



Canada Industrial Relations Board • Conseil canadien des relations industrielles

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CIRB Letter Decision No. **1533**

BY PRIORITY POST

Mr. Dimitrios Papadopoulos

Communications, Energy and
Paperworkers Union of Canada
Suite 9100
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Montréal, Quebec
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Attention: Mr. John Caluori
National Representative

Corus Entertainment
Metromedia CMR Broadcasting Inc.
Human Resources Services and Corporate Affairs
4255 Wellington Street
Montréal, Quebec
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Attention: Mr. Gilles Sénécal
Director

Dear Sirs:

In the matter of the *Canada Labour Code (Part I - Industrial Relations)* and a complaint of unfair labour practice filed pursuant to section 97(1) thereof by Mr. Dimitrios Papadopoulos, complainant, alleging violation of section 37 of the *Code* by the Communications, Energy and Paperworkers Union of Canada, respondent, CORUS Entertainment Inc., employer.

The Board was composed of Mr. Warren R. Edmondson, Chairperson, sitting alone pursuant to section 14(3)(c) of the *Canada Labour Code (Part I - Industrial Relations)* (the *Code*).

I - Nature of the Complaint

This is a complaint filed with the Canada Industrial Relations Board (the Board) on March 29, 2005, by Mr. Dimitrios Papadopoulos (the complainant), alleging violation by the Communications, Energy and Paperworkers Union of Canada (the union) of its duty of fair representation as provided by section 37 of the *Code*, for not representing him adequately with respect to his alleged constructive dismissal by his employer, CORUS Entertainment Inc. (the employer).

II - Facts and Position of the Parties

A - The Complainant

The complainant worked for CORUS Entertainment Inc. in Montréal as a radio operator. He started working for the employer in November 1997. He explains that on December 2, 2004, he received a memo informing him that, effective December 6, 2004, the overnight operating shift would be eliminated. The complainant submits that this decision had significant financial implications for him because he worked this shift. He notes that there were no lay-offs due to these cutbacks, however, his hours were greatly reduced.

On December 6, 2004, the complainant wrote an email to Ms. Betsy Lipes, Chief Shop Steward, and to the employer stating that many articles of the collective agreement had been

breached. The complainant submits that Ms. Lipes responded the same day by email, answering that most of the articles that he had identified in the collective agreement did not apply to him because he was not a full-time employee. Ms. Lipes' email stated that it was the union's view that the complainant was, in fact, a part-time employee.

The complainant disagrees with the union's conclusion and submits that he was a full-time employee. He states that he worked 40 to 60 hours a week for many years, that he was given full-time pay stubs and that he received benefits that are only given to full-time employees.

In early December 2004, the complainant contacted Mr. Claude Cloutier, the union's National Representative. The complainant submits that he explained his situation and that Mr. Cloutier advised him that the union would support his case. According to the complainant, Mr. Cloutier did not understand why Ms. Lipes had advised him that the union would not pursue the matter.

The complainant indicates that in early December 2004, he declined a meeting with the employer because he wanted the union to be present. The complainant states that a meeting had been scheduled for December 10, 2004. According to the complainant, he contacted the union and advised it of the meeting; however, he says that Mr. Cloutier cancelled the meeting without rescheduling it.

On January 20, 2005, the complainant contacted Ms. Lipes and asked for a meeting in order to file a grievance. The meeting was held on January 24, 2005, in the presence of Ms. Lipes and Mr. Pierre Gervais, the complainant's immediate supervisor and the Local Shop Steward. The complainant left the meeting with a grievance form, which he subsequently completed.

The complainant alleges that on February 7, 2005, Mr. Gervais, in an effort to provoke him, asked him to perform work outside his normal job responsibilities, such as installing a CD burner and downloading from the Internet. The complainant says that Mr. Gervais told him that, according to a memo issued the same day, he had to do this work. The complainant argues that, by reducing his hours of work and by giving him extra work outside his job responsibilities, the union and the employer made his life miserable.

The complainant submits that on February 10, 2005, he wrote a note to Mr. Gervais advising him that he would not perform work outside his job responsibilities and that he would be filing a constructive dismissal grievance. The complainant filed the grievance on February 11, 2005. Mr. Gervais stated that he would not sign the grievance and the complainant was referred to the Chief Shop Steward. The complainant submits that he then contacted Ms. Lipes and asked her to proceed with his grievance. He submits that it was only at this point that the union advised him that it would not pursue his grievance.

The complainant states that his grievance requested retroactive payments, as per the wages provisions of article 18 of the collective agreement, damages for technological changes and severance pay. He states that he did not request a reinstatement of his employment because the union had managed to orchestrate deteriorating work conditions, under which it would have been impossible for him to return to work. In short, he alleges that the union's actions amounted to his constructive dismissal.

The complainant submits that on February 11, 2005, he wrote a letter to Mr. Brian Kenny, General Manager, advising him that he was wrongly being accused of sabotage and that the relationship between himself and his immediate supervisor had deteriorated. He explained that he was given duties that were not his responsibility, his benefits were being cut and his position was being abolished. He stated that he was being constructively dismissed and that he was essentially forced to quit.

The complainant states that he signed a settlement agreement with the employer, several weeks after sending this letter, since he could not count on the union's support in this matter. The complainant alleges that he was suffering from financial duress when he signed the agreement.

The complainant asks for a full hearing before the Board and requests that the union define "full-time employee" in all of its collective agreements across the country. He wants the Board to investigate whether the collective agreement was bargained in bad faith. The complainant asks the Board to pronounce his status as "full-time" and to confirm that certain articles of the collective agreement were breached by the employer. He further wants the union to give him back his benefits,

to delete all discriminatory clauses from its collective agreements nationwide and to refund all union dues to him for services not rendered.

With respect to the timeliness of the present section 37 complaint, the complainant indicates that the union is wrong when it identifies December 6, 2004, as the date when he was informed that the union would not be pursuing his grievance. According to the complainant, it was only on February 11, 2005, that he was advised that the union would not sign his grievance, nor would it help him with this matter.

In conclusion, the complainant alleges that the union sabotaged him, intimidated him and breached its duty of fair representation. He indicates that the union forced him to quit his job and advised him to find work elsewhere.

B - The Union

The union asks the Board to dismiss the present complaint.

As for the timeliness of the present complaint, the union submits that the complainant was well aware of the union's position on December 6, 2004, when it advised him that the collective agreement had not been breached and that consequently no grievance would be filed on his behalf. The union, therefore, does not understand how the complainant can claim that he only knew about the union's position on February 11, 2005.

With respect to the merits of the complaint, the union explains that the complainant had sent it an email on December 6, 2004, in which he listed every article of the collective agreement that, in his opinion, the employer had breached. The same day, Ms. Lipes responded by email to each of the complainant's concerns by listing the articles of the collective agreement which, in her opinion, did not apply to the complainant. For the remaining issues, she asked the complainant to contact her the following day and she offered to go over this matter with him at that time.

On December 7, 2004, according to the union, Ms. Lipes offered once more to help the complainant with respect to the articles of the collective agreement that might have been violated. The union was of the view that he was a part-time employee. She recommended that the union should be present during the meeting with the employer. According to the union, the complainant never replied to this offer of assistance, although he had told the union that he would keep it informed about his dealings with the employer.

On February 11, 2005, the complainant advised the union that he had filled in a grievance form and asked the union to sign it. The union submits that it refused to sign the grievance form, since the time to file a grievance had elapsed. According to the union, the collective agreement stipulates that employees must file their grievances within 30 days of the day upon which they learned of the alleged violation of the collective agreement. In the present case, the union points out that 65 days had elapsed before the grievance was filed.

The union considers the complainant's letter of February 11, 2005, to be his voluntary resignation. The union is not sure what remedies the complainant is seeking with the present complaint. It argues that the March 4, 2005 settlement agreement effectively concluded this matter. The union submits that this settlement ended the complainant's employment and all the outstanding issues with the employer.

C - The Employer

The employer did not intervene in the matter.

III - Analysis

A - Hearing

Section 16.1 of the *Code* provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed the parties' representations and the report of its investigating officer, the Board is satisfied that the documentation before it is sufficient to enable it to decide the matter without an oral hearing.

Since the complainant requested a hearing before the Board with regard to this complaint, it is necessary to point out that the Board has the unfettered discretion to decide a section 37 complaint without a public hearing. The scheme envisaged by section 16.1 of the *Code* and section 10(g) of the *Canada Industrial Relations Board Regulations, 2001*, foresees that the Board may decide a complaint on the basis of the material filed, unless it considers that it has insufficient information before it to determine the matter and that the parties should be given the opportunity to advance their respective positions by way of an oral hearing. One or the other of the parties may request an oral hearing; however, the Board is not compelled to grant this request.

There is furthermore no requirement for the Board to give notice to the parties of its intention not to hold a hearing (see *Nav Canada*, April 5, 2000 (CIRB LD 213); affirmed in *NAV Canada v. International Brotherhood of Electrical Workers, Local 2228* (2001), 267 N.R. 125 (F.C.A., no. A-320-00); and *Raymond et al. v. Syndicat des travailleurs et travailleuses des postes* (2004), 318 N.R. 319; and [2004] CLLC 220-020 (F.C.A., no. A-686-02)). The *audi alteram partem* rule, that is, the requirement to hear both sides of a matter, does not require that an oral hearing be held in every case (see *Commission des Relations de Travail du Québec v. Canadian Ingersoll-Rand Company Limited et al.*, [1968] S.C. R. 695; *Anne Marie St. Jean*, [1999] CIRB no. 33; *Boulos v. Canada (Labour Relations Board)* (1994), 178 N.R. 32 (F.C.A., no. A-661-93); and *Nav Canada*, *supra*.)

B - Timeliness of the Complaint

The union submits that the present complaint should be dismissed because it was filed outside of the time limits prescribed by section 97(2) of the *Code*. It argues that the complainant knew at least since December 6, 2004, that the union would not be pursuing this matter. The complainant, on the other hand, submits that the union only told him about its decision not to file a grievance on his behalf on February 11, 2005.

Section 97(2) of the *Code* provides as follows:

97.(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.

It is important to note, especially in an industrial relations context, that delays have to be respected. As this Board has outlined on numerous occasions, this is absolutely necessary in order to encourage all parties to resolve matters, rather than let them fester over a prolonged period of time (see *Anil Kumar Luthra*, August 10, 2000 (CIRB LD 273); and *Marie Laperrière*, March 13, 2003 (CIRB LD 821)).

Furthermore, the Board has made clear that the 90-day time limit starts to lapse from the time of the alleged illegal act, and not from the time when the complainant has amassed sufficient evidence to file the complaint (see *BHP Diamonds Inc., Securecheck and Klemke Mining Corporation*, [2000] CIRB no. 81).

The documentation before the Board in the present case shows that it was not entirely clear, until February 11, 2005, whether or not the union would be filing a grievance on behalf of the complainant. Although the union pointed out on December 6, 2004, that it did not agree with most of the complainant's statements, it let the complainant believe that it was still going to meet and correspond with him in order to get more details before making a definite decision.

On February 11, 2005, at 4:39 p.m., Ms. Lipes sent the complainant an email which stated: “As of this point, I will not help you or sign your grievance.” It became clear, at this point in time, that the union would not be pressing the grievance. Since the present complaint was filed on March 29, 2005, this constitutes a delay of less than 90 days from the moment that the complainant knew, or ought to have known, of the circumstances leading to this complaint.

In conclusion, the Board finds that the present complaint was timely.

C - Duty of Fair Representation

Before examining the complainant’s specific allegations, it is important to explain that, in a duty of fair representation complaint, it is the Board’s role to examine the union’s conduct in light of the underlying principles of section 37 of the *Code*, which reads as follows:

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.

To determine whether the union violated its duty of fair representation, the Board analyzes the facts according to the principles established by the Supreme Court of Canada in *Canadian Merchant Service Guild v. Guy Gagnon et al.*, [1984] 1 S.C.R. 509.

The Board will not second-guess the actual decision made by a union. A section 37 complaint before this Board is not an appeal of the union’s decision not to file a grievance, but an assessment of the union’s conduct as to how it handled the complainant’s file. In other words, the Board rules on the union’s decision-making process and not the merits of the grievance (see *Fred Blacklock et al.*, [2001] CIRB no. 139; *Yvonne Misiura*, [2000] CIRB no. 63; and 59 CLRBR (2d) 305; and *Anthony William Amor* (1987), 70 di 98; and 18 CLRBR (NS) 249 (CLRBR no. 633)).

Accordingly, the Board will normally find that the union has fulfilled its duty of fair representation responsibility if it investigated the complainant’s grievance, obtained full details of

the case, put its mind to the merits of the claim, made a reasoned judgment about the outcome of pursuing the grievance, and advised the employee of the reasons for its ultimate decision not to proceed any further.

Since the complainant, on several occasions in his complaint, questions the wording of the collective agreement between the union and the employer, it is important to point out that although the duty of fair representation obliges the union to have proper regard to the interests of all members of the bargaining unit, it does not require that the union attempt to satisfy every single member of the unit. The union, however, must engage in a rational decision-making process and recognize and consider the competing interests of all the employees in the bargaining unit (*Vergel Bugay et al.*, [1999] CIRB no. 45; 57 CLRBR (2d) 182; and 2000 CLLC 220-034; and *Mario Soulière et al.*, [2002] CIRB no. 205; and 94 CLRBR (2d) 307).

This means that in a case like the present one, where the complainant, among other things, questions the collective agreement itself, the Board will not attempt to assess whether the union has achieved the best or most equitable balance. It is also to be noted that the Board and its predecessor established in several decisions that they will not automatically intervene in a matter where the sole or main issue at hand is a difference of opinion between a member of the bargaining unit and the union, concerning the precise interpretation of the collective agreement:

... The Board has explained in its decisions, on many occasions, that such differences of opinion are not in and of themselves a basis to find violations of the duty of fair representation. Interpretation of collective agreements is the responsibility of the parties that negotiated them...

(*Marinus Van Uden* (1998), 106 di 89; and 41 CLRBR (2d) 188 (CLRB no. 1223), pages 94; and 193)

IV - Conclusion

Since it is the complainant that bears the burden of proof in section 37 complaints, Mr. Papadopolous must put forward sufficient facts to establish that it is more likely than not that the union contravened its obligations under section 37 of the *Code* (see *Richard Connolly et al.* (1998), 107 di 120; and 45 CLRBR (2d) 161 (CLRB no.1235)).

The complainant asks the Board to order that a grievance be advanced on his behalf. In most collective agreements employees do not have the absolute right to have their grievances advanced or referred to arbitration (see *Garry Little*, [2001] CIRB no. 114), even if this involves serious discipline, termination (see *Yvonne Misiura*, *supra*) or even forced resignation (see *Tadele Lemi*, [1999] CIRB no. 24).

The Board's role in a case like the present one is to look at the process as to how the union reached its decision not to proceed with the grievance, and not to act as a "Court of Appeal" to the union's decision (see *Ghislaine Gagné*, [1999] CIRB no. 18).

The Board understands that it must be difficult for the complainant, professionally and personally, to suddenly have his hours reduced considerably. However, the documents on file show that the union promptly reacted to the complainant's concerns and that it investigated the complainant's grievance. On the same day that the complainant emailed his concerns to the union, the union representative sent the complainant partial answers to his questions and provided him with an initial evaluation of the situation.

After investigating and reviewing this matter, the union judged that it could not justify the filing of a grievance. Ms. Lipes clearly informed the complainant on February 11, 2005, that the union would not file a grievance on his behalf. It is regrettable that the relationship between the complainant and the union deteriorated quickly with respect to this file. Nevertheless, it has not been demonstrated that the union acted with malice, or in bad faith.

The complainant has alleged that his union violated the *Code* and wishes to obtain a remedy for that violation. It is incumbent on him to present cogent and persuasive grounds to sustain a complaint. A complaint is not merely a perceived injustice; it must set out the facts upon which the employee relies in proving his case to the Board. A complaint goes beyond merely alleging that the union has acted "in a manner that is arbitrary, discriminatory or in bad faith."

After having analyzed the submitted facts and the positions of the parties in light of these principles, the Board finds that the complainant did not bring forward sufficient facts to establish that the union violated its obligations with respect to its duty of fair representation.

For the reasons cited above, the complaint is dismissed.

For the Board,

Warren R. Edmondson
Chairperson

c.c.: Mr. Jesse Peters (CIRB - NCR)