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Reasons for decision

Trevor William Emile Rees,

complainant,

and

Canadian Union of Postal Workers,

respondent,

and

Canada Post Corporation,

employer.

Board File: 27807-C

Neutral Citation: 2010 CIRB **499**

March 12, 2010

A panel of the Canada Industrial Relations Board (the Board), composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. André Lecavalier and John Bowman, Members, considered the above-noted complaint.

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 submissions and accompanying material on file, the Board is satisfied that the documentation before it is sufficient for it to make this interim decision under section 20 of the

Code without an oral hearing.

Party Representatives

Mr. Ken Mooney, for the Canadian Union of Postal Workers;

Mr. Zygmunt Machelak, 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 November 9, 2009, the Board received a duty of fair representation (DFR) complaint from Mr. Trevor William Emile Rees (Mr. Rees). Pleadings closed on December 10, 2009.

2 In that complaint, Mr. Rees alleged that his bargaining agent, the Canadian Union of Postal Workers (CUPW), violated its duty of fair representation under section 37 of the *Code* when it failed to file his termination grievance within the time limits set out in the collective agreement:

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.

3 Mr. Rees requested that the Board accept his complaint and order that an arbitration be held on the merits of his grievance.

4 The Board has decided to defer deciding this complaint, given that the timeliness issue is currently pending before an arbitrator. Depending upon the arbitrator's decision, the Board may later decide the complaint. These reasons explain the Board's decision.

II - Facts

5 In June and July 2009, Mr. Rees filed several grievances.

6 Mr. Rees' termination arose from his attendance at a Jehovah's Witnesses convention while off on medical leave from Canada Post Corporation (CPC). Mr. Rees' doctor suggested that

attendance at the convention was not incompatible with the medical certificate allowing Mr. Rees to be off work.

7 CPC took the position that Mr. Rees' attendance at the convention was an abuse of his sick leave and a misrepresentation of his ability to perform his duties on his originally scheduled shift.

8 On July 29, 2009, CUPW grieved CPC's July 21, 2009 letter recommending Mr. Rees' termination.

9 On July 28, 2009, CPC terminated Mr. Rees' employment in writing.

10 Mr. Rees provided CUPW with a copy of his discharge letter on July 29, 2009, the same day he received it.

11 On or about September 23, 2009, CUPW discovered that no grievance had ever been filed contesting the July 28, 2009 discharge letter, even though it had grieved the earlier letter recommending termination.

12 CUPW immediately requested an extension from CPC to file a grievance contesting Mr. Rees' termination. CPC denied that request.

13 On September 24, 2009, CUPW filed a grievance contesting Mr. Rees' discharge. That grievance requested in part that the arbitrator extend the time limits for the filing of the grievance.

14 CUPW admitted in its response to the Board that the grievance had been filed outside the collective agreement's time limits. CUPW also agreed with the remedies Mr. Rees requested in his complaint and argued that there would be no prejudice to CPC if the Board provided the requested relief and allowed the parties to arbitrate the merits of Mr. Rees' discharge.

15 On December 10, 2009, CPC filed its response. CPC argued that the simple missing of a time limit under the collective agreement does not amount to a breach of section 37 of the *Code*. CPC accordingly asked that the Board dismiss Mr. Rees' section 37 complaint.

III - Analysis and Decision

16 Section 60(1.1) of the *Code* allows an arbitrator to extend the time limits in the parties' grievance and arbitration procedure:

60. (1.1) The arbitrator or arbitration board may extend the time for taking any step in the grievance process or arbitration procedure set out in a collective agreement, even after the expiration of the time, if the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the other party would not be unduly prejudiced by the extension.

17 On the same date that section 60(1.1) was added to the *Code*, the Legislator also added section 16(l.1):

16. The Board has, in relation to any proceeding before it, power
...
(l.1) to defer deciding any matter, where the Board considers that the matter could be resolved by arbitration or an alternate method of resolution.

18 Section 16 (l.1) does not authorize the Board to dismiss Mr. Rees' complaint. In this respect, it differs significantly from section 98(3) of the *Code*:

98(3) The Board may refuse to determine any complaint made pursuant to section 97 in respect of a matter that, in the opinion of the Board, could be referred by the complainant pursuant to a collective agreement to an arbitrator or arbitration board.

19 Section 16(l.1) allows the Board to put its matter on hold while another possibly more appropriate labour relations proceeding takes place.

20 The Legislator added section 16(1.1) for just this type of case. Mr. Rees' discharge grievance is proceeding before an arbitrator. The arbitrator has the authority under section 60(1.1) of the *Code*

to consider whether to extend the collective agreement's time limits and hear the merits of Mr. Rees' grievance.

21 The Board prefers not to preempt the arbitrator. More importantly, while the arbitrator will consider the simple question of whether to extend time limits, the case before the Board is more complex. Stated succinctly, this case involves a determination whether a bargaining agent's failure to observe a collective agreement time limit constitutes a violation of the duty of fair representation.

22 The Board would likely require oral submissions on that issue since its case law does not hold that every error a trade union makes necessarily constitutes a violation of the duty of fair representation. The Board does not hold trade unions to a standard of perfection.

23 Rather than start a process that could end up academic or moot, and given that the Board's hearing might not conclude before the anticipated arbitration date, the Board prefers to defer deciding the DFR question and allow the arbitrator to decide whether to extend the time limit for Mr. Rees' grievance under section 60(1.1) of the *Code*.

24 This is a unanimous interim decision of the Board.

Graham J. Clarke
Vice-Chairperson

André Lecavalier

John Bowman

Member

Member