Canada Industrial Relations Board ● Conseil canadien des relations industrielles
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Reasons for decision

Mr. Ronald Schiller,

complainant,

and

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

respondent,

and

Detroit Canada Tunnel Corporation,

employer.

Board File: 26703-C
CIRB/CCRI Decision no. 435
January 9, 2009

The Board was composed of Mr. Graham J. Clarke, Vice-Chairperson and Messrs. Normand Rivard and André Lecavalier, Members. Hearings were held in Windsor on November 24 and 25, 2008.

Appearances

Mr. Peter Hrastovec, for Mr. Ronald Schiller;
Mr. Michael Renaud, for the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW- Canada);
Ms. Jean Leslie Marentette, for the Detroit & Canada Tunnel Corporation.

These Reasons for Decision were written by Mr. Graham J. Clarke.

I - Nature of the Application

[1] On January 31, 2008, the Board received from Mr. Ronald Schiller Jr. (Mr. Schiller) a duty of fair representation complaint under section 37 of the *Canada Labour Code (Part I - Industrial Relations)* (the *Code*). The National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (the CAW) was Mr. Schiller's bargaining agent. Mr. Schiller worked as a traffic guard for the Detroit and Canada Tunnel Corporation (collectively described by the parties as "the Tunnel") and had 19.5 years of service. The Tunnel is an international toll road that connects Windsor and Detroit.

[2] On August 28, 2007, the Tunnel terminated Mr. Schiller for certain alleged activities while off on sick leave. The CAW ultimately decided not to take Mr. Schiller's grievance to arbitration, despite his lengthy service and clean disciplinary record.

II - Facts

[3] On or about June 8, 2007, Mr. Schiller applied to the Tunnel for a leave of absence. He asked for the months of July, August and September off for: "Re: care and nurturing (family care)".

[4] While Mr. Schiller alleged that the Tunnel turned down this request, the Tunnel's June 12, 2007 letter suggests that it required further information before granting the leave of absence. The Tunnel reaffirmed its position by letter dated June 15, 2007.

[5] Mr. Schiller did not disclose at that time to the Tunnel certain health issues he had himself. In his testimony, Mr. Schiller did not deny stating that if his leave of absence were denied, he would get the time off anyway. Mr. Schiller made this comment within earshot of his Plant Chairperson, Mr. Paul Adams, and a member of Tunnel management.

[6] Mr. Schiller later went to see his doctor, Dr. P.Y. Soong, who provided him with a medical note stating:

> "Unfit for work Jun 20/07
> - Aug 19/07
> Fit to return Aug 20/07."

[7] Mr. Schiller indicated at the hearing that his health issues related to his work at the Tunnel.

[8] At the Tunnel's request, Mr. Schiller provided a functional abilities form to his doctor. Dr. Soong completed this form on July 13, 2007 and commented upon Mr. Schiller's limitations.

[9] Mr. Schiller also filled out an application for sickness and accident benefits (S&A) for the Tunnel's insurer, The Great West Life Assurance Company (GWL). GWL later turned down the benefit application.

[10] On the S&A application, Mr. Schiller answered the following questions in the negative:

4. Have you performed any other work since that date? ☐ Yes ☒ No
   If yes, describe _____

5. Are you able to do any other work? ☐ Yes ☒ No
   If yes, describe _____

[11] It was common knowledge at the Tunnel that Mr. Schiller had a landscaping and snow removal business. The Tunnel had used his business in the past. Mr. Schiller's Plant Chairperson, Mr. Adams, had assisted Mr. Schiller in obtaining work for his business from the CAW.

[12] Following the submission of the various medical forms, the Tunnel engaged a private investigator (PI) to videotape Mr. Schiller. The PI captured Mr. Schiller on videotape from August 8 - 10, 2007. Mr. Schiller discovered the PI's activities on August 10, 2007 and no further surveillance took place.

[13] On August 14, 2007, the Tunnel provided Mr. Adams with a letter in accordance with section 17.01 of the collective agreement. In the Tunnel's opinion, Mr. Schiller was "actively engaging in the operation of his business which is inconsistent with his sick leave application."

[14] On August 21, 2007, Mr. Schiller, accompanied by Mr. Adams, met with representatives of the Tunnel. At that meeting, Mr. Schiller answered questions about his activities.

[15] On August 28, 2007, the Tunnel reiterated in its termination letter the grounds set out in its August 14, 2007 letter. Mr. Adams filed a grievance on Mr. Schiller's behalf that same day.

[16] On September 18, 2007, the CAW representatives met with the Tunnel and were granted permission to view the PI's videotape. The Tunnel denied the CAW's request to have Mr. Schiller present and also refused to provide the CAW with a copy of the tape.

[17] The CAW representatives made notes and then typed up a summary of the events they saw on the tape. They sent this information to Mr. Schiller. Mr. Schiller never saw the actual video before the CAW withdrew his grievance.

[18] Mr. Schiller denied he had been working at his business, though he agreed that some of the activities filmed on August 10, 2007 included carrying a fridge door, moving a dump truck and sitting in trucks. The activities filmed on August 8 and 9, 2007, such as going to Tim Hortons, seemingly had little to do with his business.

[19] After viewing the video, the CAW obtained an extension from the Tunnel so that it could look into the matter in greater detail. During this extension, the CAW met with Mr. Schiller and then sent him a letter dated September 19, 2007 in which it expressed its "grave concerns" about the case.

[20] That letter also contained questions for Dr. Soong. According to the CAW, Mr. Schiller had advised them that Dr. Soong knew of his leave of absence request and further knew that he would be involved with his private business while off work.

[21] Mr. Schiller later provided an October 5, 2007 letter from Dr. Soong which included the following paragraphs:

> I was not aware that Ronald had applied from leave June 8, 2007 [sic].
> I did not know that it was his intention to work at his own business while he was on leave.
> I would not be willing to testify.

[22] On October 25, 2007, the CAW representatives held a "screening meeting", the purpose of which was to decide whether to take the grievance to arbitration. The CAW representatives at this meeting knew that Mr. Schiller was attempting to get further clarification from Dr. Soong. Subject to that evidence, the representatives felt they would not proceed with the grievance. It was their feeling that Mr. Schiller was not levelling with them about what had transpired.

[23] The CAW representatives later considered a second document from Dr. Soong. In the CAW's representatives' views, Dr. Soong's second letter did not address specifically the key questions they had about whether Mr. Schiller had told Dr. Soong about his prior request for a leave of absence or that he would be working at his business.

[24] The CAW representatives did not contact Dr. Soong to interview him.

[25] As a result of the screening meeting, and after consideration of Dr. Soong's second letter, the CAW confirmed its decision not to take Mr. Schiller's grievance to arbitration. The CAW met with Mr. Schiller for approximately 30 minutes and explained to him the reasons for their decision. They later confirmed their decision by letter dated November 1, 2007.

[26] The CAW told Mr. Schiller that he could appeal the decision internally. Mr. Schiller did not pursue this appeal, though the CAW admitted on cross-examination that the grievance had already been withdrawn, thus this internal recourse might have been of little practical use.

[27] The CAW also mentioned to Mr. Schiller that he could file a duty of fair representation complaint with this Board under section 37 of the *Code* if he wanted to contest their actions.

III - Issues

[28] There are three issues in this case:

a) What is the relevance of the CAW's decision to take a different employee's grievance to arbitration?

b) Did the CAW act in bad faith because of alleged personality differences between Mr. Adams and Mr. Schiller?

c) Did the CAW respect its duty of fair representation?

IV - The Duty of Fair Representation Process

[29] 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.

[30] The parties did not dispute the well-known principles which apply to a duty of fair representation complaint.

[31] Absent a specific entitlement in the collective agreement, an employee does not have the absolute right to have his or her grievance referred to arbitration, even if it involves serious discipline or termination. In *Virginia McRaeJackson et al.*, [2004] CIRB no. 290; and 115 CLRBR (2d) 161 the Board stated:

> [19] In most collective agreements, employees do not have the absolute right to have their grievance referred to arbitration *(Garry Little*, [2001] CIRB no. 114), even if this involves serious discipline or termination (*Yvonne Misiura*, *supra*) or even forced resignation (*Tadele Lemi*, [1999] CIRB no. 24). Again, the Board's role is to look at the process as to how the union reached its decision *(Ghislaine Gagné*, [1999] CIRB no. 18).

[32] A union must not act in bad faith or for an improper purpose. Bad faith could include the personal feelings of a union officer influencing whether or not a grievance should be pursued. A union cannot discriminate on the basis of age, race, religion, sex, or medical condition. However,

not every instance of differential treatment is necessarily discrimination. The referring of an employee's grievance to arbitration, but not that of another, where there are relevant considerations to support the distinction, is not discriminatory.

[33] A union also cannot act arbitrarily by only superficially considering the facts or merits of a case. It would be arbitrary not to investigate and discover the circumstances surrounding the grievance or to fail to make a reasonable assessment of the case.

[34] Union officials can make honest mistakes in the sense that they may wrongly assess a grievance but still not act arbitrarily. As the Board stated at paragraph 37 in *Virginia McRaeJackson et al.*, *supra*:

> [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.

[35] In short, the Board examines the trade union's process in order to determine whether it acted in an arbitrary, discriminatory or bad faith manner.

[36] Employers have a limited role in duty of fair representation complaints. The Board summarized the reasons for this at paragraph 47 of *Virginia McRaeJackson et al.*, *supra*:

> [47] The employer is not a principal party to a section 37 proceeding. Its actions are not at issue and it has no case to defend. As a matter of practice, it is added as an affected party since its interest could be affected by the outcome of the complaint, that is, the remedy imposed by the Board if the complainant is successful. For this reason, the Board provides the employer with the opportunity of presenting its submissions on the question of remedy. The employer's role with respect to the merits of the complaint is restricted to that of an observer.

[37] The Board previously held in *James H. Rousseau* (1995), 98 di 80; and 95 CLLC 220-064 (CLRB no. 1127) that "The Board will not accept the employer acting as a second defence for the union". In *André Gagnon* (1986), 63 di 194 (CLRB no. 547), the Board explained that it limited the employer's role in order to avoid improper collaboration between the union and the employer during a duty of fair representation complaint:

> It is Board practice, in the name of minimum fair play toward the complainant, to ask the employer to keep a very low profile in cases involving a contravention of section 136.1 (now section 37), at least with respect to the merits of the complaint. On the other hand, it will be asked to come to the fore in the matter of remedies that will counteract the negative consequences of such an unfair labour practice, if the Board were to grant such relief.

[38] In limited situations, the Board may allow the employer to submit certain information on the merits in order to clarify the facts, but generally the role of the employer should be limited to that of an observer. It is up to the trade union alone to defend its actions.

V - Analysis and Decision

a) What is the relevance of the CAW's decision to take a different employee's grievance to arbitration?

[39] In this case, Mr. Schiller called as a witness another employee who had been terminated, but reinstated after the CAW succeeded at arbitration. The Board had asked about the relevance of this evidence and had been advised that this particular witness would also have evidence relevant to Mr. Schiller's specific situation.

[40] While the Board admitted this evidence under advisement, it is of the view that regardless of what the CAW decided to do in an earlier arbitration case, that does not create any type of precedent that binds it in future cases. The cases were significantly different such that the CAW did not discriminate when it took the earlier case to arbitration but not that of Mr. Schiller.

[41] Each case is a question of fact. In this case, the CAW was entitled to consider the facts in Mr. Schiller's case and not be forced to go to arbitration because of a previous decision it made for a different tunnel employee.

b) Did the CAW act in bad faith because of alleged personality differences between Mr. Adams and Mr. Schiller?

[42] The Board has in the past found a violation of the duty of fair representation where a union official harboured a personal grudge against an employee and decided not to send that employee's case to arbitration.

[43] In this complaint, Mr. Schiller suggested that he had a bad relationship with the Plant Chairperson, Mr. Adams, and that this was the reason the matter did not go to arbitration.

[44] The evidence did not support this submission.

[45] The evidence disclosed that Mr. Schiller may have had a physical altercation with Mr. Adams in 1989. Mr. Schiller also complained that Mr. Adams did not represent his father properly in 1989 over a seniority issue. In addition, Mr. Adams beat Mr. Schiller by only three votes in a recent election for the position of General Chairperson.

[46] However, the evidence also disclosed that Mr. Adams frequently assisted Mr. Schiller. For example, when Mr. Schiller wanted his leave of absence in June, 2007, Mr. Adams asked him to provide a letter so that he could see what he could do. In addition, Mr. Adams was prepared to allow the Tunnel to hire a part-time employee, thus lowering the Tunnel's costs, in order to replace Mr. Schiller.

[47] Mr. Adams also helped Mr. Schiller get work with the CAW for his landscaping company. Mr. Schiller had also provided some friendly assistance to Mr. Adams with some recent renovation work.

[48] In cross-examination, Mr. Adams testified that, if the decision had been up to him, he would have taken Mr. Schiller's grievance to arbitration. Mr. Adams indicated that in his roughly 18-year career as Plant Chairperson, he had gone to arbitration about four times given the bargaining unit had

only approximately 40 employees. More experienced CAW representatives evaluated grievances in order to determine whether to go to arbitration.

[49] The evidence also disclosed that the other CAW representatives involved in deciding whether to go to arbitration never knew about any alleged differences between Mr. Adams and Mr. Schiller until long after the decision not to go to arbitration had been made.

[50] As a result, the Board cannot find that Mr. Adams was biased in any way against Mr. Schiller and rejects this aspect of the complaint.

c) Did the CAW respect its duty of fair representation?

[51] The Board has decided to dismiss Mr. Schiller's complaint.

[52] In a situation where a bargaining agent decides not to take a termination grievance to arbitration, especially one involving an employee with almost 20 years of service and with no disciplinary record, the Board will examine carefully the process followed in deciding not to give the bargaining unit member a chance to win his job back.

[53] Evidently, the consequences for Mr. Schiller not to have an opportunity to put his case to an independent third party were significant.

[54] Mr. Schiller argued that the CAW's investigation was deficient to such an extent that it amounted to arbitrary conduct.

[55] For example, Mr. Schiller argued that the CAW discounted his medical evidence from Dr. Soong, despite no independent medical ever being demanded by the Tunnel. Mr. Schiller argued that there was no medical evidence that forced him to remain in bed while he was off work from the Tunnel. Mr. Schiller submitted that it was common knowledge that he had a business and that none of his filmed activities, including those at the business, were inconsistent with his medical diagnosis.

[56] Mr. Schiller further argued that the allegations the Tunnel had listed explicitly in its termination letter had little evidence in support of them. The Board understood this argument to refer to the fact that, if the Tunnel could not prove all of its listed grounds for termination, then an arbitrator would intervene and modify the penalty.

[57] The CAW argued that they had the impression that Mr. Schiller refused to level with them. In the CAW's view, Mr. Schiller had completed forms and obtained a medical note indicating he could not work. However, based on the video evidence for August 10, 2007, the CAW felt that he was in fact working. The CAW also stressed the fact that when Mr. Schiller did not obtain his leave of absence quickly, he mentioned to Mr. Adams, within earshot of a member of the Tunnel's management, that he would obtain it another way.

[58] The CAW also pointed to the fact that, in their view, Dr. Soong's two letters did not support Mr. Schiller's position that he had told Dr. Soong about his request for a leave of absence and had mentioned that he would be continuing with his private landscaping business.

[59] In a duty of fair representation case, the Board does not sit in appeal of the bargaining agent's decision. Nonetheless, the Board will ensure that the bargaining agent followed a process in reaching a decision that was not arbitrary, discriminatory or carried out in bad faith.

[60] In this case, the Board is satisfied that the difference between Mr. Schiller and the CAW is a question of judgment. Mr. Schiller understandably disagrees with the CAW refusing to give him a chance to contest his termination. Moreover, Mr. Schiller was well aware that the Tunnel would have the burden of proof and the arbitrator, even if he or she found that the Tunnel had proved its case, still had the power to intervene and modify the penalty of termination.

[61] However, the evidence demonstrates that the CAW did carry out an investigation and made discretionary judgment calls whether or not to take the case to arbitration. They immediately grieved when Mr. Schiller was terminated, attempted to settle the case on the basis of a last chance agreement, after getting Mr. Schiller's consent to do so, and sought to obtain further evidence from Dr. Soong in order to weigh the strength of the case they would have to put before an arbitrator.

[62] They clearly looked at the documentation in the case, some of which has been cited previously, and disagreed with Mr. Schiller about the impact of that documentation at arbitration.

[63] It is clear to the Board that another bargaining agent may well have chosen the route that Mr. Schiller wanted, given an arbitrator's extensive remedial powers and Mr. Schiller's blemish-free record.

[64] However, the Board's role is not to choose between Mr. Schiller's view and that of his bargaining agent. Rather, the Board must determine whether the CAW's process which led to its decision not to proceed to arbitration amounted to arbitrary, discriminatory or bad faith conduct.

[65] Based on the evidence set out above regarding the many steps the CAW followed in arriving at its decision, the Board cannot find that the CAW's conduct fell within the parameters of section 37 of the *Code*.

[66] For the above reasons, this complaint is dismissed.

Graham J. Clarke
Vice-Chairperson

Normand Rivard
Member

André Lecavalier
Member