

Reasons for decision

Abubakar Kasim,

complainant,

and

**National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW - Canada),
Local 2002,**

respondent,

and

Air Canada,

employer.

Board File: 27142-C

CITED AS: Kasim

Neutral Citation: 2008 CIRB 432

December 22, 2008

This is a complaint pursuant to section 37 of the *Canada Labour Code (Part I–Industrial Relations)*.

Duty of fair representation–Quality of representation –Prima facie case–The complainant filed a complaint alleging that the union had violated its duty in its representation of him following an incident that occurred with his employer–The complainant alleged that the union ought to have done more for him and that his rights have not been upheld–The Board conducts a prima facie case analysis when dealing with duty of fair representation complaints–In order to determine if a complainant has established a prima facie case, the Board considers whether, if all of a complainant’s allegations are true, would the Board find a *Code* violation had taken place–The Board has examined the process followed by the union and concluded that no violation of the duty of fair representation took place–The materials filed by the complainant demonstrated that the union immediately filed a grievance with regard to the incident about which he had complained–Moreover, the union prepared and filed a detailed memorandum in the expedited arbitration process setting out its position why the employer had not respected the complainant’s rights–Under the expedited arbitration process, an independent third party investigator interviewed the parties and produced a report with conclusions and recommendations–The arbitrator reviewed that report and decided that the grievance should be settled on the basis of the recommendations found in the investigator’s report–The Board found that there was simply nothing about this process, and the union’s actions in representing the complainant, that can be described as arbitrary, discriminatory or in bad faith–The Board noted that both the union and the employer cooperated in the hearing of the complainant’s grievance pursuant to their negotiated arbitration procedure–The Board found that a mere disagreement between an employee and his or her bargaining agent with regard to the ultimate disposition of a grievance does not give rise to a violation of the *Code*.

The Board was composed of Mr. Graham J. Clarke, Vice-Chairperson, Messrs. Patrick J. Heinke 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 this complaint without an oral hearing.

Party Representatives

Mr. Abubakar Kasim, on his own behalf;

Ms. Rachelle Henderson, for Air Canada;

Ms. Sylvia Rothlin, for the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW - Canada), Local 2002.

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

I–Nature of the Application

[1] On October 31, 2008, the Board received from Mr. Abubakar Kasim (Mr. Kasim) a duty of fair representation complaint alleging a violation of 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. Kasim alleged that his bargaining agent, the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW - Canada), Local 2002 (CAW) had violated their duty in its representation of him following an incident that occurred with his employer, Air Canada.

II–Facts

[3] In the summer of 2007, Air Canada received an airline award for its level of service to customers.

[4] On August 11, 2007, Mr. Kasim sent an internal email to fellow employees, including Air Canada executives, expressing his opinion that Air Canada did not deserve the award. Mr. Kasim set out, *inter alia*, a personal experience he had had onboard an Air Canada flight.

[5] On August 16, 2007, two Air Canada managers convened a meeting with Mr. Kasim to discuss the email. The perceptions of what occurred at that meeting differed between Mr. Kasim and the managers.

[6] As a result, on August 28, 2007, the CAW filed a grievance on Mr. Kasim's behalf contesting the meeting and the fact that no CAW representative had been present. The grievance alleged, *inter alia*, that Mr. Kasim had been harassed in violation of his rights under the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

[7] Mr. Kasim indicated he fell ill because of the incident. On September 13, 2007, he had to go to the hospital and was on sick leave for approximately three months.

[8] On January 16, 2008, as part of Air Canada's expedited arbitration procedure, the CAW filed a mediation brief setting out its position on behalf of Mr. Kasim.

[9] On February 22, 2008, again as part of the expedited arbitration process, Mr. Kasim's grievance was sent for a fact-finding facilitation resolution.

[10] From April 9 to 11, 2008, an investigator conducted interviews with various individuals about the August 2007 incident.

[11] On April 15, 2008, the investigator produced a Fact-Finding Report containing these three recommendations:

- a) In addition to having employees sign Management's Policy that includes acceptable internal email practices, it is advisable that this policy be reinforced through other means of communications.
- b) Management advises employees of when they plan to hold informal meetings including who will be present.
- c) Although the meeting was not disciplinary in nature, management should consider union involvement when the issues are of the kind raised in this matter.

[12] On July 25, 2008, during a monthly review under the expedited arbitration process, Arbitrator Martin Teplitsky, Q.C., issued the following decision with regard to Mr. Kasim's grievance:

Decision: A fact finding report was presented to the parties. I agree with its conclusion. The grievance is resolved accordingly.

[13] The CAW advised Mr. Kasim that his grievance had been resolved.

[14] On September 9, 2008, Mr. Kasim wrote to the Board to complain about the CAW and Air Canada. In that letter, he sets out the circumstances with regard to his email and the meeting with management. Mr. Kasim wrote at page 3 of his letter:

I would like to ask you kindly to do a thorough follow up on this troubling issue and the way the union has handled it right from the beginning. I strongly believe that the union did not do its job the way it should have.

[15] On October 31, 2008, the Board received Mr. Kasim's completed duty of fair representation form which referenced his earlier September 9, 2008 letter. On that form Mr. Kasim alleged "the union didn't do enough to fight for my rights" and "my ultimate hope is to pressure the union to do what it's supposed to do in fighting for my rights that are being violated by the company."

[16] On November 7, 2008 the Board confirmed receipt of the complaint to Mr. Kasim, as well as to the CAW and Air Canada. In accordance with its current process for duty of fair representation complaints, the Board advised Mr. Kasim that it would first consider whether there were sufficient grounds for a complaint. The Board advised the CAW and Air Canada that submissions were not required while it determined whether Mr. Kasim had made out an apparent violation of the *Code*.

III–The Duty of Fair Representation Process

[17] As set out in the letters to the parties, the Board now conducts a *prima facie* case analysis when dealing with duty of fair representation complaints. The large number of duty of fair representation complaints involves considerable resources, not just at the Board, but also for bargaining agents and employers. It is now essential for a complainant to make out a *prima facie* case before the Board will require the bargaining agent and the employer to respond to a complaint.

[18] In order to determine if a complainant has established a *prima facie* case, the Board considers whether, if all of a complainant's allegations are true, would the Board find a *Code* violation had taken place. This process requires complainants to put in their complaint all relevant material facts which, if true, would constitute a violation of section 37 of the *Code*.

[19] The duty of fair representation in the *Code* ensures that a bargaining agent respects the significant rights that come with certification. A bargaining agent cannot act in a manner that is arbitrary, discriminatory or in bad faith with regard to an employee's rights under the applicable collective agreement.

[20] However, this duty does not mean that every employee has a right to have his or her grievance taken to arbitration. Rather, the bargaining agent can determine which grievances will go to arbitration and which grievances will be settled.

[21] In order to analyze whether a bargaining agent respected the duty imposed by the *Code*, the Board examines the process it followed in its representation of an employee. A bargaining agent is not comparable to a private sector lawyer who is obliged to follow the specific instructions of the client. Rather, in almost all cases, the bargaining agent has carriage of the grievance and, while it needs to communicate with the employee in question, retains the discretion to decide what to do with the grievance.

[22] The Board does not sit in appeal of how a trade union exercises this discretion. The Board will only intervene if a complainant is able to demonstrate that a bargaining agent acted in an arbitrary, discriminatory or bad faith manner.

IV–Analysis and Decision

[23] The Board has considered the extensive materials Mr. Kasim filed. Mr. Kasim believes that the CAW ought to have done more for him and feels that his rights have not been upheld.

[24] The Board has examined the process followed by the CAW and concludes that no violation of the duty of fair representation took place.

[25] Mr. Kasim's complaint demonstrates that the CAW immediately filed a grievance with regard to the incident about which he had complained. Moreover, the CAW prepared and filed a detailed memorandum in the expedited arbitration process setting out its position why Air Canada had not respected Mr. Kasim's rights.

[26] Under the expedited arbitration process, an independent third party investigator interviewed the parties and produced a report with conclusions and recommendations. Arbitrator Teplitsky reviewed that report and decided that the grievance should be settled on the basis of the recommendations found in the investigator's report.

[27] In the Board's view, there is simply nothing about this process, and the CAW's actions in representing Mr. Kasim, that can be described as arbitrary, discriminatory or in bad faith. It appears to the Board that both the CAW and Air Canada cooperated in the hearing of Mr. Kasim's grievance pursuant to their negotiated arbitration procedure.

[28] While the Board understands that Mr. Kasim desired a different result, a mere disagreement between an employee and his or her bargaining agent with regard to the ultimate disposition of a grievance does not give rise to a violation of the *Code*.

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

STATUTE CITED

Canada Labour Code, Part I, ss. 16.1, 37