Canada Industrial Relations Board Conseil canadien des relations industrielles

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Dear Sir/Mesdames:

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. Jorge Gallegos, complainant, alleging violation of section 37 of the *Code* by the Canada Council of Teamsters, respondent; United Parcel Service Canada Ltd., employer. (033793-C)

A panel of the Canada Industrial Relations Board (the Board), composed of Ms. Allison Smith, Vice-Chairperson, and Mr. Richard Brabander and Ms. Lisa Addario, Members, considered the above-noted complaint.

Section 16.1 of the *Canada Labour Code* (the *Code*) provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed all of the material on file, the Board is satisfied that the documentation before it is sufficient for it to determine this matter without an oral hearing.

I. Background to the Complaint

On June 8, 2020, Mr. Jorge Gallegos made a complaint against his union, the Canada Council of Teamsters (the union). He claims that the union violated its legal duty to fairly represent its members. Section 37 of the *Code* is the legal provision that requires a union to meet its duty of fair representation (DFR).

Mr. Gallegos was an employee of United Parcel Service Canada Ltd. (UPS or the employer) from approximately July 7, 2014, until November 29, 2019. He worked as a mechanic on the employer's fleet of vehicles.

The issue in this case is whether the union's representation of Mr. Gallegos after the employer terminated him was, as he claims, arbitrary or conducted in bad faith. If it was, the union will have violated its legal duty to represent Mr. Gallegos fairly.

As remedy, Mr. Gallegos asks to be given lost wages and benefits and to be compensated for his legal costs. He also asks the Board to order the union to refer his grievance to arbitration and to extend any time limits needed to make this referral.

In this complaint process, the Board reviews and decides complaints about a union's actions only. This Board does not have the authority to hear an employee's grievance challenging an employer's actions. This is beyond the boundaries of what the *Code* gives this Board permission to do.

The Board has reviewed the material that Mr. Gallegos provided with his complaint, and his reply. It has also reviewed the material that the union and the employer filed when they responded to this complaint.

In *Gallegos*, 2021 CIRB LD 4446, the Board requested that the union provide specific additional information. The employer and Mr. Gallegos were given an opportunity to respond to the union's response. The Board has reviewed this additional material as well.

The Board decides a complaint by reviewing the legal standard and the facts of the case and then applying the facts of the case to the legal standard. Mr. Gallegos, the union and the employer gave the Board a great deal of material related to this complaint. The Board has fully reviewed all of this material.

However, in this decision, the Board will only refer to arguments or issues that are relevant to its decision and will not include every issue or argument in its reasons. The Supreme Court of Canada has accepted this approach to decision-making in the cases of *Newfoundland and Labrador Nurses' Union* v. *Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62; [2011] 3 S.C.R. 708; and *Construction Labour Relations* v. *Driver Iron Inc.*, 2012 SCC 65; [2012] 3 S.C.R. 405, at paragraph 3.

A. The Events That Gave Rise to This Complaint

An accident took place in which two wheels came off the rear driver's side of a company truck while a UPS driver was driving it on the highway. The wheels then hit other cars that were driving on the highway at the time. No one was seriously injured, but the UPS truck and the cars that were hit by the wheels were all damaged. The police investigated the incident and charged UPS for violations of the provincial *Highway Traffic Act*, RSO 1990, c H.8. Mr. Gallegos had changed the tires on the truck in question several days before the accident.

The employer terminated Mr. Gallegos' employment. In its termination letter dated December 6, 2019, the employer stated that Mr. Gallegos had failed to follow proper methods and procedures on November 12, 2019, which resulted in poor-quality work. The employer claimed that Mr. Gallegos had previously been instructed in the proper policy and procedures to perform his work correctly.

The employer, the union and Mr. Gallegos do not agree on the date of the vehicle accident, nor do they agree on the date on which Mr. Gallegos changed the tires. However, this difference of opinion does not affect the essence of the parties' positions or the outcome of this decision. Since the Board does not need to make a final determination regarding this disagreement, it will describe Mr. Gallegos' work on the truck as having taken place "on or about November 12, 2019" and the motor vehicle accident involving the truck as having taken place "on or about November 19, 2019."

Mr. Gallegos does not agree with the employer's decision to terminate him. He also states that the employer's termination letter of December 6, 2019, is vague, lacks detail and does not make it clear that the employer drew any "formal conclusions" that he was actually responsible for the accident. He states that right up until the date that he filed this complaint, June 8, 2020, neither the union nor the employer had given him specific reasons why he was terminated.

II. The Law and the Process for Establishing That a Union Has Violated Its Legal Duty

Before the Board reviews the union's conduct, section 37 of the *Code* says the following about a union's legal duty to fairly represent its members:

> **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.

The person complaining that the union violated its legal DFR must convince the Board of their claim. This is known as the burden of proof. It is not enough for the person making the complaint to state that the union has violated its legal duty; they must also provide the Board with proof of their claim. This proof can take the form of such information as statements, emails and documents and—if the Board asks for oral evidence—can also take the form of witness testimony. The Board will then review all the information that the parties have provided and decide whether it is more likely than not that the union has violated its duty.

III. The Parties' Positions

Both the union and Mr. Gallegos agree that the employer terminated him and that the union filed a grievance challenging the employer's decision to terminate him.

Ultimately, however, the union decided not to advance Mr. Gallegos' grievance to arbitration and told him so in a letter dated March 11, 2020.

Mr. Gallegos does not agree with the union's decision and states that the union conducted itself with respect to his representation in a way that violated its DFR. The Board will deal with each of Mr. Gallegos' allegations below.

A. Allegations of Arbitrary Conduct

Mr. Gallegos alleges that the union's conduct related to his discharge and its decision not to advance his grievance were arbitrary in two main ways.

1. The Union Did Not Investigate

Mr. Gallegos alleges that "there was no review of the facts" and that "[n]o investigation was undertaken." He states that the union did nothing to assess the merits of his grievance.

He cites several ways in which the union could have challenged his dismissal and states that the union did not investigate any of these ways, including the fact that his tools may not have been properly calibrated. On this point, he states that Mr. Vince Johnson, the principal union representative who provided him with representation, assumed that the tools Mr. Gallegos had used were properly calibrated. He also notes that the employer's response to this complaint included certain certificates of calibration for tools, including a torque wrench. However, Mr. Gallegos maintains that he did not use a torque wrench when he was working on the truck but rather a torque stick.

He also says that, contrary to what the employer states, the employer failed to provide him with proper training. The employer included with its response a document that indicates that Mr. Gallegos had received wheel end training on March 11, 2015, along with Mr. Gallegos' initialed confirmation of this training. However, Mr. Gallegos insists that he never received such training and states that the union failed to investigate his allegation regarding the lack of training.

He also argues that even if the accident was due to his workmanship, the union could have challenged the employer's decision to terminate him on the basis that this penalty was disproportionate.

Although the employer produced documentation indicating that it had documented at least three incidents of poor workmanship on Mr. Gallegos' part in the two months prior to the accident, Mr. Gallegos states that the employer never provided him with the November 19, 2019, letter of reprimand before he filed this complaint. He also disputes that he incorrectly installed a hose in October 2019. He states that if this had occurred, the vehicle would have been undriveable.

Mr. Gallegos states that the union did not properly investigate to determine what role, if any, he had played in connection with the accident and that it handled his case with indifference and reckless disregard.

The union disputes that it handled Mr. Gallegos' representation in an arbitrary way and that it failed to investigate. It states that Mr. Johnson, who is himself a mechanic with 32 years' experience, visually inspected the truck after the accident. He observed that the bolt holes on the wheels that had fallen off the truck were elongated.

The union states that at the November 29, 2019, meeting, which Mr. Gallegos attended with Mr. Johnson, along with another union representative and Mr. Floyd Bristol, the employer's representative, they all discussed the employer's allegations against Mr. Gallegos in detail. As such, the union disputes that Mr. Gallegos was not aware of the reasons for his termination.

The union also states that at this meeting, Mr. Gallegos confirmed that he had used the same equipment to install the wheels on both sides of the vehicle. Mr. Johnson then asked Mr. Bristol whether the employer had checked if the wheels on the passenger side of the truck had been torqued properly. Mr. Bristol confirmed that they had been checked and, unlike the wheels on the driver's side, had been torqued correctly.

The union provided the Board with handwritten notes by Mr. Johnson and Mr. Jaycin Edwards, the two union representatives who had attended the November 29, 2019, meeting. The meeting notes of one of the union representatives—and here the Board notes that neither set of notes is signed, so it is not possible to determine which union representative wrote which notes—confirm that the employer stated that since the wheels on one side of the vehicle were not torqued properly while those on the other side were torqued to specification, it was hard to blame the tools.

One set of notes states, "[Mr. Bristol] explain that wheel was not installed properly" [*sic*].

The notes also indicate that Mr. Bristol reviewed previous incidents of poor workmanship on Mr. Gallegos' part, described him as a "liability" and stated that the employer was terminating him.

The union states that, based on Mr. Johnson's inspection of the vehicle involved in the accident, his experience as a mechanic and the employer's exchange with Mr. Gallegos in the November 29, 2019, meeting, Mr. Johnson's initial assessment was that the wheels had likely come off the truck because Mr. Gallegos had improperly installed them and that his grievance was unlikely to succeed. The union states that as part of his investigation, Mr. Johnson also interviewed the driver of the vehicle involved in the accident in February 2020. It says that it conducted its own investigation and reached the same conclusion as the employer regarding the cause of the accident, that is, that the wheels had come off the truck because of Mr. Gallegos' faulty workmanship.

The union states that before it decided not to advance the grievance, Mr. Johnson also asked Mr. Bristol about whether Mr. Gallegos had received the wheel end training and Mr. Bristol confirmed that he had. In any event, the union argues, as a licenced mechanic, Mr. Gallegos should already have known how to change the wheels on a truck.

The union states that Mr. Johnson investigated Mr. Gallegos' assertion that the tools he was using may not have been calibrated and submits that this assertion was unfounded. The Board notes that the union does not explicitly state the basis for Mr. Johnson's conclusion in its response; it simply directs the Board to the employer's torque wrench certification record. The Board understands from the union's broader submissions that Mr. Johnson concluded that the accurate calibration of tools did not contribute to the wheels coming off, because only one set of wheels had come off while the other remained in place.

The union provided the Board with the employer's written records of previous incidents of poor workmanship on Mr. Gallegos' part, which included Mr. Gallegos' initials confirming that the employer had discussed these other incidents with him.

Finally, the union states that Mr. Johnson met with the employer to discuss Mr. Gallegos' case on November 29 and December 3, 2019, and January 7 and March 10, 2020. Mr. Johnson tried to convince the employer to substitute a lower penalty of seven-day suspension, but the employer refused to do so.

The employer states that before the vehicle accident on or about November 19, 2019, it had disciplined Mr. Gallegos for several incidents of poor workmanship. It included with its response documentation confirming that it had spoken to Mr. Gallegos about these previous incidents.

The employer also included a written confirmation that Mr. Gallegos had received training on wheel end maintenance, which included removing and replacing tires, on March 11, 2015, and that he had initialed a confirmation of this training.

The employer states that as part of its investigation after the accident, it inspected all the tools that Mr. Gallegos had used and found that they were all in good working condition. It notes that Mr. Gallegos' tools had previously been reviewed and had been certified to be in good working condition in July 2019. The employer also included documentation which it called "torque wrench certifications," dated May 28 and June 17, 2019. However, the employer's statement in this regard appears to be at odds with the report of both the union and Mr. Gallegos that the employer representative, Mr. Bristol, had asserted in the November 29, 2019, meeting, that the tools Mr. Gallegos had used did not need to be calibrated. Mr. Gallegos recalled that Mr. Bristol had explained that UPS engineers chose the tools because they were 100 per cent accurate and did not need to be calibrated. Although the Board provided it with the opportunity to do so, the employer did not refute Mr. Gallegos' recollection of Mr. Bristol's statement regarding the lack of a necessity for tool calibration.

The employer also included with its response a report by its supervisor, Mr. Kaushik Mistry, of his meeting with Mr. Gallegos and his union representative on November 19, 2019. Mr. Mistry reported that Mr. Gallegos had confirmed that he had changed the truck's wheels on or about November 11, 2019. He reported that Mr. Gallegos had said that he had done so with a torque stick to tighten the wheel nuts, using the UPS method and a star pattern. He said that Mr. Gallegos had stated, "I always torque my wheels the same way."

The employer states that it investigated the accident and that Mr. Johnson was involved in and kept aware of the progress of the employer's investigation. The employer states: "Further, the investigation completed by UPS and disclosed to Mr. Vince Johnson of the Respondent concluded

that the wheel-off accident was caused by Mr. Gallegos' gross negligence and poor workmanship." The employer also submits that it gave Mr. Johnson all the information it had obtained as part of its investigation into the accident.

The employer included with its response its November 28, 2019, investigation report, which concluded that it was likely that Mr. Gallegos had either failed to torque the fasteners to specification or improperly seated the hubs. According to the investigation report, either one of these mistakes resulted in the wheels falling off the truck on or about November 19, 2019.

The employer also included an interview with the driver of the vehicle, who confirmed that before taking the vehicle on the road on or about November 19, 2019, he had completed the required pre-trip inspection of the vehicle earlier that morning. The employer included documentation that confirmed this fact.

The employer confirms that the union advocated on Mr. Gallegos' behalf for reinstatement but that it refused to change its decision.

2. The Union Failed to Give Mr. Gallegos a Chance to Respond to the Employer's Allegations

Mr. Gallegos states that no substantive discussion took place between him and Mr. Johnson regarding the allegations against him, nor did they review the facts of the case together. He states that the union dropped his grievance without giving him a fair opportunity to know and respond to the employer's vague allegations against him.

He states that he learned of the employer's allegations that he had not torqued the fasteners or seated the hubs properly for the first time in the union's response to this complaint. He states that Mr. Johnson never told him about the fasteners and never asked him whether he had seated the tires on the hubs properly.

Mr. Gallegos also argues that had the union reviewed the employer's full investigation report with him, it would have discovered discrepancies in the employer's case against him, including the employer's false statement that he had received wheel end training.

He states that he was unfamiliar with the process after an unjust dismissal grievance is filed. He submits that he repeatedly asked Mr. Johnson for a complete investigation into the cause of his dismissal and an update on his grievance but that Mr. Johnson never answered these questions.

As a result, he states that he did not know the case against him and was "never given a fair opportunity... by the Union… to respond."

The union referred the Board to its written notes of the November 29, 2019, meeting in support of its contention that the issue of whether Mr. Gallegos had seated the hubs properly was discussed during the meeting.

The union states that between December 2019 and March 2020, Mr. Johnson spoke on the telephone with Mr. Gallegos five times about the termination of his employment, the status of the grievance and Mr. Gallegos' questions about his Record of Employment.

On March 4, 2020, Mr. Johnson asked to speak to Mr. Gallegos over the phone to tell him about "the status of the grievance process, the conclusions of the investigation and the Union's assessment of the merits of the case." Mr. Gallegos declined to speak to Mr. Johnson and instead asked him to provide answers, presumably, to the questions he had asked Mr. Johnson on March 1, 2020, and for which he had requested a written response by March 13, 2020.

The union says that when he asked to speak to Mr. Gallegos on March 4, 2020, Mr. Johnson was giving Mr. Gallegos an opportunity to provide the union with additional details regarding his version of events but that Mr. Gallegos did not avail himself of this opportunity. Nor did he do so at any time before the union made its decision not to advance his grievance to arbitration. After this date, there was no conversation between Mr. Gallegos and Mr. Johnson, either by phone or by email.

On March 11, 2020, the union wrote to Mr. Gallegos, stating the following: "After a complete review of the facts of your grievance, please be advised that the Union will not be proceeding any further with this matter, for in our opinion, we would not be successful." The union submits that this letter clearly communicated its decision not to refer the grievance to arbitration and its reasons for making this decision.

The union states that Mr. Johnson spoke to the union's grievance committee several times between December 2019 and March 2020. It submits that the grievance committee decided that Mr. Gallegos' grievance was unlikely to succeed due to his unwillingness to take responsibility for the accident, his length of service, the seriousness of the accident, his previous disciplinary infractions and the information that the union had obtained during its investigation and during the employer's interview with Mr. Gallegos about the accident. The union also states that it considered what the consequences would be for Mr. Gallegos' work prospects if an arbitrator were to decide that his incompetence had led to the accident.

B. Allegation of Bad Faith

Mr. Gallegos also alleges that his union acted in bad faith. He mainly bases this allegation on the claim that Mr. Johnson's former working relationship with Mr. Bristol influenced his handling of Mr. Gallegos' grievance.

Both the union and the employer have disputed this allegation and described it as unsupported by facts.

IV. No Obligation for the Board to Hold a Hearing

After reviewing Mr. Gallegos' complaint, the Board invited the union and the employer to respond to it, in a letter dated August 11, 2020. As is the practice, the Board outlined in this letter that it could render a decision in this matter without holding a hearing. On page 2 of its letter, the Board drew the parties' attention to section 16.1 of the *Code*, stating the following:

> … Please note that pursuant to section 16.1 of the *Code*, the Board may decide any matter before it **without holding an oral hearing**, even if a hearing has been requested. In such cases, the Board determines the complaint on the basis of the written representations of the parties and supporting documentation. It is therefore in the best interest of the parties to file full, accurate and detailed representations in support of their respective positions, and to cooperate fully with the Board's officer who is overseeing the conduct of the file.
>
> (emphasis added)

The Board's discretion to determine a complaint without holding a hearing has been confirmed by the Federal Court of Appeal in *Nadeau* v. *United Steelworkers of America (F.T.Q.)*, 2009 FCA 100.

Moreover, the Board is not required to advise the parties of its intention to determine a complaint without holding a hearing (see *NAV Canada* v. *International Brotherhood of Electrical Workers*, 2001 FCA 30; *NAV CANADA*, 2000 CIRB 88; *Raymond* v. *Canadian Union of Postal Workers*, 2003 FCA 418; *Sutcliffe Heinrichs*, 2016 CIRB 819; and *Trudeau*, 2009 CIRB 464).

The union and the employer provided their respective written responses on September 9, 2020. When the Board requested further information from the union in *Gallegos*, the union responded on February 26, 2021, and the employer responded on March 5, 2021.

The Board will not order that a hearing be held in a DFR complaint unless it is necessary to do so in order to render a decision and unless the parties require the opportunity to present their positions through oral evidence (see *Power*, 2018 CIRB LD 4073). Having given the parties at least two opportunities to provide their complete and detailed positions, and having examined the documents that all of the parties submitted, the Board has determined that it has all of the information necessary to determine this matter without holding a hearing.

V. Analysis and Decision

The Board outlined the principles that govern its analysis of a DFR complaint in *McRaeJackson*, 2004 CIRB 290:

> [37] Accordingly, the Board will normally find that the union has fulfilled its duty of fair representation responsibility if: a) it investigated the grievance, obtained full details of the case, **including the employee's side of the story**; b) it put its mind to the merits of the claim; c) it made a reasoned judgment about the outcome of the grievance; and d) it advised the employee of the reasons for its decision not to pursue the grievance or refer it to arbitration.
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> (emphasis added)

The Board affirmed this test for a union's arbitrary conduct in *Lamolinaire*, 2009 CIRB 463, in which it stated the following:

> [36] ...
>
> 1. Did the union conduct only a perfunctory or cursory inquiry, or a thorough one?
>
> 2. Did the union gather sufficient information to arrive at a sound decision?

The Board has also determined that where a grievance involves a termination, the union's obligation to represent the employee will be of a higher standard. In *McRaeJackson*, the Board stated the following:

> [31] The union's duty in this regard is open to greater scrutiny when a matter involves an employee's termination, serious discipline that affects gainful employment or a disability that requires accommodation. …
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> (also see *Cassman* (1994), 95 di 137 (CLRB no. 1087))

The union notes that the Board is not sitting in judgment of the union's decision not to advance Mr. Gallegos' case to arbitration. The Board agrees that its role is not to determine whether the union ought to have proceeded to arbitration on Mr. Gallegos' behalf. Nor is its role to decide whether the employer's actions were justified. In a DFR case, the Board's role is to examine the actual process that took place to determine if the union's conduct complies with section 37 of the *Code*.

The Board has determined that the union conducted its representation of Mr. Gallegos in an arbitrary fashion. It has arrived at this conclusion for the following reasons.

A. The Failure to Fully Inform Mr. Gallegos of the Case He Had to Meet

In the Board's opinion, the precursor to a union's obligation to conduct a "thorough inquiry" is its obligation to fully inform the employee of the case against them. Only when the employee understands the breadth of the employer's case can they help their union to effectively respond to and assess the merits of the employer's discipline.

As the Board noted in *Singh*, 2012 CIRB 639:

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

In this case, the Board finds that the union did not adequately apprise Mr. Gallegos of the actual case he had to meet. To do so, the union would have had to have provided Mr. Gallegos with some level of detailed information regarding the employer's case against him.

As one example, the employer's investigation report concluded that improperly seated hubs were one of two possible reasons that the wheels had fallen off. The improperly torqued fasteners were the other possible reason. This means that improperly seated hubs were one of the two principal theories that led the employer to conclude that Mr. Gallegos' faulty workmanship was responsible for the accident, which it then relied upon to terminate him.

Mr. Gallegos alleges that he was never asked whether he had seated the hubs properly. The union insists that the issue of the improper seating of the hubs was discussed at the November 29, 2019, meeting and provided the Board with the meeting notes of both union representatives with its response to this complaint. The Board has reviewed both sets of notes. Neither of them contains any reference to a specific discussion about the hubs on the truck or any specific discussion about their seating.

While the Board finds it likely that Mr. Gallegos was aware in the November 29, 2019, meeting that he was being terminated because the employer held him responsible for the "wheel-off" incident, the union does not dispute Mr. Gallegos' claim that he had never seen the employer's investigation report in which the specifics of the employer's two theories about the cause of the "wheel-off" incident were spelled out until the employer filed its response to this complaint.

Moreover, while a union representative, Mr. Yanto Lee, was present when Mr. Gallegos gave his statement to a supervisor, Mr. Mistry, on the day of the accident, on or about November 19, 2019, Mr. Mistry's report failed to mention any discussion by the meeting participants about the cause of the accident.

Additionally, and according to the union's submissions, at no time during the five conversations that Mr. Johnson had with Mr. Gallegos after his termination did Mr. Johnson ever explain to Mr. Gallegos the employer's specific rationale for concluding that he was responsible for the wheels falling off the truck. For this reason, the Board finds that the specifics leading to the employer's finding that Mr. Gallegos was at fault were not adequately shared with him.

The union points out that Mr. Gallegos is raising his conjecture that an improperly seated hub would have been immediately apparent, for the first time in his reply to this complaint. However, Mr. Gallegos cannot be faulted for not having raised this theory earlier if he did not understand, until the parties responded to his complaint, that improperly seated hubs were one of the two principal theories the employer had as to why the wheels had fallen off.

This being the case, the Board finds that since Mr. Gallegos himself never saw the employer's investigation report prior to this complaint and was never told that the employer's investigation had specifically concluded that the accident was possibly attributable to his improper seating of the hubs, he was never given an opportunity to provide his union, in the words of *Singh*, with "helpful verification" of the employer's evidence.

The Board's role is not to delve into the merits of this theory. However, irrespective of whether this theory has merit, Mr. Gallegos was entitled to know what the union knew about these possible

assumptions on the employer's part, and to have the opportunity to give Mr. Johnson any rebuttal of this theory before the union concluded that his grievance was not worth advancing.

B. The Failure to Obtain Mr. Gallegos' Version of Events

In *Gallegos*, the Board asked the union to clarify its process of investigation by providing the following information:

> • Mr. Johnson's understanding regarding Mr. Gallegos' version of the events leading to the accident which took place on or about November 19, 2019, before the union decided not to advance his grievance;
>
> • Any steps Mr. Johnson took to investigate Mr. Gallegos' version of events before the union decided not to advance his grievance; and,
>
> • If Mr. Johnson did not have an understanding of Mr. Gallegos' version of the events leading to the accident which took place on or about November 19, 2019, or did not take steps to investigate his version of events, his rationale for not doing so.
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> (page 5)

In its response to the Board's request for the above-noted clarifications, the union stated that Mr. Johnson's understanding of Mr. Gallegos' version of the events came from what Mr. Gallegos had said in the employer's termination meeting of November 29, 2019.

This was a meeting that the employer called, to which Mr. Gallegos was summoned and in which the employer terminated him. Again, and based on the union's submissions, there is no indication, outside of the employer's termination meeting of November 29, 2019, that Mr. Johnson ever discussed the cause of the accident with Mr. Gallegos. In *Gallegos*, the Board specifically requested further information regarding the source of the union's information on Mr. Gallegos' version of events. Other than the employer's November 29, 2019, meeting, the union cited no other conversations between Mr. Johnson and Mr. Gallegos in support of its decision not to advance his grievance.

The Board is not persuaded that the single meeting on November 29, 2019, was sufficient to discharge the union's obligation to obtain the employee's side of the story in the course of its investigation, as the DFR requires (see *McRaeJackson*, *supra*, at paragraph 37) It takes this view for two reasons: Firstly, with its investigation report completed, the employer's agenda going into this meeting was to terminate Mr. Gallegos. The union, itself, described this meeting as a "termination meeting." While there was an opportunity for Mr. Gallegos to speak and defend himself and for the union to ask questions, this was unquestionably the employer's meeting. In this pressured and stressful environment, it is not reasonable for the union to have expected Mr. Gallegos to be sufficiently poised and collected so as to be able to deliver in "one shot" a comprehensive and coherent narrative, and defence of his actions upon which the union could rely to discharge its obligation to conduct a thorough investigation.

Secondly, a union member who has been terminated is entitled to a free-ranging and, more importantly, private discussion with their union representative about the case they must meet and any mitigating factors without the employer being present. Only in an environment where a union

member can expect confidentiality can that member, in turn, be expected to speak freely with their union representative and to ask and answer questions about the events leading to the termination. Only in such a confidential environment can a union be assured that it has obtained and can rely on a full outline of the terminated employee's version of events, on which to base its own investigation.

For these reasons, the Board finds that the single meeting between Mr. Johnson and Mr. Gallegos (and another union representative and an employer representative) on November 29, 2019, was an unsuitable and inadequate forum in which to obtain Mr. Gallegos' version of events.

C. The Failure to Communicate Was to Mr. Gallegos' Detriment

The case law is clear that, in general, a union's failure to communicate with a member is not, per se, a breach of section 37 of the *Code*. However, the Board has also been clear that while the failure to communicate is not typically a stand-alone breach of section 37 of the *Code*, it can be a factor in a union's arbitrary conduct, and that the Board makes such determinations on a case-by-case basis.

For example, in *Brideau* (1986), 63 di 215; 12 CLRBR (NS) 245; and 86 CLLC 16,012 (CLRB no. 550), the Board's predecessor, the Canada Labour Relations Board (CLRB), pointed out the following:

> Although the lack of communication between the union and Brideau in the instant case did not result in a violation of section 136.1 [now section 37], this does not mean that the Board does not consider communication to be an element that can never give rise to a section 136.1 [now section 37] violation.
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> ...
>
> Thus, there is no obligation to communicate with the grievor, but if the lack of communication results in a situation which prejudices the position of the grievor, then that omission can result in a violation of section 136.1 [now section 37].
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> (pages 239–240; 269–270; and 14,109)

In *Gagnon* (1992), 88 di 52 (CLRB no. 939), the CLRB noted the following:

> We share this view. In fact, if the Board concluded that poor communication between a union and an employee did not constitute generally a violation of section 37, it is mainly because it had determined, rightly in these cases that the union's conduct in the actual processing of the grievance still met the minimum requirements of the *Code*.
>
> In conclusion, past Board decisions reveal that if a lack of communication "is not per se a violation of a union's duty of fair representation" (*Clarence R. Young* (1989), 78 di 117 (CLRB no. 753), page 121), it is nevertheless a factor the Board must often take into account in properly assessing a union's conduct.
>
> (page 71)

The union has provided the Board with emails that indicate that Mr. Gallegos communicated by email with Mr. Johnson on at least six occasions. According to the union, they also spoke on the phone five times between December 2019 and March 2020.

Despite these interactions, the union failed to answer Mr. Gallegos' repeated requests for information.

On December 4, 2019, Mr. Gallegos sent Mr. Johnson an email asking: "what the updated on my case? I haven't heard nothing back from you or ups" [*sic*].

On December 30, 2019, he wrote to Mr. Johnson: "what the update with my case?" [*sic*]

On January 6, 2020, he wrote to Mr. Johnson: "what is the union doing regarding my case and what are the timelines or the step to follow regarding my situation" [*sic*].

On January 16, 2020, Mr. Gallegos asked Mr. Johnson: "…kindly advice what the next step follow are."

Though Mr. Johnson emailed Mr. Gallegos information related to his Record of Employment on December 13, 2019, his only answer to Mr. Gallegos' preceding questions about the union's process came on January 17, 2020, when he wrote to Mr. Gallegos: "The next step is for me to keep trying to get you reinstated, which I'm doing."

Mr. Gallegos then said more directly on January 17, 2020: "im hoping for you and for the union to proceed with a proper investigation to determine if I was at fault, since I follow ups proper procedures… Please advice of the exact step by step plan that you have to get me reinstated" [*sic*]. Mr. Johnson did not respond to this request.

He next wrote to Mr. Gallegos on February 14, 2020, with the following message: "The company has refused to reinstate your employment. They are asking you to call the supervisor to make the necessary arrangements to remove your tool box."

On March 1, 2020, Mr. Gallegos then wrote to Mr. Johnson as follows:

> 2. Please advise on the investigation that was undertaken to conclude I was supposedly at fault? …
>
> …
>
> 4. What other steps or procedures, … will you or the union take to resolve my case and fight for my rights?

Mr. Johnson did not answer this request.

The union points out that Mr. Johnson wrote to Mr. Gallegos on March 4, 2020, and said: "I would like to speak to you. I will be in the office on Friday morning. Please give me a call." The union argues that Mr. Johnson's invitation to Mr. Gallegos to call him gave Mr. Gallegos the opportunity to discuss his grievance in detail, which he chose not to pursue.

As previously noted, the union has also acknowledged that on March 4, 2020, Mr. Johnson wanted to speak to Mr. Gallegos in order to tell him about "the status of the grievance process, the conclusions of the investigation and the Union's assessment of the merits of the case." In other words, by March 4, 2020, the union had already concluded that Mr. Gallegos was responsible for the accident and that he would not be successful at arbitration.

As the union noted, Mr. Johnson and Mr. Gallegos spoke on the phone five times. The Board notes that in *Gallegos*, it specifically asked the union for further information regarding the steps that Mr. Johnson had taken to ascertain Mr. Gallegos' version of events. Although these phone conversations included discussions about the termination of Mr. Gallegos' employment, they did not, apparently, and according to the union's submissions, include any discussion of his version of the events that had led to his termination.

The union has emphasized that "[a]t no time did [Mr. Gallegos] provide any additional information to contradict the allegations against him."

There is no doubt that Mr. Gallegos could have taken the initiative to raise various aspects of his defence with Mr. Johnson after he was terminated. He did not do this. He did, however, take the initiative on six different occasions to write to Mr. Johnson and ask him for information about the status of his grievance and the process that the union was following. On at least two of these occasions, he asked Mr. Johnson for very specific information about the union's investigation to determine whether he was at fault.

Mr. Johnson did not answer any of these requests. Nor, on a reading of the emails that the union provided to the Board, did Mr. Johnson or any other union official ever explain to Mr. Gallegos how and when the union would determine whether he was at fault and what the implications of that would be for the union's handling of his grievance.

An examination of the emails quoted above makes clear that these are not the emails of a discharged employee who was apathetic about the union's determination of his grievance; they are the emails of someone who was persistently seeking news about the union's investigation process that would determine whether the union would advance his grievance. Mr. Gallegos took the initiative to repeatedly ask for information about how the union would reach its determination about his responsibility for the accident.

While he could have taken the initiative to unilaterally provide his union with additional information, the fact is that this was the union's process. It was the union that determined the steps of its investigation and its parameters. It was the union that determined how to assess the likelihood of Mr. Gallegos' grievance succeeding at arbitration.

While Mr. Gallegos could have provided supplemental information to the union about his defence, the fact that he did not do so does not absolve the union of its own responsibility to communicate with Mr. Gallegos regarding the case against him and to give him a meaningful opportunity to participate in its assessment of the employer's case against him. Its failure to answer his questions about its processes, both with respect to its investigation of the accident and its determination whether his grievance would be advanced to arbitration, deprived Mr. Gallegos of information that would have helped him understand how and when to participate. The Board finds that the union's

failure to give him this information ultimately operated to his detriment, and in the words of *Brideau*, *supra*, at pages 240, 270 and 14,109, “prejudice[d]” Mr. Gallegos.

At paragraphs 114 and 116 of *Lang,* 2017 CIRB 848, a decision upheld by the Federal Court of Appeal in *Canadian Union of Postal Workers* v. *Lang*, 2017 FCA 233, the Board found that, among other things, the union had failed to obtain the complainant’s version of events or provide her with the opportunity to fully explain. This failure in the union’s process led the Board to conclude that the union had not ensured that its investigative findings were thorough and reasonable.

In this case, and based on the union’s own submissions, the Board concludes that the union relied on Mr. Johnson’s experience as a mechanic, his one discussion with Mr. Gallegos and the employer on November 29, 2019, his inspection of the vehicle in question, his interview with the driver and his discussion with the employer in support of its position that it had met its DFR.

The Board agrees that the union was entitled to rely on Mr. Johnson’s 32 years of experience to form a preliminary assessment that Mr. Gallegos’ faulty workmanship had caused the wheels to come loose. This reliance, however, should not have operated to the exclusion of providing Mr. Gallegos with a meaningful opportunity to know and respond to the specific case against him.

It may be reasonable for the union to view the fact of the wheels staying on the passenger side of the truck, while the wheels on the driver’s side came off, as strongly suggestive of an error on Mr. Gallegos’ part. The Board takes no position on whether this would be the correct conclusion to draw. However, a bargaining agent’s exclusive authority to represent its members in the negotiation and administration of a collective agreement, including its discretion to determine whether to advance a grievance to arbitration, is accompanied by a corresponding accountability. As codified by section 37 of the *Code*, that accountability to a bargaining unit member, in this case, Mr. Gallegos, takes the form of ensuring that the decision not to advance an employee’s grievance to arbitration is premised on a thorough investigation.

The union’s failure to do so in this case made its inquiry a perfunctory one. A proper discussion of the employer’s evidence with Mr. Gallegos, along with his response, if any, would have enabled the union to make a reasoned judgment about the outcome of the grievance at arbitration.

On the basis of the union’s failure to fully inform Mr. Gallegos of the case he had to meet, obtain his version of events or communicate with him, which operated to his detriment, the Board finds that the union’s conduct was arbitrary. As such, the union has breached its DFR under section 37 of the *Code*.

D. The Union’s Representation of Mr. Gallegos Was Not Conducted in Bad Faith

Mr. Gallegos alleges that Mr. Johnson failed to act neutrally regarding his handling of Mr. Gallegos’ grievance. He claims that Mr. Johnson was formerly a colleague of the person who made the decision to terminate Mr. Gallegos, his supervisor, and that this influenced the way in which Mr. Johnson handled the grievance.

In *McRaeJackson*, the Board found that it determined that examples of acting in bad faith or with improper purpose could include:

> [27] … personal feelings of union officers influencing whether or not a grievance should be pursued; conspiring with the employer to have an employee disciplined or terminated; or, putting the ambitions of a group of employees who support a union official ahead of the interests of the individual employee.

As noted, Mr. Gallegos has the burden of proof to persuade the Board of his claim. The Board has not been provided with any evidence that supports this claim of bad faith. As a result, it has not been persuaded that Mr. Johnson or any other union official acted in bad faith in their representation of Mr. Gallegos. For these reasons, the Board dismisses this allegation.

VI. Conclusion

For the reasons stated, the Board finds that the union conducted its representation of Mr. Gallegos in an arbitrary manner. The Board provides the parties 30 days from the date of the issuance of this decision to come to a settlement on the issue of remedy. Should the parties be unable to reach a settlement on the issue of remedy, the Board will then decide an appropriate remedy after allowing the parties, including the employer, to provide the Board with their written submissions on this issue.

This is a unanimous decision of the Board, and it is signed on its behalf by

Lisa Addario
Member

c.c.: Mr. Kieran Clarke (CIRB–Toronto)