Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Firmin Mallet,

complainant,

and

Canadian Brotherhood of Railway, Transport and General Workers,

respondent,

and

VIA Rail Canada Inc.,

employer.

Board File: 29467-C
Neutral Citation: 2014 CIRB **730**
June 16, 2014

The Canada Industrial Relations Board (Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. Richard Brabander and Daniel Charbonneau, Members. A hearing was held on March 18−20 and April 14, 2014.

Appearances

Mr. Brian F.P. Murphy, Ms. Candace Salmon and Mr. Tom Barron, for Mr. Firmin Mallet;

Mr. Anthony F. Dale, for the Canadian Brotherhood of Railway, Transport and General Workers;

Mr. William Hlibchuk, for VIA Rail Canada Inc.

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

I. Introduction

[1] On June 11, 2012, the Board received from Mr. Firmin Mallet's legal counsel a duty of fair representation (DFR) complaint. Mr. Mallet works for VIA Rail Canada Inc. (VIA), but has been off work for several years for health reasons.

[2] The officially certified bargaining agent is the Canadian Brotherhood of Railway, Transport and General Workers (CBRT). Unifor, which resulted from the recent merger of the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW−Canada) and the Communications, Energy and Paperworkers Union of Canada, advised the Board that it is in the process of updating its many certification orders at the Board.

[3] For current purposes, and to avoid confusion, these reasons will simply refer to the bargaining agent as the Union.

[4] Mr. Mallet alleged that the Union had violated the *Canada Labour Code (Part I−Industrial Relations)* (*Code*) when it failed to pursue an offer of mediation designed to allow him to return to work. His complaint further contested the Union's decision not to file an accommodation grievance.

[5] The Union alleged that it had represented Mr. Mallet whenever he requested assistance. Moreover, the Union noted the mediation did not take place because the other employee involved had declined to participate. That situation arose after the other employee learned that Mr. Mallet had contacted the police about certain matters.

[6] The Union alleged in its initial pleading to the complaint that Mr. Mallet's grievance would not have succeeded before an arbitrator. At the hearing, the Union argued that the grievance was premature.

[7] VIA alleged that Mr. Mallet's complaint constituted an attempt to avoid the *Code*'s time limits so that he could contest certain earlier and untimely events. The Union also raised timeliness issues.

[8] The Board has concluded that the Union acted arbitrarily with regard to Mr. Mallet's rights under the collective agreement and has ordered, *inter alia*, that his accommodation grievance be taken to arbitration.

[9] These are the reasons for the Board's conclusions.

II. Facts

[10] The background to Mr. Mallet's situation covered several years. Mr. Mallet has not worked for VIA since February, 2010. As of the date of the parties' final arguments on April 14, 2014, Mr. Mallet had still not returned to the workplace despite expressing his interest to do so on multiple occasions, *infra*.

[11] Mr. Mallet's disability benefits expired in or about November, 2013. He has been without income since that time.

[12] The length of time during which Mr. Mallet had been absent from the workplace gave rise to certain timeliness objections from both the Union and VIA. The Board considered the parties' pleadings and, in its letter dated November 1, 2013, described the focus of its oral hearing in Halifax:

> The Board will hold a focussed oral hearing to examine Mr. Mallet's March 30, 2012 request for the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW−Canada) (CAW) to file a grievance on his behalf and the CAW's subsequent conclusion not to file a grievance.
>
> The Board has scheduled a hearing in this matter for March 18−20, 2014, in Halifax, Nova Scotia, at the Delta Halifax located at 1990 Barrington Street.
>
> The scope of a section 37 complaint is tied to Mr. Mallet's rights under the collective agreement. Therefore, the hearing will not examine in any detail, except possibly for context, any events under VIA Rail Canada Inc.'s (VIA) or the CAW's internal policies.
>
> The CAW and VIA will be free to argue the issue of timeliness, but it will be dealt with along with the merits of the section 37 complaint. The Board has concluded it will not be able to rule on the timeliness arguments without first hearing the evidence.

[13] Mr. Mallet first started working as a part-time employee for VIA in May, 1998. In 2007, his status changed to full time.

[14] In January 2010, Mr. Mallet filed a complaint alleging harassment and discrimination at work (Ex−5). The Union assisted in finding a resolution, though Mr. Mallet ultimately declined to sign the proposed agreement.

[15] In May, 2011 Mr. Mallet filed a sexual harassment complaint with VIA (Ex−6).

[16] VIA investigated that second complaint in accordance with its internal Harassment policy (Ex−3; Tab 3). During the hearing, the parties referred to the contents of various interviews held as part of that process (Ex−3; Tab 4).

[17] On September 6, 2011, VIA advised Mr. Mallet that it was unable to establish the allegations in his complaint. VIA also offered the services of a third party mediator:

> This is in response to your complaint dated November 24, 2010 and received by VIA on May 12, 2011 regarding alleged sexual harassment by xxx approximately one and a half years ago.
>
> Due to the seriousness of the allegations and in accordance with the Harassment policy, both you and xxx were formally interviewed. In addition, statements from co-workers were reviewed.
>
> **Pursuant to the examination of the facts and the statements taken, I wish to inform you that it was not possible to establish the allegations you made in your complaint.**
>
> Please take note that management will continue to monitor that the Code of Conduct and Harassment policy are respected in the workplace.
>
> **In order to facilitate your return to work and try to resolve the conflict with xxx, the Corporation is willing to provide the service of a third party mediator.** Drawing on the expertise of a mediator, the process allows the conflicting parties to craft agreements in order to solidify the resolution. Your cooperation in participating in a mediation process would be appreciated. Confidentiality ensures that privacy and respect are maintained during and after mediation.
>
> xxx will also be advised of our conclusions and that any future instance of harassment, intimidation or retaliation shall be considered as misconduct and will not be tolerated.
>
> (emphasis added)

[18] After learning of VIA's conclusions, Mr. Mallet did not request that the Union file a grievance about his allegations of sexual harassment.

[19] In or about November, 2011, Mr. Mallet retained the services of Barron T Labour Relations (BTLR). By letter dated January 16, 2012, BTLR wrote to VIA requesting that it implement the third party mediation process it had offered in its September 6, 2011 letter so that Mr. Mallet could return to work:

> I am writing to you with respect to your September 6, 2011 correspondence to Firmin Mallet concerning the matter of the harassment complaint. This is to confirm that Baron T Labour Relations has been retained in regards to the matter of the sexual harassment complaint filed by Mr. Mallet. He has asked us to intervene with him and to be part of the resolution process in this matter.
>
> As you know Mr. Mallet is currently under psychiatric care and has been since the formal filing of this complaint and as **we understand by way of your letter that the corporation is prepared to provide the service of third party mediation. I would appreciate receiving a call from you regarding the implementation of this process as an aid to find resolution to Mr. Mallet's complaint and return to work.**
>
> (emphasis added)

[20] In its January 17, 2012 response, VIA advised BTLR that it had to deal directly with the Union for matters involving members in the bargaining unit. VIA copied its letter to two local representatives of the Union:

> This is in response to your letter faxed and received in our offices on January 16, 2012.
>
> Mr. Mallet is a unionized employee represented by the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW) with respect to wages, hours of work, and other working conditions.
>
> Consequently, VIA Rail Canada Inc. recognizes the CAW as the sole bargaining agent on behalf of Mr. Mallet and is unable to negotiate directly with Mr. Mallet or yourself on these matters.

[21] On February 2, 2012, BTLR wrote to the National President of the Union about Mr. Mallet's situation (Ex−1; Tab 3, page 93). In that letter, BTLR asked the Union to follow up on VIA's mediation offer. BTLR also asked the Union to conduct an investigation of the matter pursuant to its own internal policy on harassment. That policy forms part of the Union's constitution:

> **I would ask that you take direction and have a Staff Representative immediately engage this issue including putting Via to the test of independent mediation as offered.** It is important for you to understand given the facts as we understand them and given the evidence that has been made, Brother Mallet needs my company assistance along with the proper representation from the union to get through this matter. It is also important to understand that we believe that this matter can be addressed with open and frank discussions along with examination of the facts so that Brother Mallet

can have a rebuilding of a trust in his union for representation. I think the following might be an appropriate direction:

> **1. Engage Via in third party intervention as proposed (see attached letter).**
> **2. CAW with National attachment conduct an investigation related to this matter.**

In closing we would insist that Brother Mallet have access to a person to help him with this process. I look forward to hearing from you given the seriousness of this matter.

[*sic*]

(emphasis added)

[22] On February 25, 2012, Mr. Mallet (using BTLR letterhead) wrote to Mr. Les Holloway, Regional Director of the Union, to ask who in the Union would be initiating the mediation process:

> I am asking you to advise me of who it is within the CAW, my bargaining agent that will be initiating this process. **To date I have heard nothing back from CAW or Via Rail regarding my decision to accept the company's offer.**
> **I want to return to work and I need to return to work in an environment free from sexual harassment.** I would appreciate receiving a call from you regarding the implementation of this process as an aid to find resolution to my return to work.

(emphasis added)

[23] By letter dated February 29, 2012, Mr. Holloway advised Mr. Mallet to contact the Union's Regional Representative, Mr. Lou Walsh, about the mediation process (Ex−2; Tab 3).

[24] On March 5, 2012, Mr. Mallet wrote directly to VIA again about the mediation, though he did copy both Mr. Holloway and Mr. Walsh of the Union:

> Mr. Jason Carney wrote to you on my behalf requesting the start of that process and you responded to him on January 16, 2012 stating that CAW Canada was the certified bargaining agent and that you would only be dealing with them. More than two weeks has elapsed since that reply and therefore I am requesting the following:
> (1) **The offer of your September 6, 2011 is directed to me and not the union (CAW Canada) and I am therefore requesting that you provide me with a name of an independent mediator for my review and consent thereto.**
> (2) I will consider your suggestion and or propose a name of a mediator for your consideration and what's important to understand here is that **I have made it clear that it is my intention to engage the process as expressed by Mr. Carney because I wish to return to work in secure employment which is free from any harassment.**

(emphasis added)

[25] On March 30, 2012, Mr. Mallet wrote to Mr. Walsh and asked him to do two things: 1) pursue the mediation offer with VIA and 2) file an accommodation grievance with VIA:

> I am requesting that you do two things as a member of CAW to get this process that Via has offered me started:
>
> > 1. Engage Via with respect to when they intend to provide the process of independent mediation and when they intend to refer to me their suggestion on who the mediator will be.
> >
> > 2. File the attached grievance with Via on my behalf.
>
> [*sic*]

[26] The text of the grievance that Mr. Mallet asked the Union to file alleged that VIA had failed to accommodate him:

> To Louis Walsh
>
> **I would request that the union file a grievance with Via alleging a violation of the collective agreement wherein the company refuses to make and have reasonable accommodation for me**, Firmin Mallet in a workplace that is free from harassment and that this violation of the refusal to accommodate has caused me the loss of wages and benefits and the right to work with Via. I allege that the company's actions are unjust, contrary to the collective agreement and the human rights act section 7. **I request that the employer compensate me for all lost wages and benefits from the day the request to activate the proposed agreement on independent mediation.**
>
> (emphasis added)

[27] Mr. Walsh testified he received Mr. Mallet's letter on April 3, 2012 at 11:55. He immediately phoned Mr. Mallet and asked for certain information. Mr. Walsh's follow-up email that same day at 15:11 summarized the information he had requested (Ex−1; Tab 3; page 99):

> As per our phone conversation today I had the following questions:
>
> 1- Did VIA respond to your letter dated March 5, 2012 addressed to Sheila Duffy, Sr. Mgr.
>
> 2- Regarding your grievance request note attached to the letter received today dated March 30th, 2012.
>
> What is the actual date you wish compensation to start?

Does "request to activate proposed agreement" date refer to :

Sept 6/11 VIA's response and offer of third party conciliation;

Jan 16/12 Jason Carney fax to VIA (I do not have copy or details) which was responded to Jan 17/12;

OR some other date?

In our phone conversation Q1 you weren't aware of any response ; Q2 you weren't sure of timeline for compensation/benefits.

As you stated you'll contact Mr. Carney for clarification.

Any documentation, such as the above mentioned fax, would be welcome.

[28] Mr. Walsh also wrote a short note to himself (Ex−2, page 21) on April 3, 2012 at 12:35 about his conversation with Mr. Mallet:

1) When did VIA respond to your March 5/12 letter?

-Not that he knows

Your Grievances request for lost wages and benefits, what is the actual date you were to use "Request to activate proposed agr [agreement]"?

-Didn't know for sure, I'll send email request info.

He doesn't want anyone (employee staff) of VIA to know his address.

[29] Two days later, on April 5, 2012, Mr. Walsh made another note to himself of a discussion he had had at 11:40 with VIA about Mr. Mallet's request for mediation (Ex−2; page 25):

Sheila (illegible) Firmin

Call EAP to set up mediation

Did he ask for accommodation?

He didn't want to work for [xxx]

He was offered move to SA

Feb 2010 last worked

Job Selection since

GWL – Where can he work other than with [xxx]

Sheila will contact Firmin, response to March 5/12 letter and info regard mediation session

[30] In his evidence in chief, Mr. Walsh described this telephone call with VIA. They discussed accommodation and Mr. Mallet's request not to work with the other employee who was the subject of his harassment complaint. VIA indicated it would contact "EAP" to set up the mediation.

[31] Mr. Walsh spoke to VIA about Mr. Mallet's views in 2011 about working in his workplace. A discussion about a job as a Stock Attendant had apparently taken place during VIA's July, 2011 investigation of Mr. Mallet's sexual harassment complaint.

[32] In 2011, Mr. Mallet had expressed concern about being in the same workplace as the other employee.

[33] Mr. Walsh further discussed with VIA the fact that Great-West Life (GWL), which was paying Mr. Mallet's disability benefits, was interested in getting Mr. Mallet back to work. GWL apparently had asked where else Mr. Mallet could move so that he would not be in contact with the other employee.

[34] Mr. Walsh did not discuss the content of his VIA telephone conversation with Mr. Mallet or his representatives. Mr. Walsh never requested any medical information from Mr. Mallet.

[35] On April 5, 2012 at 14:10, Mr. Mallet responded to Mr. Walsh's written request for information (Ex−1; page 101):

> Louis Walsh, further to your inquire on my grievance. The union was copied on Ms Duffy's reply to Jason's letter to her on my request to activate the Mediation process offered to me by VIA. The union was made aware of this on February 2nd and 25th, 2012. I am requesting that you request lost wages from January 26, 2012 the date of Mr. Carney,s letter. Via has not responded to the March 5, 2012 letter. The offer from Via to Mediate is September 6, 2011 and you know that because Heather Grant was copied on it. Mr Carney,s letter is attached.
> Firmin Mallet
>
> [*sic*]

[36] Mr. Walsh was not otherwise involved in Mr. Mallet's request for mediation. His Union colleague, Ms. Heather Grant, who had been involved in the original harassment complaint investigation, dealt with VIA's offer of mediation.

[37] Mr. Walsh explained in his evidence in chief why he decided not to file a grievance. He testified that Mr. Mallet was not ready to return to work. He indicated he would look at the situation again when Mr. Mallet could return to work. In his view, Mr. Mallet's grievance was premature.

[38] Mr. Walsh testified that Mr. Mallet's grievance concerned reasonable accommodation and that he was waiting for Mr. Mallet to tell him that he was able to return to work.

[39] Mr. Walsh testified that after the filing of his complaint with the Board, Mr. Mallet never requested any other assistance from the Union.

[40] Mr. Walsh, who testified about his training for the handling of grievances, indicated the standard protocol was to make notes of conversations and actions.

[41] Mr. Walsh testified he decided on April 5, 2012 not to file Mr. Mallet's grievance. He said he left a message to this effect on Mr. Mallet's voice mail, a message that Mr. Mallet denied ever receiving. Mr. Walsh did not send a confirmation letter explaining the reasons why the Union had decided not to file the grievance. He made no note to his file about this phone call or the content of the message he said he left.

[42] Mr. Walsh confirmed in cross-examination that he never advised Mr. Mallet of his right to appeal the Union's decision.

[43] In cross-examination, Mr. Walsh indicated that Mr. Mallet could have filed his grievance himself. However, he noted that the Union generally recommended that employees not do that.

[44] At the hearing, Ms. Heather Grant, Secretary-Treasurer (National Council), who was involved in the mediation issue but not in the grievance request, also suggested Mr. Mallet's grievance was premature. She worked in the same office as Mr. Walsh. Since it was not her file, Ms. Grant did not keep any notes.

[45] Ms. Grant testified Mr. Mallet was in receipt of LTD benefits because he was totally disabled. She indicated that Mr. Mallet had never advised her that he was no longer disabled. The Union had no medical information about Mr. Mallet. Ms. Grant understood from discussions in July, 2011 that a position was available for Mr. Mallet, with no reporting relationship to the other employee. But they would still work in the same workplace.

[46] Ms. Grant also described how the possibility of a criminal investigation ended the other employee's interest in mediation in May, 2012. Ms. Grant also noted that Mr. Mallet had the right to file a grievance on his own.

[47] In cross-examination, Ms. Grant testified that Mr. Mallet's grievance was a request for reasonable accommodation. According to her testimony, the accommodation process would start only if a doctor's note said that Mr. Mallet could return to work. However, since Mr. Mallet did not provide a doctor's note about his fitness to work, Ms. Grant indicated they could not explore accommodation.

[48] In Ms. Grant's view, it was not up to her to ask about Mr. Mallet's limitations. As she testified, "I do not ask for medical information". She did not know if Mr. Walsh had asked Mr. Mallet for medical information.

[49] In Ms. Grant's view, the most important thing for Mr. Mallet was to have the mediation to resolve his issues.

[50] On or about April 5, 2012, Mr. Mallet wrote to his BTLR representative that VIA had contacted him about the proposed mediation (Ex−2; page 27):

> Sheila Duffy call me after i talk to you. She as me if i want to go to work, and went i will be ready. I said i want to go to work went this problem will be deal with, that wath the doctor put on is repord.
>
> She sait then she will set a meeting for a mediater , with EAP. i said ok and would you sent me a letter to conferme she said yes and i will answer your letter then I said ok.
>
> Firmin
>
> [*sic*]

[51] It was unclear when the Union received a copy of this email exchange between Mr. Mallet and VIA. The Union produced it as part of its document brief for the oral hearing.

[52] Mr. Mallet wrote again to VIA on April 10, 2012 about the mediation:

> Further to your phone conversation on April 5, 2012 regarding mediations on behalf of Via's offer to independent mediation, I understand that we discussed and agreed to the following :
>
> **You asked me if I wanted to come back to work and I replied to you that I was and had been prepared to return to work under the terms of reference directed by my doctor that being the harasser being dealt with or removed from the workplace.** You indicated to me that you would set up the mediation session and I indicated to you that I would require any direction that Via proposed to be put in writing to me.
>
> Am I correct in assuming that the mediator will be an independent person, mandated to rectifying the opportunity for me to work in an environment that is free from harassment and am I to be part of the decision making process to identify who that person is going to be to mandate this process? As you know, the union is the certified bargaining agent but this offer of mediation is to me and not them, what role do you see them playing in the process? I look forward to hearing from you in writing.
>
> (emphasis added)

[53] Mr. Mallet did not copy the Union, though this document was also produced in the Union's book of documents.

[54] The Board does not conclude the Union knew of the April 5 and 10, 2012 communications between Mr. Mallet and VIA at the time they were sent. Evidently, it obtained copies of them sometime afterward and included them in its book of documents.

[55] The Union did pursue the issue of mediation with VIA. Ultimately, the mediation did not take place. The other employee involved had refused to participate after learning that Mr. Mallet had contacted the police about the matter.

[56] The Union had advised the other employee that if criminal charges were pending then mediation might not be in his best interest, as confirmed in the Union's May 17, 2012 email to VIA:

> Sheila,
>
> I talked with xxx today and he is looking forward to the planned mediation sessions.
>
> There is however a problem, Fermin [*sic*] has filed criminal charges against xxx.

> I have advised xxx that while criminal charges are pending any participation in mediation may not be in his best interests.
>
> We will advise you when the charges are dealt with.

[57] On June 11, 2012, the Board received Mr. Mallet's complaint.

[58] In the Union's August 15, 2012 Response to Mr. Mallet's written complaint, it argued that his grievance, which it suggested contested VIA's September 6, 2011 findings for the sexual harassment complaint, was untimely. On the issue of accommodation, the Union further argued in its submission to the Board that an arbitrator would have concluded that VIA had made offers of reasonable accommodation:

> 20) Under date of March 30, 2012 the Union did receive a request from the complainant to file a grievance. Throughout the process this was the first time the complainant made such a request. The Union turned its mind to this request.
>
> **First consideration was could we present the same evidence, material and/or lack thereof to an arbitrator and expect a different conclusion then that of the September 6, 2011 decision. The answer to that question was "no"** The [*sic*] next consideration was time limits. Clearly, the Corporation could argue that cause of grievance dated back to 2007 or alternatively, January 21, 2010 and at the very least September 6, 2011. In any event, the time limits would be exceeded. **The Union also considered the Company's offers to accommodate the Complainant. It is the Union's opinion that an arbitrator would find those offers of accommodations to be reasonable.** The Union was also concerned with the question of duplicity of proceedings.
>
> 21) The Complainant was advised by Mr. Walsh in April 2011 that his request of March 30, 2012 for a grievance being filed was declined.
>
> (emphasis added)

[59] Mr. Mallet had also filed a complaint with the Canadian Human Rights Commission (CHRC) which initially led this Board to defer hearing the matter. However, the Board later learned the CHRC had closed its file in August, 2012 when its calls about the complaint were not returned:

> I apologise for missing your call earlier but I was on another call. In response to your last voice mail message of January 18, 2013 concerning the request to amend the complaint to add the union as a respondent, I would like to refer you to the email of June 22, 2012 addressed to you by my colleague Marie-Josée Frenette. In this e-mail, she informed you that your letter had been received and that your client would have to file a separate complaint against the CAW because a new respondent cannot be added to an existing complaint. She then informed you that your letter had been forwarded to an analyst who would contact you in the following weeks to discuss further.

> Our records show that you were contacted by the analyst on July 24 and 30, 2012 and that voice-mail messages were left for you on both occasions. Given that these calls were not returned, the analyst closed the file on August 1, 2012. Our records show no further contact on your part concerning this new complaint until your voice mail message of January 18, 2013.
>
> I note that the complaint against the Union alleges a failure to represent. These allegations would best be dealt with by the Canadian Industrial Relations Board.

[60] Upon receipt of this information, the Board lifted its deferral and proceeded to consider Mr. Mallet's complaint.

III. Issues

[61] The facts in this case raise the following questions:

A. What is the scope of a DFR complaint?
B. Is Mr. Mallet's complaint timely?; and
C. Did the Union respect the duty it owed Mr. Mallet under section 37 of the *Code*?

[62] We will deal with these issues in the above order.

IV. Analysis and Decision

A. What is the scope of a DFR complaint?

[63] Mr. Mallet's complaint makes reference to the Union's constitution and the harassment policy contained within it:

> It is alleged that the respondent's have acted in an arbitrary way by refusing to exercise their jurisdiction and responsibility to assist its member and to **fulfill its constitutional requirement to its members in the investigation of discriminatory conduct in the workplace.**
>
> …
>
> **The union, CAW Canada by constitution established a policy that all workplaces under their jurisdiction were to be free from harassment and that the union created a policy equal to everyone that required the appointment of a representative of the union to investigate any and all alleged harassment within the workplace.** This policy was designed to cover and deal with all forms of harassment. I am a gay man who has been subject to extradorinary circumstances of sexual harassment and sexual assault within my workplace and I did provide a copy of the issues of harassment to my local union representatives and for whatever reason, they chose not to engage

> CAW's policy. **That policy is attached for the Board's reference and it requires the investigation of the circumstances central to the discriminatory practice, requires a written report with recommendations and delivered to the National President for action in accordance with the constitutional requirements of the union's constitution**
>
> [*sic*]
>
> (emphasis added; pages 4 and 10 of the complaint)

[64] There seemed to be confusion at times in some of the pleadings, as well as at the oral hearing, about the Board's jurisdiction. The Board had attempted to describe the scope of the hearing in its November 1, 2013 letter, *supra*. Evidence about the Union's constitution led to relevancy objections during the hearing.

[65] Section 37 is explicit that the duty of fair representation in the *Code* applies with regard to an employee's rights under 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.
>
> (emphasis added)

[66] Except in very specific situations found in section 95 of the *Code*, the Board is not the forum in which to contest allegations that a trade union may not have followed its internal policies: see, for example, *Thibeault*, 2014 CIRB 711. A trade union's constitution is evidently distinct from any collective agreement it might negotiate with an employer.

[67] The Board dismisses Mr. Mallet's argument that the Union violated section 37 of the *Code* by failing to conduct a harassment investigation pursuant to its constitution. Any issues related to this alleged failure fall outside the scope of a DFR complaint.

B. Is Mr. Mallet's complaint timely?

[68] Sections 97(1) and (2) of the *Code* establish a 90-day time limit for the filing of a complaint:

97. (1) Subject to subsections (2) to (5), any person or organization may make a complaint in writing to the Board that

(*a*) an employer, a person acting on behalf of an employer, a trade union, a person acting on behalf of a trade union or an employee has contravened or failed to comply with subsection 24(4) or 34(6) or **section 37**, 47.3, 50, 69, 87.5 or 87.6, subsection 87.7(2) or section 94 or 95; or

(*b*) any person has failed to comply with section 96.

(2) Subject to subsections (4) and (5), **a complaint pursuant to subsection (1) must be made to the Board not later than ninety days after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint.**

(emphasis added)

[69] The *Code* also grants the Board a discretion at section 16(*m.1*) to extend the time limits for instituting a proceeding:

16. The Board has, in relation to any proceeding before it, power

…

(*m.1*) to extend the time limits set out in this Part for instituting a proceeding;

[70] VIA argued that Mr. Mallet had lost confidence in the Union long before the events of 2012 took place. It noted that Mr. Mallet never appealed VIA's September 6, 2011 findings on the harassment complaint. Neither did Mr. Mallet file a grievance about his sexual harassment allegations.

[71] VIA suggested Mr. Mallet used BTLR to create evidence of a fresh denial in order to resurrect an otherwise untimely complaint; *Bélair*, 2010 CIRB 510. VIA argued the Board should not be used to relitigate that sexual harassment issue.

[72] VIA further argued Mr. Mallet had never asked for accommodation. Therefore, there was no basis for his March, 2012 grievance suggesting VIA had failed to accommodate him.

[73] The Union argued that Mr. Mallet started receiving BTLR's assistance in November, 2011. In its view, the 90-day time limit in section 97(2) started to run from that date. The later June, 2012 complaint therefore could not contest events from 2010 and 2011.

[74] Mr. Mallet for his part argued that his June, 2012 complaint arose from events occurring in the period from January to May, 2012.

[75] The Board quoted earlier from its November 1, 2013 letter regarding the scope of its oral hearing. The Board in its letter had referred to Mr. Mallet's March 30, 2012 request to the Union:

> The Board will hold a focussed oral hearing to examine Mr. Mallet's March 30, 2012 request for the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW−Canada) (CAW) to file a grievance on his behalf and the CAW's subsequent conclusion not to file a grievance.

[76] The parties' differing positions for their timeliness objections suggest that confusion may have existed about Mr. Mallet's precise request to the Union in his March, 2012 grievance.

[77] If Mr. Mallet's grievance had asked the Union to contest VIA's September, 2011 findings that no sexual harassment had occurred, then VIA and the Union might have had a persuasive timeliness argument. But there was no evidence suggesting Mr. Mallet had this intention. Neither did the Union at the material times ever ask Mr. Mallet if this was his intent.

[78] The Board emphasized at the hearing that it was not the forum to determine the merits of Mr. Mallet's sexual harassment complaint or the Union's conduct during the 2010-2011 period. While the parties led evidence about these events to provide context, events occurring in 2010 and 2011 would usually be untimely for a June, 2012 DFR complaint.

[79] Had Mr. Mallet asked the Union to file a grievance to contest VIA's findings on the sexual harassment allegations when he first retained BTLR in the Fall of 2011, then a refusal to do so might have been relevant for the purposes of a DFR complaint's timeliness.

[80] But the documentation BTLR sent to VIA in January, 2012 only inquired about VIA's proposed mediation. The documentation does not suggest that Mr. Mallet had ever requested the Union to file a grievance to contest VIA's findings on his sexual harassment complaint. Neither do Mr. Walsh's notes suggest Mr. Mallet's grievance had this purpose.

[81] Confusion may have arisen from Mr. Mallet's request to the Union for an investigation under its constitution. But that issue has nothing to do with the collective agreement or Mr. Mallet's grievance.

[82] Mr. Mallet's requests starting in January, 2012 concerned the mediation VIA had offered. He also asked the Union to file a grievance alleging that VIA "refuses to make and have reasonable accommodation for me". When these 2012 requests did not lead to an acceptable resolution for M. Mallet, he decided to file a DFR complaint in June, 2012.

[83] Given this clear time frame, the Board finds there are no timeliness issues which impact Mr. Mallet's June, 2012 complaint.

[84] The Board therefore will examine the process the Union followed after it received Mr. Mallet's 2012 requests for assistance.

C. Did the Union respect the duty it owed Mr. Mallet under section 37 of the *Code*?

1. DFR principles

[85] The principles governing the duty of fair representation are fairly well known.

[86] In *McRaeJackson*, 2004 CIRB 290, the Board described the four elements it will examine when evaluating a trade union's process:

> [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)

[87] The Board does not sit in appeal of a trade union's decisions. Rather, it examines the process a trade union carried out at the material times in order to assess whether a violation of section 37 occurred. The Board in *Singh*, 2012 CIRB 639 (*Singh 639*) described the importance of examining what the union representatives actually did at the material times, instead of what they might have done:

> [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.
>
> (emphasis added)

[88] In *Pepper*, 2009 CIRB 453 (*Pepper 453*), the Board examined allegations that a trade union had failed to address a request for accommodation:

> [37] Based on the Board's review of the evidence in this case, **there are two aspects of the union's conduct that are of concern to the Board: the union's failure to make any effort to obtain any actual medical evidence, other than a verbal summary from the employer representative, despite the fact that this was an accommodation case where medical evidence was admittedly crucial;** and the union's failure to make any effort to discuss the case with the grievor prior to making its decision to withdraw the grievance.
>
> (emphasis added)

[89] The Board in *Pepper 453*, *supra*, concluded that the union had violated the *Code* by failing to discuss the case with the grievor and by not attempting to obtain all the relevant medical information:

> [41] On the facts of this case, **the Board finds that the complainant was prejudiced by the failure of the union to discuss the grievance with her and to endeavour to obtain all of the relevant**

> **medical information prior to withdrawing it.** The union failed to communicate with the complainant to obtain medical evidence that could have challenged the employer's decision to remove her from the modified duty program or at least to obtain the complainant's version of events before making its decision to withdraw the grievance. The union's conduct in this case amounts to serious negligence that is inconsistent with the union's duty of fair representation, which is subject to greater scrutiny in cases involving accommodation issues.
>
> [42] **The Board therefore finds that the union conducted itself in an arbitrary manner when it made the decision to withdraw the complainant's grievance without having made any effort to contact the complainant to obtain the medical evidence necessary to properly evaluate the grievance.**
>
> (emphasis added)

[90] In *Gough*, 2010 CIRB 534 (*Gough 534*), the Board examined a trade union's process when it assisted a bargaining unit member with an accommodation issue. The Board found the trade union's process and assistance demonstrated it had not acted in an arbitrary or discriminatory manner:

> [39] After hearing all of the evidence, including the efforts of the union and the employer beginning in 2004 to encourage the complainant to return to work, and the accommodations offered to the complainant, **we do not find any evidence that the union acted in an arbitrary or discriminatory manner on this issue. Indeed, the union provided advice and assistance to the complainant throughout the process. It advised him what medical evidence he needed, attended meetings with the employer regarding his return to work, convinced the employer to withdraw its demands for him to return to work, and put forward the position of the complainant to the employer.** It is clear during the period prior to the complainant's termination that the complainant's principle interest was not in returning to the workplace, but rather he was focused upon pressuring the employer to investigate his earlier harassment complaint. As arbitrator Picher noted in his award of May 2005, the complainant was "fixated on the past" (Exhibit 3, Tab 3). We would therefore distinguish the matter at hand from the *Barbara Pepper*, *supra*, and *Grace Bingley*, *supra*, cases cited earlier, where the complainants were actively seeking accommodation into the workplace. Ultimately, the complainant returned to work successfully in November 2005 under the same conditions that were offered to him by the employer in July 2004. This suggests that the complainant may well have been able to return to work long before he did and thus mitigate the financial losses that he suffered as a result of his actions. The Board therefore has no difficulty in dismissing this aspect of the complaint against the union.
>
> (emphasis added)

[91] The Board in *Gough 534*, *supra*, further explained why the trade union could make a reasoned decision based on only some of the relevant medical information:

> [41] **Mr. Neale testified that at the time he made his decision to withdraw the grievance, he did not have the specialist reports of Dr. Spinner, however, he did have the June 10, 2003, medical note from Dr. Lenart, which provided a diagnosis for the complainant and mentioned that he was being referred to Dr. Spinner.** Mr. Neale also testified that he spoke to Mr. Penner about the complainant's case on a regular basis, and that on October 16, 2003, he had a lengthy meeting with the

> complainant where all aspects of his grievance were discussed. It is clear from the evidence that while Mr. Neale may not have seen all of the medical reports, he was aware of the complainant's medical condition and was also aware that the complainant attributed this condition to harassment by the terminal manager. **This was not a case like that referred to in *Barbara Pepper, supra*, where the union representative who decided to withdraw the grievance had virtually no contact at all with the grievor prior to making the decision. The evidence suggests that the union representative, Mr. Neale, did have sufficient information to make a reasoned decision on the grievance.** It should also be noted that at the relevant time in question, the grievance being discussed was not one that would be won or lost based on medical reports. The question before the arbitrator would have been whether or not the manager in question had harassed the complainant. This was not a medical issue.
>
> (emphasis added)

[92] The Board will consider these principles as it analyzes the Union's process in Mr. Mallet's case.

2. The Union's argument in support of the representation it provided to Mr. Mallet

[93] The Union argued the evidence demonstrated it turned its mind to Mr. Mallet's requests and came to a reasonable decision. It noted that both Mr. Walsh and Ms. Grant bore no ill will towards Mr. Mallet. Indeed, each had assisted Mr. Mallet with different issues in the past.

[94] The Union did not dispute that it knew Mr. Mallet was on LTD for medical reasons, but it noted that it had no particulars because Mr. Mallet never provided it with the medical information that he had filed at the hearing. In addition, the Union argued that Mr. Mallet's grievance only sought a harassment-free workplace; he did not ask for accommodation of any mental or physical disability.

[95] The Union distinguished the Board's decision in *Pepper 453, supra*, on the basis that Mr. Mallet's situation was not a disability case.

[96] The Union noted that Mr. Mallet's conduct made representation challenging, such as his attempts, through his advisors, to deal directly with VIA. VIA had advised Mr. Mallet in January, 2012 that it had to deal with the Union. The Union then wrote to Mr. Mallet on February 29, 2012 and asked him to contact Mr. Walsh for assistance.

[97] Despite this written correspondence, Mr. Mallet again wrote directly to VIA in March, 2012 and suggested it should deal directly with him.

[98] Mr. Walsh for his part contacted Mr. Mallet the same day he received the request for mediation and the filing of a grievance. Mr. Walsh spoke to Mr. Mallet and considered the information Mr. Mallet later emailed to him. He also spoke to VIA about Mr. Mallet's situation.

[99] Ms. Grant similarly dealt with Mr. Mallet in good faith in her efforts to schedule a mediation. Her goal was to get Mr. Mallet back to work.

[100] The Union argued both Mr. Walsh and Ms. Grant had concluded the grievance was premature. They concluded mediation would ultimately resolve his situation.

3. Mr. Mallet's actions

[101] The Board agrees with the Union that some of Mr. Mallet's actions made it more challenging to represent him. But a few ill-advised actions were not sufficient to relieve the Union of its duty under the *Code*.

[102] For example, rather than writing initially to the Union to assist Mr. Mallet, his advisors bypassed the Union and wrote directly to VIA. VIA advised Mr. Mallet in January, 2012 that it had to deal with the certified bargaining agent. This is not a surprising position for a unionized employer to take.

[103] Despite this clear position, and despite the Union's February 29, 2012 letter to Mr. Mallet advising which union official he should contact to pursue his issues, he again decided to correspond directly with VIA on March 5, 2012.

[104] While no doubt annoying and unhelpful, Mr. Mallet's actions do not impact the Board's ultimate conclusion. The Union still had a request for its assistance from a disabled employee who had been off work for several years for medical reasons. The Board must examine how the Union dealt with this request.

4. Union decision regarding mediation

[105] Did the failure of the mediation to take place demonstrate the Union violated the *Code*?

[106] Mr. Mallet did not persuade the Board that the Union acted inappropriately when it did not pursue mediation after the other employee declined to participate. The mediation was consensual; there was no suggestion the Union could force his fellow employee to participate.

[107] The Board does not find it surprising that the other employee refused to participate in the mediation once there was a suggestion that a criminal investigation was taking place. If Mr. Mallet's complaint were limited to the fact no mediation took place, then the Union's process in that regard would have met the standard imposed by section 37.

[108] However, Mr. Mallet, who had repeatedly asked the Union to assist him to return to work, satisfied the Board that the Union acted arbitrarily when it decided not to file his accommodation grievance.

5. Did the Union ever clarify what Mr. Mallet sought from his grievance?

[109] A trade union needs to know what a grievance is about, or to ask for clarification if in doubt, in order to process it properly. In this case, the Board had trouble reconciling the Union's seemingly contradictory positions about the subject matter of Mr. Mallet's grievance request.

[110] In the Union's August 15, 2012 response to Mr. Mallet's DFR complaint, it took two positions: i) that an arbitrator would agree with VIA's September 6, 2011 conclusions on the sexual harassment allegations and ii) that VIA had already satisfied its obligation to accommodate Mr. Mallet.

[111] It is useful to repeat the Union's position as set out in its official response to Mr. Mallet's complaint:

> 20) Under date of March 30, 2012 the Union did receive a request from the complainant to file a grievance. Throughout the process this was the first time the complainant made such a request. The Union turned its mind to this request.
>
> **First consideration was could we present the same evidence, material and/or lack thereof to an arbitrator and expect a different conclusion then that of the September 6, 2011 decision. The answer to that question was "no"** The [*sic*] next consideration was time limits. Clearly, the Corporation could argue that cause of grievance dated back to 2007 or alternatively, January 21, 2010 and at the very least September 6, 2011. In any event, the time limits would be exceeded. **The Union also considered the Company's offers to accommodate the Complainant. It is the Union's opinion that an arbitrator would find those offers of accommodations to be reasonable.** The Union was also concerned with the question of duplicity of proceedings.

> 21) The Complainant was advised by Mr. Walsh in April 2011 that his request of March 30, 2012 for a grievance being filed was declined.
>
> (emphasis added)

[112] The Union further suggested in its August, 2012 response to the complaint that it had examined VIA's accommodation attempts and determined it would not succeed before an arbitrator. This is an interesting proposition given that VIA, in support of its timeliness objection, argued that Mr. Mallet had never asked for accommodation and thus his grievance had no foundation. Ultimately, however, if this constitutes a contradiction in the perspectives of VIA and the Union, it is relevant to a grievance under the collective agreement rather than to this DFR complaint.

[113] Why does the Board place such importance on the Union's response to Mr. Mallet's written complaint? In DFR cases, the Board initially conducts a *prima facie* case analysis. If a complainant does not make out a *prima facie* case, then the Board will not ask the trade union to respond to the DFR complaint. Instead, the Board will dismiss the complaint.

[114] In *Reid*, 2013 CIRB 693, the Board highlighted the importance of a complainant's pleadings, as well as those of a responding trade union if called upon to respond to a DFR complaint:

> [32] As mentioned above, the Board is fully aware that Ms. Reid, like many unrepresented litigants, may not be familiar with the *Code*. But a complainant still has the ultimate obligation of going through his/her own material, including allegedly relevant documents, and drafting a complaint in accordance with the *Regulations*. That obligation is not satisfied by filing hundreds of pages of documents and implicitly asking the Board to go through it and decide what, if anything, should form part of a complaint.
>
> [33] **It would be unfair in a DFR case for the Board to forego the essential *prima facie* case screening analysis of an unwieldy pleading and instead ask the respondents to provide their submissions. One of the goals of the *prima facie* process is to avoid the waste of resources which occurred in the past when respondents had to respond to every DFR complaint, no matter how deficient.**
>
> [34] **The quid pro quo is that respondents must now take the time necessary to respond properly in those cases where the Board requests submissions after finding that a *prima facie* case exists.**
>
> (emphasis added)

[115] Since the Board dismisses the vast majority of DFR complaints based solely on the parties' written pleadings, a trade union's response has significant importance in the process.

[116] The Board has trouble reconciling the explanation contained in the Union's August 15, 2012 response with the position it later put forward at the oral hearing. In August, 2012, the Union argued *inter alia* the grievance would not succeed before an arbitrator because VIA had already offered Mr. Mallet appropriate accommodation.

[117] At the hearing, the Union argued that that same grievance was premature.

[118] Mr. Walsh's April 5, 2012 handwritten note indicates some initial discussion occurred with VIA about the concept of reasonable accommodation. When asked in cross-examination what Mr. Mallet's grievance was about, Mr. Walsh replied: "The basis as I read it is reasonable accommodation".

[119] In the two-day period the Union took to decide not to file Mr. Mallet's grievance, no one seemingly ever asked him precisely what his grievance was about. This may explain the differing positions the Board heard both about Mr. Mallet's request, as well as the arguments put forward on timeliness.

6. Must a trade union ask for medical evidence for a grievance requesting accommodation?

[120] Mr. Mallet had been off work since February, 2010. The Union knew that he was in receipt of LTD benefits. The Union knew as early as 2012 that Mr. Mallet was asking to return to work at VIA. VIA had copied Union representatives in its January 17, 2012 letter to BTLR.

[121] At the oral hearing, Mr. Mallet filed medical evidence about his condition. It was not disputed that the Union never asked Mr. Mallet to provide medical evidence about his ability to return to work. Neither did it ask him about any limitations he had which might impact his accommodation request.

[122] Both Mr. Walsh and Ms. Grant testified they did not ask Mr. Mallet for medical information in support of his grievance. Ms. Grant understood that Mr. Mallet had to first provide a doctor's note indicating that he was fit to work. She testified she would not ask for medical records without first receiving a note.

[123] The Union argued that Mr. Mallet had an obligation to provide it with relevant medical information, but that he failed to do so.

[124] The Board is satisfied that the Union acted arbitrarily in making a decision about Mr. Mallet's grievance without first requesting and reviewing his medical information: *Pepper 453*, *supra*. Mr. Walsh clearly discussed accommodation issues with VIA. As the Board's decisions in *Pepper 453*, *supra*, and *Gough 534*, *supra*, illustrate, medical evidence is a crucial element when evaluating an accommodation case.

[125] The Union suggested that Mr. Mallet's grievance was focussed solely on resolving a work-related interpersonal issue and was therefore not an accommodation grievance involving a disability. This argument failed to convince the Board for several reasons.

[126] Firstly, as mentioned, the Union never confirmed with Mr. Mallet what his grievance was about. The Union could not refer the Board to any evidence which confirmed that Mr. Mallet's disability, which entitled him to LTD benefits, had no relevance to his grievance.

[127] Secondly, the argument that Mr. Mallet's grievance had nothing to do with his disability seems difficult, though perhaps not impossible, to reconcile with the Union's August submission which stated that VIA had already fulfilled its obligation to accommodate Mr. Mallet.

[128] Thirdly, even if part of Mr. Mallet's concern involved an interpersonal issue, if that issue also contributed to Mr. Mallet's disability and long absence on LTD, then it needed to be considered. The Board does not see the two issues as watertight and distinct. An interpersonal issue and a later disability preventing an employee from working are not necessarily mutually exclusive. There was little, if any, evidence the Union turned its mind to this possibility.

[129] In short, whether Mr. Mallet's medical evidence would have supported or hurt the strength of his grievance is not a question for the Board. But a failure to ask for and evaluate it demonstrates a level of perfunctoriness which raises significant concerns.

7. The Union's examination of Mr. Mallet's grievance

[130] Mr. Walsh talked to VIA about several issues, including accommodation, *supra*. His April 5, 2012 handwritten note (Ex−2; page 25) refers to a July, 2011 discussion during the

harassment investigation about a Stock Attendant position. Mr. Walsh had not been involved personally in that 2011 discussion. His note also referred to GWL's interest in getting Mr. Mallet back to work.

[131] Mr. Walsh never discussed VIA's information with Mr. Mallet. A trade union generally has an obligation to verify an employer's information with the complainant. In this case, the Union seemingly decided not to pursue the grievance in part based on information it had received during a single telephone call with VIA.

[132] In *Singh 639*, *supra*, the Board noted that a failure to obtain the complainant's views on key information provided by the employer could violate its duty:

> [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.
>
> …
>
> [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.**
>
> (emphasis added)

[133] The Union seemed to focus mainly on the mediation process, rather than considering Mr. Mallet's independent request for the Union to file an accommodation grievance. In the Board's view, the Union acted arbitrarily when it failed to investigate what Mr. Mallet wanted from his grievance and what evidence existed in support of his request.

[134] The Board notes that the Union made the decision not to file Mr. Mallet's grievance within two days. Mr. Walsh first received the grievance on April 3, 2012. The Union indicated it decided not to file the grievance just two days later on April 5, 2012. While a Union may make a decision expeditiously if it has all the relevant information, a hasty decision based on limited facts is an entirely different situation.

[135] The Board has concluded that Mr. Walsh, despite good intentions, never advised Mr. Mallet that he would not file the grievance. While Mr. Walsh made notes of other conversations he had in early April, 2012, he made no note of his alleged April 5, 2012 phone message advising Mr. Mallet that the union would not file his grievance.

[136] Mr. Walsh agreed in cross-examination that he did not send Mr. Mallet a letter confirming the Union's decision and the reasons for it. Neither did he advise Mr. Mallet that he could appeal the Union's decision not to file the grievance.

[137] Even if Mr. Walsh had left a message for Mr. Mallet, a union has an obligation to provide some explanation to a member why it has decided not to pursue a grievance, as the Board recently described in *Scott*, 2014 CIRB 710 (*Scott 710*):

> [139] **A refusal to provide reasons raises the troubling question of whether long service union members must file a complaint with the Board in order to learn, at even a basic level, the specific reasons why their grievances did not go to arbitration. The Board is not suggesting a trade union needs to provide written reasons in the way tribunals do.** But there needs to be some concrete explanation, especially for the four Complainants who had, collectively, over 60 years of service at United.
>
> [140] In labour arbitration, an employer must provide its grounds at the time it terminates an employee. It usually cannot later change or add to those grounds. In a similar light, the Board in *McRaeJackson 290*, *supra*, indicated a key factor to consider is whether the trade union provided reasons for its decision not to go to arbitration.
>
> [141] It does not appear overly demanding to require a trade union, at the end of its process, to provide an explanation to an employee why his/her grievance will not go any further. **If providing nothing of substance to a grievor is designed to provide a trade union with greater flexibility at a future DFR hearing, then this strategy may be suspect. The Board examines what a trade union actually did, not what it could have done: *Singh 639*, *supra*.**
>
> (emphasis added)

[138] In this case, Mr. Mallet received no indication in April, 2012 that the Union had decided not to file his accommodation grievance. It seemed he only learned of this fact after filing a complaint with this Board.

8. Mr. Mallet's ability to file a grievance

[139] The Union noted that Mr. Mallet could have filed his own grievance under the collective agreement. Even if this were the case, that entitlement did not relieve the Union from respecting its obligations under section 37 of the *Code*. When Mr. Mallet sought assistance from the Union for matters arising from the collective agreement, the *Code*'s duty applied.

[140] VIA's January 17, 2012 letter, and the Union's own actions, clearly suggested that Mr. Mallet and his representatives did not have the requisite status to pursue these matters on their own. Mr. Walsh also testified that the Union preferred that bargaining unit members not file grievances themselves.

[141] Neither did the Union advise Mr. Mallet that he could file the grievance himself.

[142] Accordingly, the Board was not persuaded that Mr. Mallet's failure to file the grievance himself in any way absolved the Union from meeting its *Code* obligations.

9. Mr. Mallet's alleged failure to ask for assistance

[143] The Union also suggested that it remained willing to assist Mr. Mallet, but that he failed to make any other requests for assistance. Instead, he filed a DFR complaint.

[144] The Union was fully aware of Mr. Mallet's lengthy absence on disability. It had been heavily involved in the earlier 2011 sexual harassment complaint, both by meeting with Mr. Mallet about the facts and by participating in VIA's investigation.

[145] The Union knew that in 2012 Mr. Mallet had repeatedly indicated that he wanted to return to work; see, for example, his letters of January 16, February 2, February 25, March 5 and March 30.

[146] Mr. Mallet asked the Union directly for its assistance with the proposed mediation and an accommodation grievance. The Board does not find persuasive the Union's argument that Mr. Mallet somehow failed to ask for help. After clearly advising the Union of his desire to return to work on several occasions, there was no further obligation on Mr. Mallet to keep asking for assistance.

[147] The Board notes as well that the duty of fair representation is a continuing duty. It does not end when an employee files a DFR complaint: *Lamolinaire*, 2009 CIRB 463, at paragraph 51.

10. Summary

[148] The Board has concluded that the Union violated the *Code*.

[149] In the Board's view, the Union focussed on the mediation and carried out a perfunctory examination of Mr. Mallet's request to file an accommodation grievance. The Union's arbitrary process failed to meet the standards imposed by the *Code* in several key ways, including:

i) Judging from its August 15, 2012 response, as compared with its position at the oral hearing, the Union seemingly did not have a clear understanding of Mr. Mallet's grievance. Its August, 2012 response suggested an arbitrator would dismiss Mr. Mallet's grievance on the merits. At the oral hearing, the Union argued that same grievance was premature;
ii) The Union failed to request and examine relevant medical information after receiving a grievance requesting reasonable accommodation from a disabled employee;
iii) The Union discussed accommodation with VIA, but never spoke to Mr. Mallet to get his views; and
iv) The Union never told Mr. Mallet it would not proceed with his grievance following its April 3−5, 2012 consideration of the matter. It never provided him with any explanation of the reasons why it had decided not to proceed.

[150] Individually, or cumulatively, these items support a finding that the Union violated section 37 of the *Code* by acting in an arbitrary manner.

V. Remedy

[151] Sections 99(1)(*b*) and 99(2) provide the Board with its remedial authority for situations where a trade union has violated its duty under the *Code*:

> 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.

[152] Unless the three parties can find a mutually agreeable resolution themselves, the Board has decided to order the following remedies as a result of the Union's arbitrary conduct:

i) The Union shall pay Mr. Mallet's reasonable legal costs incurred in the bringing of this complaint, either as agreed, as taxed (reviewed) or as assessed;
ii) The Union will forward Mr. Mallet's reasonable accommodation grievance to arbitration; any time limits in the collective agreement are hereby waived;
iii) Mr. Mallet will be entitled to retain legal counsel of his choice to plead his accommodation grievance before a labour arbitrator;
iv) The Union shall pay the reasonable legal costs for Mr. Mallet's choice of legal counsel, either as agreed, as taxed (reviewed) or as assessed;
v) The Union will cooperate with Mr. Mallet's or his legal counsel's reasonable requests for information and assistance with the arbitration;

vi) In accordance with *Scott 710*, *supra*, if an arbitrator awards Mr. Mallet any compensation, then the Union shall pay such sums for the period starting from the date Mr. Mallet filed his complaint (June 11, 2012) to the date of this decision. VIA would be responsible to pay any sums for any other time period.

[153] The Board retains jurisdiction over any issues arising from the above remedies.

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

_____
Graham J. Clarke
Vice-Chairperson

_____
Richard Brabander
Member

_____
Daniel Charbonneau
Member