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Reasons for decision

Daljit Singh,

complainant,

and

Teamsters Local Union 938,

respondent,

and

United Parcel Service Canada Ltd.,

employer.

Board File: 28159-C

Neutral Citation: 2012 CIRB 639

April 20, 2012

The Canada Industrial Relations Board (Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. John Bowman and Patrick J. Heinke, Members. A hearing was held in Toronto, Ontario, from March 7–9, 2011, with final argument on February 28, 2012.

Appearances

Mr. Kuldip Grewal, for Mr. Daljit Singh;

Ms. Tracey Henry and Mr. Ryan D. White, for the Teamsters Local Union 938;

Mr. Denis Manzo and Ms. Veronica Kenny, for United Parcel Service Canada Ltd.

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

I–Nature of the Complaint

[1] On May 13, 2010, the Board received from Mr. Daljit Singh (Mr. Singh) a duty of fair representation (DFR) complaint.

[2] In that complaint, Mr. Singh, who had worked at United Parcel Service Canada Ltd. (UPS) for 18 years, alleged that his bargaining agent, the Teamsters Local Union 938 (Teamsters), had failed to respect its obligations under section 37 of the *Canada Labour Code (Part I–Industrial Relations) (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.

[3] Both UPS and the Teamsters filed their response to Mr. Singh's complaint on July 19, 2010. Pleadings closed following receipt of Mr. Singh's reply on August 5, 2010.

[4] On October 19, 2010, the Board set down the matter for hearing on March 7–9, 2011 in Toronto and later held a case management conference (CMC) on February 1, 2011. During that CMC, the Teamsters agreed to present their evidence first, even though the burden of proof remained with Mr. Singh.

[5] The Board finished hearing evidence in Mr. Singh's case in March, 2011. Rather than proceed with final argument, the parties agreed to present evidence for a similar case involving Mr. Rizwan Khan (file no. 28250-C). The Board has issued a separate decision for Mr. Khan, but he will be mentioned periodically in this decision.

[6] Final argument in Mr. Singh's case took place on February 28, 2012, at the same time as that for Mr. Khan's case.

[7] The two cases are distinct and, despite hearing them consecutively, the Board has focussed solely on the evidence in each separate case when making its decisions.

[8] Following a review of the evidence and the parties' final argument, the Board has concluded that the Teamsters acted arbitrarily in the handling of Mr. Singh's case.

[9] By way of remedy, the Board has ordered, *inter alia*, that Mr. Singh's termination grievance go to arbitration.

[10] These reasons summarize the key facts in Mr. Singh's case and provide the Board's analysis for its decision.

II—Facts

[11] Mr. Singh's complaint arose following a theft investigation at UPS. UPS terminated approximately 14 individuals, including Mr. Singh and Mr. Khan, for the theft of cell phones.

[12] UPS held an interview with Mr. Singh on March 10, 2009. That session lasted from approximately 12:30 p.m. to about 6:00 p.m.

[13] Mr. Singh alleged that UPS had denied him union representation, despite his request for it at the beginning of the meeting. UPS did seek out a Teamsters' steward, Mr. Leonard Todd, near the conclusion of the March 10, 2009 meeting.

[14] UPS prepared a question and answer (Q&A) summary of the interview (Exhibit 1, Tab 1), which Mr. Singh initialled. However, Mr. Singh denied that the final question on the Q&A, including his alleged response, came from him.

[15] Mr. Singh also alleged he had been threatened during the March 10, 2009 interview.

[16] Mr. Singh alleged that, on March 10, 2009, UPS had given him the ultimatum of either resigning or being fired for cause. Mr. Singh later spoke with another Teamsters steward, Mr. Sean John (Mr. John) and mentioned to him that he had been refused union representation at the March 10, 2009 meeting.

[17] Mr. John accompanied Mr. Singh to a meeting on March 11, 2009, at which Mr. Singh advised UPS that he would not resign.

[18] On March 11, 2009, Mr. Singh went to the Teamsters' office to fill out a grievance form (Exhibit 1, Tab 2). The Teamsters' business representative, Mr. Fred Randall (Mr. Randall), was not in the office. An administrative assistant helped Mr. Singh fill out the grievance form.

[19] On March 16, 2009, UPS sent Mr. Singh a registered letter of termination, the pertinent parts of which read as follows:

A meeting was held in Mississauga Center on March 10 [*sic*], 2009. Present with you at this meeting were Gilles Desforges, investigator and Sean John, union steward. The purpose of this meeting was to discuss your termination from UPS.

On March 10, 2009, you were investigated by the Security Department involving illegal transactions. In the past, through Prework Communications Meetings and personal training, you have been instructed in the UPS Honesty and Integrity Policy.

At this meeting, it was decided that you would be discharged from your employment at UPS Canada, effective immediately.

(emphasis added)

[20] It was clarified at the hearing that Mr. John had been with Mr. Singh at the March 11, 2009 meeting, but had not been present at Mr. Singh's original interview on March 10, 2009. The Board surmises there would have been no issue about union representation in this case had a steward been in attendance during the March 10, 2009 investigation meeting.

[21] On March 23, 2009, the first step in the grievance process for Mr. Singh took place.

[22] The Teamsters' business representative, Mr. Randall, had spoken to Mr. Singh on the telephone prior to this meeting, but met him for the first time for a few minutes prior to the start of the Step 1 meeting.

[23] Mr. Randall testified that Mr. Singh did not deny his handwriting on the Q&A interview document from the initial meeting with UPS. Mr. Singh also did not say to him anything about having been forced or threatened during the initial interview. Mr. Randall did acknowledge during questioning that Mr. Singh had mentioned that he had been refused union representation. This latter point will be commented on in greater detail later in these reasons.

[24] Mr. Singh's next grievance meeting did not take place until August 12, 2009. Mr. Randall testified that he did not insist that UPS respect the strict grievance timelines in the collective agreement for Mr. Singh's termination, because he wanted to obtain all of UPS' evidence. UPS was continuing to carry out its investigation into the thefts and was providing information updates to Mr. Randall.

[25] Mr. Randall testified that, in his experience, working collaboratively with employers to get all the evidence, even though some delay might occur, allowed the Teamsters to make a more reasoned decision whether to go to arbitration.

[26] On several occasions during its investigation, UPS provided Mr. Randall with further documentary evidence, but insisted that he keep that information confidential.

[27] For example, Mr. Randall received a copy of an employee email (Exhibit 1, Tab 7) which described a cell phone transaction the anonymous emailer said he had had with Mr. Singh. Mr. Randall "agreed with UPS to treat this under confidence".

[28] Mr. Randall never met personally with or talked to the author of the email, but testified he felt that the author "was trustworthy".

[29] Mr. Randall did ask Mr. Singh about the email in a telephone conversation, but never showed the actual email to Mr. Singh, nor identified its author. Mr. Randall wanted Mr. Singh to comment on the allegation he sold a new cell phone. Mr. Singh's position was that he sold his wife's used phone and that he was being set up.

[30] The anonymous email at Exhibit 1, Tab 7, which Mr. Singh never saw, stated in part: "...first he mentioned he bought it for his wife and she did not like it coz his son used you-tube for a while and rogers billed him a lot..." [sic].

[31] At the August 12, 2009 second grievance meeting, Mr. Randall raised with UPS Mr. Singh's recent allegations that he had been threatened during the March 10, 2009 interview. At that same grievance meeting, UPS referred to a cheque for \$350.00, allegedly for Mr. Singh's cell phone transaction. Mr. Randall asked UPS for a copy of the \$350.00 cheque.

[32] Following the second grievance meeting, more time passed before the Teamsters ultimately concluded not to take Mr. Singh's grievance to arbitration.

[33] Other than the grievance meetings on March 23 and August 12, 2009, Mr. Randall had no other face-to-face meetings with Mr. Singh.

[34] The conflicting evidence suggested that there were as few as three telephone calls between them or possibly as many as six.

[35] Mr. Randall produced a two-page handwritten note for the March 23, 2009 grievance meeting. He also had a one-page handwritten note for the August 12, 2009 grievance meeting. Those were the only handwritten notes of any substance from Mr. Singh's grievance file, with one exception.

[36] There was also a January, 2010 handwritten note in which Mr. Randall summarized a conversation he had with Mr. Singh. Mr. Randall testified he advised Mr. Singh orally that his chances did not look good, but that he would send the matter to the Teamsters' Executive Board (TEB) for a final decision whether to go to arbitration.

[37] Mr. Singh disputed this conversation ever took place.

[38] During the rest of 2009, UPS provided Mr. Randall with more evidence. For example, UPS gave Mr. Randall a one-page Q&A for Mr. Khan (Exhibit 1, Tab 9).

[39] In a separate grievance contesting his termination by UPS, Mr. Khan had denied that the content of the Q&A reflected his interview. He also denied that he had signed the bottom of the document. That Q&A referred to Mr. Singh and his alleged involvement with cell phones. Mr. Randall, who was also representing Mr. Khan, requested from UPS another signature specimen that Mr. Khan had provided.

[40] UPS provided an alleged copy of Mr. Khan's signature on a UPS policy document. Mr. Randall compared the sample signatures UPS provided him and felt that the signature on the Q&A document was in fact that of Mr. Khan. This event is described in more detail in the Board's decision for Mr. Khan, given its clear relevance to that complaint.

[41] Mr. Randall gave UPS a similar assurance of confidentiality for Mr. Khan's Q&A. He testified that he discussed Mr. Khan's Q&A with Mr. Singh, but never showed it to him. When Mr. Randall questioned him about the document, Mr. Singh maintained his original version of events.

[42] On September 24, 2009, Mr. Randall sent Mr. Singh the following letter (Exhibit 1, Tab 4):

This refers to your termination grievance dated March 11th 2009.

The Local Union has received all the company's evidence which includes witness statements and your submissions.

Further to the above the local union will take some time to go through these files and if I have any questions I will call you up to and including further meetings if required.

The Local Union will notify you of our decision whether we proceed to arbitration or not based on the merits of your grievance by November 6th 2009.

[sic]; (emphasis added)

[43] Mr. Randall described this letter as a “standard letter to show grievors their file is active”. In cross-examination, Mr. Randall agreed that, at the time he sent the letter, the union had not yet received all of UPS’ evidence about Mr. Singh. However, Mr. Randall was going on a one-month military leave and wanted to update Mr. Singh.

[44] On November 24, 2009, Mr. Randall sent Mr. Singh another letter (Exhibit 1, Tab 5) which stated the following:

This refers to your termination grievance dated March 11th 2009.

Please be advised as of today’s date I have received all evidence that the company is going to rely on to uphold your termination.

I will review this evidence and make my recommendations to the Executive Board of the Local Union 938.

I will inform you as of January 2010 of the decision whether or not we will be proceeding to Arbitration [*sic*] in this matter.

(emphasis added)

[45] This letter was actually dated September 24, 2009, though it was confirmed in evidence that it was sent on November 24, 2009. The Board is satisfied that this dating error, as well as a later March, 2010 letter from Mr. Randall which also erroneously used the date of September 24, 2009, resulted only from an innocent inattention to detail.

[46] Mr. Khan had received these identical form letters, with the same dating errors, in his case.

[47] While the November 24, 2009 letter, just like the previous September 24, 2009 letter, indicated the Teamsters had received all of UPS’ evidence, evidence was still trickling in throughout the autumn of 2009.

[48] For example, during this time frame, UPS had provided Mr. Randall with a copy of the \$350.00 cheque.

[49] Mr. Randall never showed Mr. Singh the cheque, but did talk to him on the phone about it. Mr. Singh maintained his position that he sold a used phone that had belonged to his wife.

[50] At some point in the November–December 2009 time frame, UPS provided Mr. Randall with a three-page summary of its investigation (Investigation Report, Exhibit 3). The Investigation Report consisted mainly of a lengthy email dated November 13, 2009.

[51] During the pre-hearing production stage, the Teamsters did not disclose the Investigation Report to Mr. Singh and his representative. It only came to light on March 7, 2011, the first day of the Board’s hearing. Mr. Singh’s representative sought to exclude it from evidence.

[52] As mentioned, the Investigation Report was an email thread. Exhibit 3 contained pages 2–4 of the thread. Page 1 was never produced, but the Board notes that pages 2–4 contained a statement from UPS’ Security Department about the results of its investigation.

[53] The Board heard argument about the Investigation Report’s admissibility and accepted that Mr. Randall had innocently placed it in a file other than Mr. Singh’s. This resulted apparently from the fact that there were multiple ongoing theft investigations and grievances at UPS. The Board accepted the Investigation Report into evidence.

[54] In his evidence in chief, Mr. Randall described the Investigation Report as “formidable evidence” and as a document that “put the glue together in my investigation”. In cross-examination, he described the Investigation Report as a document that “put everything together in sequence” and was a pertinent document because it was “a summary of the investigation”.

[55] In Mr. Randall’s view, that document convinced him that Mr. Singh and others had been involved in buying and selling stolen cell phones which belonged to UPS customers.

[56] One of Mr. Singh’s initial allegations concerned UPS’ refusal to provide him with union representation on March 10, 2009. The November, 2009 Investigation Report (Exhibit 3) contained the following paragraphs about Mr. Singh’s union representation request:

March 10th Singh was interviewed. When he asked why we needed to speak with him, we told him it was about the cell phones. He immediately stated he would like Union Representation. As we had been using Union Stewards through out the investigation this was not an issue.

Before I got up to get a steward, I informed Singh that if we were to get a steward here, the case details and the evidence we had on him, which we felt was detailed enough to substantiate criminal charges would now be discussed with the steward. Any confidentially breaches would not be our sole responsibility.

Singh stopped me and informed Gilles and I that “it was ok” and that he did not want a steward now.

He was asked again if he did not want the steward just in case there was a miscommunication and he again stated no, he did not.

[sic]

[57] Section 5.7 of the UPS/Teamsters’ collective agreement contains the following provision:

An employee called into the Employer’s office for any discussion which may result in discipline or a grievance shall, upon request, be accompanied by a steward or Business Representative.

[58] During his testimony in chief, Mr. Randall indicated that section 5.7 was not a “null and void clause”. In his view, there was no penalty under their collective agreement if the section was violated.

[59] Mr. Randall never showed Mr. Singh the November, 2009 Investigation Report. Mr. Randall concluded, based on that report, that Mr. Singh had waived his right to representation.

[60] Mr. Randall admitted in cross-examination he did not ask Mr. Singh if he had waived his right to representation because “the employer’s evidence indicated he asked but then changed his mind”.

[61] In December, 2009, UPS sent Mr. Randall another employee’s statement (Exhibit 1, Tab 8) suggesting a cell phone transaction had occurred between Mr. Singh and the document’s author.

[62] UPS provided a copy of this statement to Mr. Randall, again on a condition of confidentiality. Mr. Randall could not locate or talk to the author of the statement, but acknowledged relying on it in support of his ultimate conclusion not to go to arbitration. He never showed the document to Mr. Singh and never identified the author.

[63] Mr. Randall testified that he had a conversation with Mr. Singh about the case on January 5, 2010. Mr. Singh denied that any such conversation ever took place.

[64] Mr. Randall testified that he advised Mr. Singh that his chances of success were not good. In particular, he told Mr. Singh that he should have raised the issue of union representation at the very beginning of the process.

[65] During the testimony of the Teamsters' steward, Mr. John, he advised the Board that Mr. Singh had raised the issue of union representation when they met on March 11, 2009.

[66] Mr. Randall also advised Mr. Singh that the latter's difficulty in remembering the cheque for \$350.00 was another factor he took into consideration.

[67] Mr. Randall also questioned Mr. Singh's credibility when the latter first raised abuse allegations several months after the March 10, 2009 meeting.

[68] In cross-examination, Mr. Randall admitted that he had never called Mr. Singh to his office to review with him in person the documentary evidence. However, he added that "if he had asked to come down to see them, I would have accommodated that".

[69] On January 26, 2010, Mr. Randall sent the following memo to the TEB concerning Mr. Singh and two other employees who had been fired:

The above three members were involved in organized theft within UPS Airway. The company has proven without reasonable doubt that they have stolen and sold customers' merchandise through the UPS system.

Up and including the Local union has had two grievance meetings and each grievor has changed their story.

Based on the evidence and grievors' changing of stories, I recommend that we do not proceed to arbitration.

[sic]; (emphasis added)

[70] Mr. Randall testified that this three-paragraph memo constituted everything that the TEB received about Mr. Singh's case. Mr. Randall did not attend the TEB's later meeting. Mr. Randall indicated that if the TEB had any questions, they would contact him. They did not do so.

[71] Mr. Randall testified that he had talked to the local stewards about his conclusion regarding arbitration. Mr. John confirmed in his evidence that Mr. Randall had set out the evidence and discussed it with him and other stewards.

[72] Mr. Randall also testified he discussed his conclusion with a fellow Teamsters' business representative responsible for a different employer.

[73] On February 22, 2010, the TEB advised Mr. Randall that it had accepted his recommendation:

At its meeting of February 19, 2010 the Teamsters Local 938 Executive Board approved your recommendations not to proceed to arbitration with the termination grievances of [name redacted] and [names redacted] Daljit Singh at UPS.

Please ensure that you do the appropriate letters to the grievors to advise them of this and please copy me on the letters to this effect.

[74] On March 15, 2010, Mr. Randall sent a standard form letter (Exhibit 1, Tab 13) to Mr. Singh, which stated:

Pleased be advised that after conducting a careful review of the merits of your grievance and based on the evidence, it has been determined not to proceed to arbitration in this matter.

[75] On cross-examination, Mr. Randall denied that the March 15, 2010 letter should have contained specific reasons for the conclusion not to proceed. He mentioned it was "not my practice" and that he "always used this paragraph". Mr. Randall noted that he had already advised Mr. Singh of the decision orally.

[76] The March 15, 2010 letter was originally sent out under the date September 24, 2009 but, as mentioned earlier, the Board does not view the repeated erroneous use of the date of September 24, 2009 as anything more than an innocent inattention to detail.

III–Issues

[77] This case raised two issues:

1) Did the Teamsters respect the duty of fair representation it owed Mr. Singh with regard to his rights under the collective agreement? and

2) If not, what is the appropriate remedy?

IV–Analysis and Decision

[78] The Board does not sit in appeal of a trade union’s decision whether to take a matter to arbitration. That is a judgment call in most cases. However, the Board will examine the union’s process which led to its ultimate conclusion.

[79] The Board only intervenes in those rare cases where the evidence demonstrates that a trade union acted in an arbitrary, discriminatory or bad faith manner with respect to a bargaining unit member’s rights under the collective agreement. That is the focus 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.

[80] The *Code*’s imposition of a duty of fair representation at section 37 is the *quid pro quo* for a trade union obtaining the exclusive right to represent all employees in the bargaining unit.

A–Scope of the Board’s Inquiry

[81] Since the Board focusses on the trade union’s process, rather than on the correctness of its decision, a section 37 inquiry is limited to the actual steps the trade union took in reaching its decision not to take a matter to arbitration. The Board commented on the scope of its analysis in *Cheema*, 2008 CIRB 414 (*Cheema 414*):

[12] The Board's role in the context of a duty of fair representation complaint is to examine the union's conduct in handling the employee's grievance (see *Vergel Bugay*, 1999 CIRB 45). A section 37 complaint cannot serve to appeal a union's decision not to refer a grievance to arbitration, or to assess the merits of the grievance, but it is used to assess how the union handled the grievance (see *John Presseault*, 2001 CIRB 138).

[82] The Board's hearing is not the forum for a trade union to demonstrate that, if it had examined the matter more thoroughly, its original conclusion would still be correct.

[83] The Board raised this issue during the hearing several times because of concerns over the relevance of certain questions being asked.

[84] In this case, the Board was interested in precisely what the Teamsters did, mainly through Mr. Randall, in order to arrive at its March 15, 2010 conclusion not to go to arbitration. A DFR hearing is not the place for the trade union to do a new investigation of the matter, via cross-examination by highly-skilled counsel, in order to justify the correctness of its original conclusion.

[85] There are two problems if a trade union is permitted to do its investigation a second time during a DFR hearing. Firstly, it loses sight of the Board's obligation to concentrate on the actual process which took place. Secondly, it invites the Board to delve into the correctness of the trade union's decision. That is not the Board's role. The Board will respect a trade union's judgment calls on these issues, provided its process met the standards imposed by section 37 of the *Code*.

[86] The Board has decided this case based on what the Teamsters actually did when evaluating Mr. Singh's case. The Board is not persuaded that things which could have been done, but were not, have any relevance to its analysis.

B—Merits of the Grievance

[87] Normally, the Board relies on the parties' objections to exclude irrelevant evidence or to ensure a DFR hearing does not lose sight of the Board's role.

[88] In this case, the Board was forced to intervene on several occasions, on its own initiative, when evidence was led continuously about the merits of Mr. Singh's grievance. The evidentiary merits of Mr. Singh's grievance would interest an arbitrator, but not the Board, which limits its focus to the Teamsters' process.

[89] For this reason, when Mr. Singh started describing all the facts surrounding what allegedly occurred during UPS' March 10, 2009 interview, the Board intervened.

[90] The Board reminded all the parties that it was not there to determine whether UPS had just cause to terminate Mr. Singh. A DFR case examining a trade union's process could easily become sidetracked if the Board attempted to determine the veracity of either UPS' or Mr. Singh's allegations. The Board will leave such an examination for an arbitrator, if the matter goes to that forum.

C–Role of the Employer

[91] Due to the Board's focus on the process the trade union actually followed, as opposed to what it might or could have done, the employer usually has a limited observer role on the merits of a DFR complaint. However, since an employer can be impacted by any remedy ordered, it is able to participate fully for issues related to remedy.

[92] Occasionally, the Board may allow an employer to participate to a greater extent on the merits of a DFR complaint, as was recently described in *Canada Post Corporation*, 2010 CIRB 558 (*CPC 558*):

[15] In the Board's view, this reconsideration application must be analyzed having due regard to the Board's longstanding practice with regard to an employer's role in DFR complaints.

[16] Generally, an employer has an observer's role on the merits of a DFR complaint.

[17] A DFR complaint involves a bargaining unit member and his or her trade union. The dispute focusses on the trade union's internal decision-making process, an inquiry that generally does not concern the employer.

[18] Moreover, the Board does not want employers taking over the trade union's obligation to defend its process. Most DFR complainants are lay people; the trade union has the obligation to comment on its process, whether via its own representatives or outside legal counsel.

[19] The Board recently summarized its longstanding practice in *Ronald Schiller*, 2009 CIRB 435:

[36] Employers have a limited role in duty of fair representation complaints. The Board summarized the reasons for this at paragraph 47 of *Virginia McRae Jackson 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 CLC 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.

[20] The Board may grant an employer limited standing on the merits of a DFR complaint if there is an allegation that the complainant and the trade union have collaborated to use the Board to send an untimely grievance to arbitration - *Mireille Desrosiers*, 2001 CIRB 124:

[40] The employer, although impleaded, may appear, but its right to intervene in the proceeding is, in principle, limited and restricted. It might, however, be granted leave to raise objections of jurisdiction, limitation, and even participate actively in the inquiry should there be a risk of collusion between the employee and the union: *Brenda Haley* (1980), 41 di 295; [1980] 3 Can LRBR 501; and 81 CLC 16,070 (CLRB no. 271).

[21] Other than in these exceptional situations, however, an employer's usual role is limited to making submissions on the issue of remedy. This arises because its potential liability can be directly impacted by having an otherwise untimely grievance proceed to arbitration.

[93] While the Board can understand UPS' interest in demonstrating it had just cause to terminate Mr. Singh, the *Code* has mandated the Board to review trade unions' exclusive authority to represent

members of the bargaining unit. The Board does not examine whether an employer had just cause to terminate an employee. Other than for exceptional situations such as those mentioned in *CPC 558*, an employer is usually limited to an observer role when it comes to how a trade union represented one of its members.

D–The Teamsters’ Process

[94] The parties did not dispute the well-known principles which govern the Board’s DFR analysis, as summarized in *McRaeJackson et al.*, 2007 CIRB 290 (*McRaeJackson 290*):

[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.

(emphasis added)

[95] The Board will examine a trade union’s process in greater detail when a long-service employee has been terminated for cause. Mr. Singh was a UPS employee for 18 years:

[20] The Board also wishes to point out that, as stated in *Virginia McRaeJackson, supra*, the union’s duty of fair representation is open to greater scrutiny when the matter involves an employee’s termination of employment:

[31] The union’s duty in this regard is open to greater scrutiny when a matter involves an employee’s termination, serious discipline that affects gainful employment or a disability that requires accommodation. ...

[21] In keeping with the “greater scrutiny” required in cases where a member’s employment is terminated, the Board will normally find that the prima facie test has been met if the union does not provide the terminated employee with a explanation as to why the grievance was not pursued through the full grievance procedure and if there is reason to believe that the union’s conduct could be attributed to arbitrary, discriminatory or bad faith motives.

Cheema, supra

[96] The Board, in *McRaeJackson 290*, described the meaning of the term “arbitrary” as it is used in section 37:

[29] A union must not act arbitrarily. Arbitrariness refers to actions of the union that have no objective or reasonable explanation, that put blind trust in the employer's arguments or that fail to determine whether the issues raised by its members have a factual or legal basis (see *John Presseault, supra*, but see *Orna Monica Sheobaran*, [1999] CIRB no. 10, that upheld a complaint where the union referred an employee to the employer rather than assist the employee; and *Clive Winston Henderson, supra*, where the union's decision jeopardized an employee's seniority).

[30] It is arbitrary to only superficially consider the facts or merits of a case. It is arbitrary to decide without concern for the employee's legitimate interests. It is arbitrary not to investigate and discover the circumstances surrounding the grievance. Failure to make a reasonable assessment of the case may amount to arbitrary conduct by the union (see *Nicholas Mikedis* (1995), 98 di 72 (CLRB no. 1126), appeal to F.C.A. dismissed in *Seafarers' International Union of Canada v. Nicholas Mikedis et al.*, judgment rendered from the bench, no. A-461-95, January 11, 1996 (F.C.A.)). A non-caring attitude towards the employee's interests may be considered arbitrary conduct (see *Vergel Bugay et al., supra*) as may be gross negligence and reckless disregard for the employee's interests (see *William Campbell*, [1999] CIRB no. 8).

(emphasis added)

[97] The Board also explained the concept of arbitrariness in *Campbell*, 1999 CIRB 8, at paragraph 24:

[24] Conduct that the Board qualifies as arbitrary is one where the union makes no inquiry or only a perfunctory or cursory inquiry into an employee's grievance or where the union demonstrates a non-caring attitude toward the employee's interests. It encompasses gross negligence and includes a reckless disregard for the employee's interests (see *Brian L. Eamor, supra*, at pages 94; 35; and 143,376).

[98] The Board will not overturn a trade union's conclusion about arbitration if the latter clearly turned its mind to the issue. But the Board will intervene where a trade union acted arbitrarily by ignoring relevant evidence, or failing to test the employer's evidence with the help of the person best situated to comment, in this case Mr. Singh.

[99] The Teamsters acted arbitrarily in its processing of Mr. Singh's grievance. The Board does not arrive at this conclusion due to one particular fact, but rather from multiple elements in the Teamsters' process which demonstrated a preference for form over substance, as well as an uncritical reliance, without helpful verification with Mr. Singh, on UPS' evidence.

[100] The Teamsters argued that they were entitled to consider Mr. Singh's credibility when he did not immediately raise his allegations of abuse during the March 10, 2009 interview. The Board agrees that this is a factor a trade union can consider in its analysis.

[101] Similarly, the Board does not fault the Teamsters for the delay of one year before advising Mr. Singh it would not go to arbitration. Mr. Randall testified that his experience has shown that agreeing with employers to extend the time limits in the collective agreement has generally worked better than a strict insistence. This is the type of judgment call that the Board usually respects in DFR cases.

[102] While others might think it preferable to send a termination grievance to arbitration immediately if an employer does not produce quickly all evidence supporting termination, the mere existence of other possible strategies does not constitute a violation of the *Code*.

[103] However, several other factors have convinced the Board that the Teamsters' investigation into Mr. Singh's situation amounted to arbitrary conduct.

[104] In the Board's view, an agreement between the Teamsters and UPS not to show key documents to Mr. Singh, as a condition for Mr. Randall viewing them, deprived Mr. Singh of an important opportunity to know and comment upon the case against him. At an arbitration hearing, any evidence in support of a just cause dismissal would have to be produced in its entirety, subject to any orders allowing limited redaction and admissibility.

[105] Experienced employers and trade unions often share information early in the grievance process. This process helps trade unions make the difficult judgment calls. But if an employer insists on confidentiality, and this demand hinders a grievor's ability to assist his or her union, then the union and the employer will have to live with the possible repercussions arising from this practice.

[106] The Board has held in the past that the grievor is best situated to assist the union in analyzing the employer's evidence:

[17] In short, the Board will abide by the union's decision, whether or not it agrees with it, as long as the union undertook to conduct a reasonable investigation, fairly assessed the facts of the case and the impact of its decision on the grievor, and informed the grievor of the union's reasons for not referring the grievance to arbitration.

...

[19] In the case at hand, the Board finds that the union did not conduct a serious or objective investigation of the grievance it filed on Mr. Baribeau's behalf and was thus unable to assess his chances of success at arbitration. The union failed in its duty of fair representation for the reasons that follow.

[20] The evidence shows that the union relied solely on the employer's submissions in taking its position. Considering the issues raised by Mr. Baribeau's grievance and the long-term negative impact on his pension benefits, the union should have at least obtained reasonable explanations based on a factual or legal basis before deciding that his case had no chance of success at arbitration.

Baribeau, 2004 CIRB 302; (emphasis added)

[107] A trade union will consider all the evidence, either prior to making its decision to go to arbitration or, if the employer refuses to disclose it in advance, on the eve of and during arbitration. Regardless of the timing when it receives the employer's evidence in support of termination, the trade union in many cases needs the assistance of the grievor to help it appreciate the employer's case.

[108] The facts demonstrate that Mr. Randall did not show Mr. Singh the various signed statements which made negative allegations about him. Mr. Randall also did not meet with all the individuals who signed statements, but still relied on them.

[109] Mr. Randall did not show Mr. Singh the \$350.00 cheque.

[110] In the Board's view, a general comment to Mr. Singh on the phone about damaging evidence, without divulging the actual document or identifying the authors, prevented Mr. Singh from commenting knowingly on the case against him.

[111] The Board was surprised how little documentary evidence the Teamsters provided at the hearing in support of its investigation of the termination of an employee with 18 years' service. The information the Teamsters did provide consisted mainly of what appear to be form letters.

[112] The Board is also concerned that the Teamsters repeatedly placed more emphasis on form than substance.

[113] For example, both of Mr. Randall's September 24 and November 24, 2009 letters advised Mr. Singh that the Teamsters had received all of the employer's evidence. Testimony at the hearing demonstrated that evidence continued to arrive from UPS throughout the autumn of 2009.

[114] The Board agrees with the Teamsters that an accurate letter to a grievor advising about the state of the actual investigation can be helpful. But the sending of inaccurate form letters provides little persuasive evidence that the trade union has really turned its mind to the individual's specific situation.

[115] Indeed, the Teamsters' form letters in this case suggested that it would only convene an in-person meeting with Mr. Singh to review UPS' evidence if it felt it necessary. And yet, Mr. Randall did believe it important enough to meet in person with two Teamsters' stewards, who had little to no knowledge of the facts, to review the evidence and his conclusion.

[116] The Teamsters also placed an immense amount of confidence in UPS' November, 2009 Investigation Report, without ever meeting with Mr. Singh to allow him to review and comment on its specific contents.

[117] As mentioned above, Mr. Singh would have been the best person to comment on the conclusions in UPS' report. Instead, without even meeting with Mr. Singh to show him the document, Mr. Randall described the Investigation Report as "formidable evidence" in support of his conclusion.

[118] The Teamsters also suggested that they had issues with Mr. Singh's credibility by alleging that he did not raise the issue of his request for union representation with any diligence. While it may be true that Mr. Singh did not immediately raise his allegations of being threatened at the March 10, 2009 meeting, the evidence showed that Mr. Singh raised the point about no union representation

on March 11, 2009 with Mr. John, a Teamsters' steward, as well as at the first grievance meeting on March 23, 2009.

[119] Mr. Randall also testified that Mr. Singh had raised this point with him in March, 2009.

[120] UPS' Investigation Report further confirmed that Mr. Singh had raised the issue of union representation at the start of the March 10, 2009 interview.

[121] The Board had trouble understanding Mr. Randall's suggestion that Mr. Singh had lost credibility because he raised the issue of union representation late. Mr. Singh raised the issue on several occasions in March, 2009, including with Mr. Randall himself. The later November, 2009 Investigation Report merely confirmed Mr. Singh's claim that he had raised the issue of union representation during the UPS interview.

[122] Moreover, Mr. Randall concluded that Mr. Singh waived his right to union representation, without ever having asked him directly about it. Mr. Randall arrived at his conclusion based on UPS' Investigation Report, as well as on discussions with the union stewards.

[123] The Board expresses no opinion whether Mr. Randall is correct that the right to union representation at section 5.7 of the collective agreement is not a "null and void provision". The Board is not aware of the parties' practice and their collective bargaining agreements about union representation. Collective agreement interpretations are for an arbitrator.

[124] Nonetheless, the Teamsters acted arbitrarily when they received confirmation in UPS' Investigation Report that Mr. Singh had indeed asked for union representation at the beginning of his March 10, 2009 meeting, but failed to ask him about it.

[125] Mr. Randall concluded that Mr. Singh had waived his right to union representation, without ever questioning him about the specifics of that event. He also believed Mr. Singh had raised this issue late and that that undermined his credibility. The facts clearly show that the premises for Mr. Randall's conclusion on this specific point do not exist.

[126] The Board does acknowledge that it prefers Mr. Randall's evidence to that of Mr. Singh on two points. As mentioned earlier, the Board accepts that Mr. Singh did not raise until August his allegations about certain treatment during his March interrogation. Similarly, the Board accepts that Mr. Randall explained his analysis of the case to Mr. Singh in January, 2010.

[127] But these two discrepancies did not persuade the Board that this shows Mr. Singh was trying to mislead the Teamsters. Neither side kept accurate or detailed records of what was transpiring during the grievance process. Evidence, from both sides, about what communication occurred in this case left a lot to be desired.

[128] The Teamsters' emphasis on form over substance continued when the TEB reviewed Mr. Singh's case. The TEB had only a three-paragraph memo from Mr. Randall summarizing his conclusions that Mr. Singh and others had stolen and sold UPS' customers' cell phones. The memo also suggested that each grievor had changed his story.

[129] The TEB had no information before it which would have allowed it to test Mr. Randall's conclusions independently.

[130] None of the documentation that Mr. Randall had in his possession was put before the TEB. Neither was Mr. Randall present to answer any questions when the TEB reviewed his recommendation not to proceed to arbitration.

[131] The involvement of the TEB in Mr. Singh's case provides no support at all to the Teamsters' position that it respected its duty of fair representation. The Board fails to see any utility arising from this review process as it was carried out in Mr. Singh's case.

[132] The Board adds that, in appropriate circumstances, a review mechanism might be a valuable part of a trade union's process. However, it would probably require, at a minimum, a meaningful opportunity for the review body to examine the evidence and test the resulting conclusions which recommended not to go to arbitration.

[133] That was not done in Mr. Singh's case.

[134] In summary, from the evidence in this case, the Teamsters failed to turn their mind appropriately to Mr. Singh's specific situation. They routinely accepted UPS' evidence without vetting it with Mr. Singh. They agreed to treat such evidence as confidential, despite the fact it would have to be disclosed, if admissible, at any arbitration.

[135] A proper discussion of the evidence with Mr. Singh, along with his rebuttal, if any, would have allowed the Teamsters to make a reasoned decision about his credibility and the chances of success at arbitration. The use of inaccurate form letters does not save a process which has met the threshold of being arbitrary.

[136] For the above reasons, the Board finds that the Teamsters acted arbitrarily and violated section 37 of the *Code* in its handling of Mr. Singh's grievance.

V–Remedy

[137] When the Board concludes a trade union has violated section 37 of the *Code*, the issue of the appropriate remedy arises.

[138] Sections 99(1)(b) and (2) are the applicable *Code* remedial provisions:

99.(1) Where, under section 98, the Board determines that a party to a complaint has contravened or failed to comply with subsection 24(4) or 34(6), section 37, 47.3, 50 or 69, subsection 87.5(1) or (2), section 87.6, subsection 87.7(2) or section 94, 95 or 96, the Board may, by order, require the party to comply with or cease contravening that subsection or section and may

...

(b) in respect of a contravention of section 37, require a trade union to take and carry on on behalf of any employee affected by the contravention or to assist any such 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;

...

(2) For the purpose of ensuring the fulfilment of the objectives of this Part, the Board may, in respect of any contravention of or failure to comply with any provision to which subsection (1) applies and in addition to or in lieu of any other order that the Board is authorized to make under that subsection, by order, require an employer or a trade union to do or refrain from doing any thing that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of those objectives.

[139] Where a trade union has remained on good terms with a bargaining unit member during the course of a DFR complaint, and may have simply overlooked some key analytical steps in an otherwise fair and transparent process, the Board may return the entire matter to the trade union for a fresh analysis and decision on whether to go to arbitration.

[140] This type of remedy reflects the fact that the Board does not sit in appeal of a trade union's decision. As long as the Board has confidence the ensuing process will be fair and transparent, that remedy remains available.

[141] The Teamsters asked for this remedy in Mr. Singh's case in the event the Board found a violation of the *Code*.

[142] That preferred remedy is not available in this case because of the Teamsters' conclusions about, and submissions regarding, Mr. Singh.

[143] In this case, the Teamsters emphasized why they did not believe Mr. Singh. They made critical and negative conclusions about his credibility.

[144] Returning the matter for a fresh and proper review in these circumstances, given the adversarial relationship which was evident throughout the hearing, would be an illusory remedy.

[145] As a result, the only effective remedy for the Board is to order that Mr. Singh's grievance be taken independently before a labour arbitrator who can decide the merits of the grievance. The Teamsters will provide reasonable assistance to Mr. Singh, but only at his request.

[146] The Board also orders:

1) Any time limits in the collective agreement shall be waived and Mr. Singh's grievance is to be taken to arbitration; and

2) The Teamsters shall pay the reasonable costs of Mr. Singh's chosen legal representative, either as agreed to or as assessed.

[147] Both the Teamsters and UPS asked the Board not to decide on the apportionment of any liability between them unless and until an arbitrator finds that damages of any kind are owing to Mr. Singh. The Board agrees to this request and will remain seized of the issue.

[148] If the parties require a formal Board order, they will draft it, agree on the order's form and content, then submit it to the Board for approval.

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

Graham J. Clarke
Vice-Chairperson

John Bowman
Member

Patrick J. Heinke
Member