suspension in or around April 2017. It is difficult to believe that these two disciplinary actions are not serious and will not have any repercussions on Mr. Abdo's current and future career with the employer. Indeed, the union filed a grievance with respect to the second disciplinary action and referred it to arbitration.

[25] To support its arguments and excuse the union representative's lack of experience, the union cited the Board's decision in *Haley 271*, *supra*, in which a majority panel of the Board dismissed the complaint of Ms. Brenda Haley. This decision was confirmed by a majority of a reconsideration panel of the Board in *Haley* (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 (CLRB no. 304) (*Hayley 304*). In that matter, the complainant's employment had been terminated, and the union sought to challenge the employer's decision to dismiss her. The time limit had been exceeded by just a few days. The union had nevertheless referred the grievance to arbitration, and the employer had raised the issue of the grievance's timeliness. The arbitrator had allowed the employer's preliminary objection and declined jurisdiction.

[26] In that case, Ms. Haley considered that exceeding a time limit was evidence of arbitrary conduct and gross negligence. Despite the fact that Ms. Haley's grievance concerned her dismissal, the majority of the panel members concluded that the union had "made an unintentional… administrative mistake," or in other words, had committed simple negligence. The original panel of the Board stated the following:

> In this case the union made an unintentional and not fully explained administrative mistake in its Toronto office when actively prosecuting the cause of the merits of an employee's discharge against her employer. This is not a case where the union failed to act or failed to count the days. It acted but in so doing made a mistake. The consequences of the error for Brenda Haley were

> severe in the extreme, particularly when the few days involved and the fact the text of the letters of September 17 and 21 were identical is considered. But such an innocent mistake is not, in our opinion, a breach of the duty of fair representation contemplated by section 136.1. The complaint is therefore dismissed. Because of our decision on the merits of the complaint we do not find it necessary to rule on the timeliness of the complaint.
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> Our colleague arrives at an opposite decision based upon a differing opinion of union responsibility. Our difference is one of policy and statutory interpretation. The Board's practice and procedure for review by the full Board adopted by the full Board in *British Columbia Telephone Company*, 38 di 124, [1980] 1 Can LRBR 340; and 80 CLLC 16,008 was fashioned for this circumstance. Brenda Haley may wish to avail herself of this avenue for review of our decision.
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> (*Haley 271*, *supra*, pages 307; 510; and 409–410)

[27] According to the dissent in *Haley 271*, *supra*, the union's failure went beyond a mere clerical error; it was seen as a symptom of the superficial manner in which the case had been handled by the union. Among other things, the following was stated:

> Notwithstanding that the union followed through to arbitration and attempted to undo the wrong, it must still be responsible for its actions between September 5th and September 20th, 1979. It is obvious that it did not seriously turn its mind to Mrs. Haley's plight and its actions fell short of what she could have expected considering the gravity of the situation. I would find that the union failed to exercise its obligation to represent Mrs. Haley as contemplated by section 136.1 of the *Code*.
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> (pages 310; 513; and 411)

[28] Although the majority panel that rendered the decision in *Haley 304*, *supra*, dismissed Ms. Haley's application, it took the time to point out that each case must be judged based on the merits of the complaint and its own particular circumstances. The panel stated as follows:

> For us the gravity of the grievance is clearly important. This is reflected in our utilization of the notion of a critical job interest. The level of expertise of the union representative and the resources the union makes available to perform the function are also relevant factual considerations. **These and the other relevant facts of the case will form the foundation in each case to decide whether there was seriously negligent, arbitrary, discriminatory or bad faith, and therefore unfair, representation. This individual judgment must be made on the facts of each case. We make no rule about missed time limits or other procedural error in any circumstance being serious negligence.** We therefore do not accept the argument on behalf of Brenda Haley on the policy issue with respect to the duty of fair representation.
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> (pages 326; 133; and 616; emphasis added)

[29] In this case, the Board does not agree with the union's position that the written disciplinary notice of October 14, 2016, and the ensuing grievance are not serious. The notice clearly indicates that the complainant is at risk of losing his job. The disciplinary notice of October 14, 2016, concludes as follows:

> We therefore demand that you make the necessary changes without delay and adopt a professional attitude, which is fundamental to the position you hold; failing this, we will be obliged to reconsider your employment relationship with ADM.
>
> (translation)

[30] In this case, the union is not saying that it did not wish to refer Mr. Abdo's case to arbitration; rather, it admits that it made a mistake and exceeded the time limit. However, the inexperience of the union representative cannot excuse the union's inaction in trying to resolve Mr. Abdo's case expeditiously, that is, within 30 days of the grievance committee meeting, when the employer seemed open to this proposal. The successive errors on the part of the union, despite its experience in representing its members, as well as the seriousness of the grievance are sufficient to satisfy the Board that it should allow Mr. Abdo's complaint, since the union did not take the necessary measures to adequately represent the complainant before the employer. The Board concludes that the complainant's case was treated superficially by the union, without the necessary rigour required by its duty of fair representation.

V. Collusion Issue Raised by the Employer

[31] As for the employer's allegations that there was collusion between the complainant and the union, and taking into account that the union suggested to Mr. Abdo that he file a complaint with the Board to reopen the grievance file, the Board is of the opinion that the union did not commit any wrongdoing by suggesting to the complainant that he file a complaint with the Board. However, given that the employer is an interested party and that any remedy the Board may order may have an impact on it, the Board will give the employer an opportunity to make submissions on the issue of remedy.

VI. Conclusion

[32] Accordingly, the Board allows the complaint and finds that the union has breached its duty of fair representation under section 37 of the *Code*.

[33] Pursuant to section 99(1)(b) of the *Code*, the Board has the power to order a remedy commensurate with assisting an employee to take and carry on such action or proceeding as the Board considers that the union ought to have taken and carried on on the employee's behalf or ought to have assisted the employee to take and carry on.

[34] Furthermore, pursuant to section 99(2) of the *Code*, the Board may, in addition to or in lieu of any other order that it is authorized to make under section 99(1), by order, require the trade

union to do any thing that it is equitable to require the trade union to do in order to remedy or counteract any consequence of the contravention of the *Code*.

[35] However, before exercising the powers conferred on it, the Board refers the matter to Mr. Jesse Peters, Industrial Relations Officer with the Board, so that he may assist the parties in finding common ground on the issue of remedy.

[36] Since the employer is an interested party in cases under section 37 of the *Code* involving remedy, it is necessary to serve notice on the employer to invite it to be part of the discussions on this issue.

[37] The parties will have 45 days from the date of the issuance of these reasons to come to a settlement. Should the parties be unable to reach a settlement, the Board will then decide on an appropriate remedy after allowing the parties, including the employer, to provide the Board with their written submissions on this issue.

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

Translation

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Louise Fecteau
Vice-Chairperson

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Richard Brabander
Member

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Daniel Thimineur
Member