Canada Industrial Relations Board Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4e stage Oust, Ottawa (Ont.) K1A 0X8

Reasons for decision

Richard Vézina et al.,

complainants,

and

International Association of Machinists and Aerospace Workers, Transportation District 140,

respondent,

and

Air Canada,

employer,

and

Aveos Fleet Performance Inc.,

interested party.

Board Files: 27616-C
27635-C

Neutral Citation: 2010 CIRB **540**
August 24, 2010

A panel of the Canada Industrial Relations Board (the Board) composed of Mr. William G. McMurray, Vice-Chairperson, and Messrs. Daniel Charbonneau and Patrick Heinke, Members, considered the above-noted complaints.

Parties of Record

Each of the complainants was self represented;
Ms. Amanda Pask and Mr. Michel Pelot, for the International Association of Machinists and Aerospace Workers, Transportation District 140;
Mr. Fred Headon, for Air Canada;
Ms. Antonietta Marro, for Aveos Fleet Performance Inc.

These reasons for decision were written by Mr. William G. McMurray, Vice-Chairperson.

[1] Section 16.1 of the *Canada Labour Code (Part I - Industrial Relations)* (the *Code*) provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed the materials provided by the parties, the Board is satisfied that the documentation before it is sufficient for it to decide this matter without an oral hearing.

I – Nature of the Complaints

[2] On July 9, 2009, Mr. Richard Vézina filed a complaint with the Board pursuant to section 97(1) of the *Code* in which he asserts that the International Association of Machinists and Aerospace Workers, Transportation District 140 (the union) has breached the duty of fair representation owed to him, pursuant to section 37 of the *Code*. More specifically, he alleges that the union acted in a discriminatory manner when the union decided to hold a further ratification vote for members of the Technical, Maintenance and Operational Support (TMOS) bargaining unit on a tentative agreement to extend the term of the existing collective agreement for a period of 21 months. In the initial vote, the results of which were announced on June 30, 2009, the members of the TMOS unit rejected the tentative agreement.

[3] Mr. Vézina was not the only member of the TMOS bargaining unit to file a complaint with the Board alleging that the union's decision to hold a further ratification vote was a breach of the duty of fair representation. The Board received over 45 such complaints. Many of the complaints further

allege that the union's actions were either "arbitrary" or "in bad faith" and contrary to section 37 of the *Code*. This group, including Mr. Vézina, will be now referred to as "the complainants."

[4] The union submits that the subject matter of the complaints – the union's decision to hold a further ratification vote – is a matter of internal union affairs, which does not come within the scope of the Board's jurisdiction under section 37 of the *Code*. In any event, the union denies that its actions were arbitrary, discriminatory or in bad faith and it denies any breach of its duty of fair representation.

[5] By way of remedy, the complainants all ask the Board to strike down or to nullify the results of the further ratification vote. Some of the complainants also ask the Board to send the matter back to the union to negotiate a new agreement with Air Canada (the employer or the company).

[6] This is the Board's decision on all of the duty of fair representation complaints against the union related to the union's decision to hold a further ratification vote.

II – Issues to be Determined

[7] Given the union's submission over the scope of section 37 of the *Code* in the context of these complaints, the Board must decide, in making its decision on these duty of fair representation complaints, whether the union was engaged in the representation of its members "with respect to their rights under the collective agreement that is applicable to them" within the meaning of section 37 of the *Code* when the union decided to hold a further ratification vote.

[8] If so, the Board must decide whether there is evidence that the union was acting in a manner that was "arbitrary, discriminatory or in bad faith."

III – Facts

[9] The material facts are not in dispute.

[10] The complainants are all members of the TMOS bargaining unit employed, at all material times, by Air Canada.

[11] The union is the certified bargaining agent for, among others, a unit of employees working in the TMOS group at Air Canada and other employers: Board order no. 9085-U dated April 21, 2006.

[12] In the spring of 2009, the union and the company commenced collective bargaining since the term of the relevant collective agreement would expire at the end of June 2009.

[13] The bargaining was taking place in the context of the economic difficulties facing the employer, as an airline company, and the ramifications of those economic difficulties on the company's ability to fund, in a timely manner, its obligations under the defined benefit pension plans in effect. The executive summary of a regulatory impact analysis statement, published in "Air Canada Pension Plan Funding Regulations, 2009", Canada Gazette Part II, Vol. 143, No. 16 - August 05, 2009, indicated the extent of the problem:

> …Absent an immediate moratorium on its special pension payments, Air Canada would not have the financial flexibility and regulatory certainty necessary to obtain new financing, which could force the airline to cease operations...

[14] On June 4, 2009, the Government of Canada appointed a retired judge to assist the parties in resolving their pension funding issues.

[15] On or about June 7, 2009, the union and the company reached an agreement which included a moratorium on certain pension funding for a period of 21 months. At the same time, the company and the union also reached an agreement, subject to ratification, to extend the term of the collective agreement for a period of 21 months. The union issued a bulletin to its members in the TMOS unit to advise them of the content of the tentative agreement (see union information bulletin no. 056 dated June 9, 2009).

[16] A ratification vote was held. The members of the bargaining unit of TMOS workers did not ratify the tentative agreement; union information bulletin no. 065 dated June 30, 2009, indicated the

members had voted 50.8 percent against.

[17] The members of the bargaining unit of clerical workers, also represented by the union, ratified the tentative agreement; union information bulletin no. 066 dated June 30, 2009, indicated the members had voted 93.2 percent in favour.

[18] The members of the bargaining unit of finance workers, also represented by the union, ratified the tentative agreement; union information bulletin no. 067 dated June 30, 2009, indicated the members had voted 87.5 percent in favour.

[19] After the rejection of the tentative agreement by the TMOS bargaining unit, the employer issued four letters of clarification to the union; all four letters were dated July 6, 2009. The first letter addressed objections or concerns related to subcontracting of work performed by Aveos Fleet Performance Inc. (Aveos) on aircraft operated by Air Canada; the second letter addressed objections or concerns over the financial and operational status of Aveos; the third letter addressed objections or concerns over labour relations; and the fourth letter addressed objections or concerns over the defined benefit pension plans.

[20] The union circulated copies of the employer's four clarification letters and posted them on its website.

[21] On July 6, 2009, the union issued an information bulletin and a negotiations update announcing its decision to hold a further vote for the members of the TMOS unit. The members would vote for or against the tentative agreement, having regard to, among other things, the four letters of clarification. At the same time, the members would cast a separate ballot for or against a strike. The dual vote was scheduled for July 14, 2009. The information bulletin indicated that the union had a legal opinion "that there will most likely be a filing for CCAA" should the tentative agreement fail. The information bulletin recommended a vote in favour of the tentative agreement.

[22] On July 6, 2009, the union also issued a four-page "Q&A" document listing the most frequent

questions it had received from its members over the matters of interest as well as the union's answers to those questions.

[23] On July 9, 2009, the first of many duty of fair representation complaints against the union's decision to hold the further vote on July 14, 2009, was filed with the Board. On July 9, 10 and 13, 2009, some 16 more complaints, all identical, were filed with the Board. All of these complaints were supported with a common one-page letter dated July 9, 2009, alleging the union's decision to hold a further vote was a "manipulation" of the legal union process and that the decision was discriminatory and illegal.

[24] On July 13, 2009, the Local Lodge 1751 of the union issued bulletin no. 046-2009 expressing its opposition to both the tentative agreement and to the further vote. A key paragraph of the bulletin provides:

> The Local Lodge 1751 Executive Board members disagree with the fact that the bargaining committee is not involved and disagree with this second vote on the tentative agreement. Therefore, the LL Executive does not support this tentative agreement.

[25] The dual vote was held on July 14, 2009. The members voted 60.3 percent in favour of the tentative agreement. The union announced the results of the vote in bulletin no. 070 dated July 15, 2009.

[26] Between July 23, 2009 and August 13, 2009, a further dozen duty of fair representation complaints, all identical, were filed with the Board; these complaints were supported by a common four-page letter addressed to the Board's Regional Director in Montréal. The letter focused on provisions of the union constitution and by-laws. The letter alleged that the union's decision to hold a further vote was a violation of the union's constitution. The letter also alleged that members of the union negotiating committee were excluded from a meeting that was held after the results of the initial ratification vote were announced and these complainants argued that this exclusion was a violation of the union by-laws.

[27] On July 24, 2009, over a dozen more duty of fair representation complaints were filed with the

Board; these complaints were identical and focused on a common one-page letter. The complainants are among a group of workers within the bargaining unit who perform heavy maintenance work on aircraft. They are currently seconded by Air Canada to Aveos and they are concerned over the prospect of the eventual transition of employment from Air Canada to Aveos. They argue that since they are the only members within the TMOS unit to be affected by the issue of the transition of employment to Aveos that they should be the only members entitled to vote on that aspect of the tentative agreement.

IV – The Law

[28] The core of these many complaints is the allegation that the union breached it duty of fair representation under the *Code* when it decided to hold a further ratification vote.

[29] The *Code* does not contain any provisions concerning ratification votes. The *Code* does not therefore set out or regulate the conditions under which a union may or must hold a ratification vote. The Board derives its powers, primarily and essentially, from the *Code*. Accordingly, the Board does not generally or routinely concern itself with questions related to ratification votes.

[30] A union's duty of fair representation is set out in section 37 of the *Code* in the following language:

> 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.

[31] In essence, under this section of the *Code*, a union is prohibited from engaging in any of three distinct forms of misconduct when dealing with its members' rights under the collective agreement. In those circumstances, the union must not act arbitrarily, in a discriminatory manner, nor must it be motivated by bad faith. Rather, it must take a reasoned view of the problem before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations (see *Vergel Bugay*, 1999 CIRB 45 at paragraph 28).

[32] Given the nature of the allegations in the complaints and the type of relief the complainants have asked the Board to provide, it is useful to point out what the Board may and may not do under the *Code*, when it is dealing with a complaint alleging a breach of section 37.

[33] Following certification, a union has exclusive power, pursuant to section 36 of the *Code*, to bargain collectively on behalf of the employees in the bargaining unit. The union has the corresponding obligation, pursuant to section 37 of the *Code*, to act in good faith and in a manner that is not discriminatory or arbitrary. The Board has said that the duty of fair representation exists as a counterpart to the union's exclusive authority to deal with grievances under the collective agreement (see *Virginia McRaeJackson*, 2004 CIRB 290 at paragraph 6).

[34] Section 37 expressly refers to the union's actions "in the representation of any of the employees in the unit with respect to their rights under the collective agreement." Those words serve to limit the scope of a union's duty of fair representation and, at the same time, limit the scope of the Board's scrutiny of a union's actions in matters that do not relate to rights under a collective agreement (see *Nelson G. Burrows et al.* (1984), 57 di 205 (CLRB no. 488) at page 214; *Stanley Warner* (1982), 51 di 146 (CLRB no. 403) at page 157; *Dennis Dohm* (1983), 52 di 160 (CLRB no. 439) at page 164; *Richard Connolly et al. (1998)*, 107 di 120; and 45 CLRBR (2d) 161 (CLRB no. 1235) at paragraph 107; and *Vergel Bugay*, *supra*, at paragraph 38). The Board does not, therefore, have jurisdiction under section 37 of the *Code* to examine a union's actions in all areas of union activities. The Board and its predecessor, have consistently held that the scope of the duty under section 37 of the *Code* does not extend to internal union affairs (see *Terry Wilson et al.* (1986), 66 di 201 (CLRB no. 583) at page 210). Among other things, that means that in the normal course the *Code* does not give the Board the power to examine a union's activities in purely internal matters such as the administration or application of its constitution or by-laws.

V – Positions of the Parties

[35] As noted above, essentially all of the many complaints fell primarily into one of three standard types of complaints.

[36] The first group of complaints, filed starting on July 9, 2009, alleges that the union's decision announced July 6, 2009, to hold a further ratification vote on July 14, 2009, was a "manipulation" of the union process and was, therefore, discriminatory and in bad faith. There was no allegation of arbitrary conduct. These complaints all rely on the same one-page letter dated July 9, 2009.

[37] The second group of complaints, filed between July 23, 2009, and August 13, 2009, refers to a meeting that occurred following the failed ratification vote and from which the members of the union negotiating committee were allegedly excluded. The complaints state that such exclusion was contrary to article 13.09 of the union's by-laws. These complainants submit that the decision to hold a further ratification vote was contrary to article XVI of the union's constitution and further submit that in the days preceding the July 14, 2009 vote, the union engaged in a campaign of fear propaganda and misinformation. The complaints allege that the union acted in a manner that was arbitrary and in bad faith. These complaints all rely on the same four-page letter and a number of supporting documents.

[38] The last group of complaints, essentially all filed on July 24, 2009, relates specifically to those workers in the bargaining unit performing heavy maintenance and to the prospect of the transition of employment to Aveos. These complainants felt that they alone should be able to vote on that aspect of the tentative agreement that concerned issues related to the transition, at some point in time, of employment of certain workers performing heavy maintenance to Aveos. These complaints alleged that the union acted arbitrarily and in bad faith. There was no allegation that the union acted in a discriminatory manner. These complaints all rely on the same one-page letter.

[39] A few of the complainants filed more than one type of complaint.

[40] All of the complaints ask the Board to strike down or to nullify the further vote held July 14, 2009. Some of the complainants ask the Board to require the union to respect the results of the ratification vote announced June 30, 2009. Others ask the Board to require the union and the company to negotiate a new tentative agreement. Others ask the Board to fix a date on which those negotiations must begin. Others ask the Board to reprimand the union for its alleged breaches of its constitution and by-laws.

[41] The union filed its response to the complaints on October 16, 2009.

[42] The union response was short and succinct on the scope of the Board's powers under section 37 of the *Code*. The union submits that decisions as to when and under what circumstances a union will seek the views of its members through a secret ballot on a proposed contract are matters of pure trade union administration, which the Board has consistently held do not engage the duty of fair representation.

[43] The union cited and relied upon a 1998 decision of the previous Board which held that the Board has no power to interfere in respect of such internal matters as the way in which ratification takes place or indeed in respect of whether there is any membership ratification at all (see *Richard Connolly et al.*, *supra*, at paragraph 107).

[44] The union also says that the Board has no jurisdiction under section 37 of the *Code* to interfere in internal affairs of the union such as whether the actions of the union are or are not consistent with the union constitution or by-laws. The union's position is, in any event, that it fully respected its union constitution and by-laws at all times.

[45] The union also submits, the jurisdictional issues aside, that its actions were not arbitrary, discriminatory or in bad faith.

[46] The union's response was long and comprehensive when it came to setting out the history and the facts that were in issue during the negotiations and the reasons which ultimately led the union to decide to hold a further ratification vote. The union's response to the complaints sets out in great detail all of the background facts and provide a number of supporting documents. The union response provided the details of the global economic crisis and the collapse of the financial markets on the financial position of the employer and the negative impact on the employer's ability to meet funding requirements of its various defined benefit pension plans. Given the date on which the term of the collective agreement would expire, this was the economic context in which collective bargaining was taking place at the same time. The union's position, shared by other interested

parties, was that had all of the parties not resolved these issues in a comprehensive manner, the result could have been that the company would have ceased operation.

[47] The union's response, dated October 16, 2009, provides significant detail on the negotiations that led to the pension moratorium and to the tentative agreement as well as the content of the tentative agreement and the four letters of clarification. That portion of the union's response, which lists all of the considerations that led it to decide to hold a further ratification vote is, alone, some two pages long. The union's response acknowledges that some members did not vote in favour of the tentative agreement and concludes:

> 37. It is submitted, however, that internal political disagreement does not make the actions of the Union's leadership, its Negotiations Committees, and those staff and officials who supported a second vote and recommended acceptance of the tentative agreement either bad faith, arbitrary or discriminatory...

VI – Analysis and Decision

[48] The Board has reviewed all of the pleadings and has carefully considered the supporting documentation on file. This has given the Board a detailed understanding of the matters at issue during all of the various and interrelated negotiations. More critically, given the allegations in the complaints, the Board has a full appreciation of the basis and rationale for the union's actions, including the union's actions between June 30 and July 6, 2009, that led to its decision to hold a further ratification vote. The complainants provided a similarly full explanation of their concerns with the substance of the tentative agreement to extend the term of the collective agreement for a period of 21 months and with the process that led to the further ratification vote.

[49] The Board finds that the union's decision to hold a further ratification vote on July 14, 2009, on the tentative agreement following the issuance of the four letters of clarification by the employer, is solely a matter of internal union affairs. The Board's jurisdiction under the *Code* to determine complaints alleging that a union has breached its duty of fair representation to its members does not extend in these circumstances to an examination of whether the union's decision to hold a further vote was or was not consistent with its constitution or by-laws. The Board therefore finds that the union was not engaged in the representation of its members "with respect to their rights under the

collective agreement that is applicable to them", within the meaning of those words in section 37 of the *Code,* when the union reached its decision to hold a further vote. Given that finding, the Board must dismiss the complaints for lack of jurisdiction.

[50] In any event, even if the Board had jurisdiction under the *Code* over the subject matter of these complaints, the Board finds no evidence that the union was acting in a manner that was arbitrary, discriminatory or in bad faith when the union decided on July 6, 2009, to hold a further ratification vote on July 14, 2009. The dissatisfaction of some members of a bargaining unit with the tentative agreement and their disappointment with the internal union process that resulted in a further ratification vote is not, in itself, evidence that the union's actions were arbitrary or were discriminatory or were undertaken in bad faith. In the absence of such evidence, the Board must dismiss the complaints.

[51] The Board finds no breach of section 37 of the *Code.*

[52] The Board dismisses the complaints.

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

William G. McMurray
Vice-Chairperson

Patrick J. Heinke
Member

Daniel Charbonneau
Member