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Reasons for decision

Canada Council of Teamsters,

complainant,

and

Federal Express Canada Ltd.,

respondent.

Board File: 27976-C

Neutral Citation: 2010 CIRB 519

June 1, 2010

The Canada Industrial Relations Board (the Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. John Bowman and Patrick J. Heinke, Members.

Counsel of Record

Mr. Stéphane Lacoste, for Canada Council of Teamsters; and

Mr. Douglas G. Gilbert, for Federal Express Canada Ltd.

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.

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

I - Nature of the Complaint

[1] On February 25, 2010, the Board received an unfair labour practice complaint from the Canada Council of Teamsters (Teamsters), on behalf of Mr. Paul Simms.

[2] Mr. Simms alleged that Mr. Terrance Sledge, a manager working for his employer, Federal Express Canada Ltd. (Federal Express), threatened that he would be dismissed if he “talked about the union”.

[3] The Teamsters are conducting an organizing campaign for Federal Express.

[4] Federal Express responded and set out what had occurred during the course of Mr. Simms’ employment and described a series of meetings between Mr. Simms and Mr. Sledge.

[5] The Teamsters did not file a Reply to Federal Express’ submissions.

[6] The parties’ submissions satisfy the Board that Federal Express did not violate the *Code*. This decision explains the Board’s reasons.

II - Facts

[7] These are the key facts from the parties’ submissions.

[8] Mr. Simms is a courier for Federal Express and works at 1450 Caterpillar Road in Mississauga, Ontario. The entire facts filed in support of Mr. Simms’ complaint are set out in a document he signed on February 23, 2010:

“On or about February 19 2010 I was intimidated by the fact that a manager Mr. Terrence Sledge, met me to harass me with questions. He also told me that I would be dismissed if I talked about the union.”

[sic]

[9] Mr. Simms alleged that the above facts he submitted supported a violation of certain unfair labour practice provisions in section 94(3) of the *Code* and asked for two specific remedies:

“I ask that the Board:

ORDER FedEx Express Canada Inc. and anyone acting on its behalf, to cease and desist from these and other violations of my rights;

ORDER FedEx Express Canada Inc. and anyone acting on its behalf, to destroy all documents relating to the investigation in my activities;...”

[*sic*]

[10] On February 26, 2010 the Board wrote to the parties, included a copy of the complaint for Federal Express, and established time limits for Federal Express’ Response as well as the Teamsters’ Reply. The Board, as is its custom, reminded the parties:

“Please note that pursuant to section 16.1 of the Code [*sic*], the Board may decide any matter before it without holding a hearing.”

[11] On March 12, 2010, Federal Express filed its Response.

[12] In its Response, Federal Express described its operations and Mr. Simms’ employment. Mr. Simms had been a Federal Express employee since December, 1991.

[13] Federal Express described in some detail the reason why Mr. Simms and Mr. Sledge were having meetings in February, 2010. They had been meeting to discuss customer service issues.

[14] Federal Express described two customer complaints, the first of which occurred in December, 2009 and the second on or about January 25, 2010.

[15] Federal Express resolved the first customer complaint by giving coaching to Mr. Simms.

[16] The second customer complaint, which involved allegations of Mr. Simms being rude and unhelpful when a customer asked for shipping materials and supplies, was dealt with more formally.

[17] On February 16, 2010, Mr. Sledge provided Mr. Simms with written questions about the customer complaint. Mr. Simms provided his written responses.

[18] Mr. Sledge met with Mr. Simms on February 17, 2010 to discuss those responses.

[19] On February 19, 2010, Mr. Sledge contacted Mr. Simms again with some follow-up questions about the customer's complaint. Mr. Simms was apparently agitated during the meeting and suggested he still had 16 parcels to deliver. Federal Express claimed he had only six parcels left to deliver that day.

[20] At one point, Mr. Simms walked out of the meeting with Mr. Sledge and went to see Mr. Sledge's manager, Mr. Lepage. The latter confirmed to Mr. Simms that Mr. Sledge was entitled to meet with him without making any special scheduling arrangements.

[21] Mr. Simms returned to Mr. Sledge's office. Upon his return, Mr. Simms advised Mr. Sledge that "Federal Express had been unionized". Mr. Sledge replied to Mr. Simms that he "had not heard this".

[22] Mr. Sledge, when he felt Mr. Simms was becoming belligerent, concluded there was no purpose in continuing the meeting and told Mr. Simms to complete his deliveries.

[23] Mr. Simms left Mr. Sledge's office, but returned shortly afterwards with Mr. Lepage. Mr. Simms claimed he had been told to go home. Mr. Sledge reiterated to Mr. Simms that he had been asked to complete his deliveries and not to go home.

[24] Mr. Simms then left work indicating he was ill. He did not finish his work for the day. Mr. Simms did not return to work subsequently and has filed a claim for short-term disability benefits.

[25] Federal Express argued that Mr. Simms had a significant disciplinary record and that his conduct with Mr. Sledge resulted from the fact that he knew discipline might be imposed for the

second customer incident.

[26] Federal Express argued that Mr. Sledge had no knowledge of Mr. Simms' involvement with the Teamsters, until Mr. Simms raised it himself at the February 19, 2010 meeting.

[27] Federal Express suggested that Mr. Simms' requested remedy requiring that Federal Express destroy all documents relating to the investigation of his activities with the customer demonstrated that Mr. Simms was using his unfair labour practice complaint to avoid the consequences of his work-related conduct.

[28] The Board confirmed in its April 12, 2010 letter to the parties its understanding that the Teamsters, on behalf of Mr. Simms, would not be filing any Reply to Federal Express' Response. The complaint was accordingly assigned to a Board panel for determination.

III - Analysis and Decision

I) Oral Hearings

[29] Section 16.1 of the *Code* reads:

16.1 The Board may decide any matter before it without holding an oral hearing.

[30] Federal Express originally requested an oral hearing, pursuant to sections 10(g) and 12 of the *Canada Industrial Relations Board Regulations, 2001*.

[31] There is no absolute right to an oral hearing for an unfair labour practice complaint. The Board has concluded it has sufficient information from the parties' submissions to determine this case based solely on the written record. This approach to section 16.1 has been endorsed by the Federal Court of Appeal:

[11] The scheme of the legislation and Regulations indicates that the Board will decide on the basis of the material filed unless it decides to hold an oral hearing or specifically requests additional

evidence. No authority was provided to the Court for the proposition that the Board cannot do so, or that in order to treat the material filed as evidence, the Board must give notice to the parties of this intention.

- *Nav Canada v. International Brotherhood of Electrical Workers*, 2001 FCA 30

[32] While the Board always considers whether to hold an oral hearing, and indeed has scheduled hearings in other current matters between the Teamsters and Federal Express, this case does not require one.

ii) The Burden of Proof

[33] Section 98(4) of the *Code* contains a reverse-onus provision for certain unfair labour practice complaints:

98. (4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party.

[34] The Board cited in paragraph 8, *supra*, all the facts Mr. Simms filed in support of his unfair labour practice complaint.

[35] For the purposes of this decision, the Board will assume that Mr. Simms provided sufficient information to reverse the burden of proof onto Federal Express under section 98(4).

[36] Mr. Simms alleged that Federal Express violated sections 94(3)(a)(i) and (iii) as well as 94(3)(c), (e), and (f):

94. (3) No employer or person acting on behalf of an employer shall
(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person
 (i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,
 ...
 (iii) has testified or otherwise participated or may testify or otherwise participate in a

proceeding under this Part,

...

(c) suspend, discharge or impose any financial or other penalty on an employee, or take any other disciplinary action against an employee, by reason of their refusal to perform all or some of the duties and responsibilities of another employee who is participating in a strike or subject to a lockout that is not prohibited by this Part;

...

(e) seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a financial or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of a trade union or to refrain from

(I) testifying or otherwise participating in a proceeding under this Part,

(ii) making a disclosure that the person may be required to make in a proceeding under this Part, or

(iii) making an application or filing a complaint under this Part;

(f) suspend, discharge or impose any financial or other penalty on a person employed by them, or take any other disciplinary action against such a person, by reason of that person having refused to perform an act that is prohibited by this Part; or ...

[37] Mr. Simms' complaint refers to an alleged threat from Mr. Sledge related to union activities. It does not appear any discipline has occurred since Mr. Simms went off work due to illness before the investigation concluded.

[38] Under the reverse onus provision at section 98(4), the Board considers the respondent employer's explanation of the situation. The Board must be satisfied that no anti-union animus motivated the employer's actions. A respondent's burden under section 98(4) was recently summarized at paragraph 97 in *Rousseau (Re)* 2007 CIRB 393:

...the burden is on the employer to refute, on a balance of probabilities, the allegations giving rise to the complaint, namely that it was aware of the complainant's union activities and that those activities were a factor in its decision to terminate his employment.

[39] The burden of proof on a balance of probabilities remains constant; it does not increase in difficulty based upon the severity of the issues at stake in the case. The Supreme Court of Canada, in *C.R. v. McDougall*, [2008] S.C.C. 53 recently confirmed the civil case standard:

[49] In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

[40] Similarly, the burden remains with the respondent employer. It does not shift to the complainant. However, evidence from the complainant is often crucial in allowing the Board to

examine the context and decide whether the employer has met its burden.

[41] There will seldom be direct evidence of anti-union animus. Rather, the Board must decide, based on the overall context, whether anti-union animus played even a small part in an employer's actions.

[42] Federal Express has satisfied the Board that other factors led to Mr. Sledge holding meetings with Mr. Simms.

[43] Two customer complaints had come to Federal Express' attention in late 2009 and early 2010 about Mr. Simms' comportment.

[44] Federal Express resolved the first complaint by giving Mr. Simms coaching. However, Mr. Sledge was not prepared to do the same thing after receiving a second customer complaint.

[45] Federal Express explained how it investigated the second complaint. It described Mr. Simms' comportment as Mr. Sledge carried out his investigation.

[46] The only allegation Mr. Simms made in support of his complaint is that "he [Mr. Sledge] also told me that I would be dismissed if I talked about the union".

[47] Federal Express has denied that such a threat was ever made. It was uncontested that Mr. Simms advised Mr. Sledge about the Teamsters during the February 19, 2010 meeting. Similarly, it was not contested that Mr. Sledge advised he had not heard of it previously.

[48] The Board is satisfied that Federal Express has met its burden of proof by explaining the circumstances which led to Mr. Sledge holding meetings with Mr. Simms. The meetings resulted from a second customer complaint about Mr. Simms.

[49] There was no evidence that those meetings, which Mr. Simms described as intimidating and harassing, had anything to do with the Teamsters' organizing campaign. There was no evidence Mr. Sledge knew of the Teamsters' campaign until Mr. Simms apprised him of this fact at their final

meeting on February 19, 2010.

[50] In an unfair labour practice complaint, the Board does not decide whether there was any merit to the customer complaints or whether Federal Express could have cause to impose discipline.

[51] The Board focusses instead on whether Federal Express' actions were related in whole or in part to the Teamsters' organizing campaign. The material on file allows the Board to come to the conclusion that Mr. Sledge's actions on behalf of Federal Express resulted from customer service issues which were unrelated to the Teamster's current organizing campaign.

[52] The Board dismisses the complaint.

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

Graham J. Clarke
Vice-Chairperson

John Bowman
Member

Patrick J. Heinke
Member