Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Xavier Pallares,

complainant,

and

International Association of Machinists and Aerospace Workers,

respondent,

and

Air Canada,

employer.

Board File: 036855-C
Neutral Citation: 2026 CIRB **1224**
January 22, 2026

The panel of the Canada Industrial Relations Board (the Board) was composed of Ms. Annie G. Berthiaume, Vice-Chairperson, and Messrs. Thomas Brady and Daniel Thimineur, Members.

Parties' Representatives of Record

Mr. Xavier Pallares, on his own behalf;
Mr. Sean FitzPatrick, for the International Association of Machinists and Aerospace Workers;
Ms. Alexandra Meunier, for Air Canada.

These reasons for decision were written by Ms. Annie G. Berthiaume, Vice-Chairperson.

[1] 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, even if one of the parties has requested a hearing.

The Board's discretion to decide whether an oral hearing is required was affirmed by the Federal Court of Appeal in *Nadeau* v. *United Steelworkers of America*, 2009 FCA 100, application for leave to appeal dismissed by the Supreme Court of Canada (SCC) in *Benoît Nadeau* v. *Métallurgistes unis d'Amérique (F.T.Q.) and Groupe de sécurité Garda du Canada inc.*, No. 33195, October 15, 2009 (J.S.C.C.).

[2] Furthermore, the Board is not required to notify the parties of its intention to decide a matter without holding an oral hearing (see *NAV CANADA*, 2000 CIRB 88; *NAV Canada* v. *International Brotherhood of Electrical Workers*, 2001 FCA 30; and *Raymond* v. *Canadian Union of Postal Workers*, 2003 FCA 418).

[3] Having reviewed the parties' submissions and the documents filed, the Board is satisfied that the record before it is sufficient for it to issue this decision without an oral hearing.

I. Nature of the Complaint and Overview of the Proceedings

[4] On July 2, 2023, Mr. Xavier Pallares (the complainant) filed a complaint pursuant to section 97(1) of the *Code*, alleging that the International Association of Machinists and Aerospace Workers (the union) breached its duty of fair representation (DFR) under section 37 of the *Code*.

[5] More specifically, the complainant, who is employed by Air Canada (the employer), alleges that the union acted arbitrarily by failing to refer to arbitration a 2017 policy grievance challenging Air Canada's decision to limit the number of consecutive days of work without rest for a certain group of employees included in the bargaining unit and to which Mr. Pallares belongs. In its response, the union raises a preliminary objection that the complaint is untimely. It also denies any breach of its DFR.

[6] After reviewing the submissions in this matter, the Board convened the parties to a case management conference (CMC) on May 22, 2024, to discuss the file. The Board asked the union for information and, in particular, clarifications on the status of the policy grievance at the basis of the complaint and the communications sent to members pertaining to that grievance. Given some of the information that the union provided at the CMC, the Board asked it for written submissions and provided the complainant with an opportunity to comment.

[7] The union and the complainant filed supplementary submissions following the Board's request, which the Board considered insufficient to decide the complaint based on the written record. The Board consequently sought additional clarifications, more specifically regarding the status of the policy grievance, which remained unclear. As such, a second CMC was scheduled for January 29, 2025. The Board further asked the union to complete its submissions on certain allegations. The submissions were filed between February 10 and 28, 2025.

[8] Having considered the evidence, the parties' written submissions and the submissions presented at the CMCs, the Board dismisses the union's preliminary objection. Further, the Board allows the complaint. The following are the Board's reasons for its decision.

II. Facts and Evidence Before the Board

[9] The union is the exclusive bargaining agent of approximately 9,000 technical, maintenance and operational support (TMOS) workers employed at Air Canada. It is not disputed that approximately 2,000 employees in this bargaining unit perform work related to the maintenance of Air Canada's aircraft, including Mr. Pallares, who is employed as an aircraft maintenance engineer (AME) and is part of the Air Canada Maintenance (ACM) group. At the May 22, 2024, CMC, Mr. Pallares indicated that he also served as a union representative between 2014 and 2024.

[10] In 2017, Air Canada implemented a "Six-Day Rule" (the 6-day rule), which limited certain employees in the bargaining unit, including Mr. Pallares, from working more than six consecutive days. This was based on Air Canada's interpretation of the *Code* and for safety reasons. The union filed a policy grievance on June 30, 2017, challenging this rule (the 6-day rule grievance or the policy grievance).

[11] On July 3, 2017, the union issued a first communication to its members on the 6-day rule grievance, in Bulletin No. 040. It advised its members of the following:

> Our Legal Counsel has been consulted and until this issue can be formally resolved we are requesting an Arbitrator to provide a cease and desist order.
>
> In addition, the Union intends to schedule a meeting with Air Canada regarding this matter. Updates will be provided when available.

[12] On July 11, 2017, in Bulletin No. 043, the union posted another communication to its members, advising them of the following:

> Discussions with our legal revealed the probability of a cease and desist, interim relief order on Air Canada's interpretation and application of the **"6 Day Rule"** upon our ACM membership is unlikely.
>
> We are scheduled to meet before an Arbitrator on September 19, 2017.

[13] On November 13, 2017, the union provided another update to its membership in Bulletin No. 067:

> We attended a hearing on November 11, 2017 with our Legal Counsel on behalf of the Membership working at Air Canada in District 140. Present were; ACM Management, Labour Relations, Air Canada Senior Counsel, Air Canada Corporate Health and Safety and Arbitrator Mr. Brian Keller.
>
> We were given a presentation from a Fatigue Expert on factors that contribute to or assist in mitigating fatigue. How hours of work, work schedules, sleep patterns and environmental stressors are key factors that influence levels fatigue experienced by humans.
>
> …
>
> Presently, ACM has not provided enough data specific to the subjects related, therefore we are not able to understand the extent of the problem.
>
> The concern by all parties is that informed and responsible conclusions regarding the 6 day work week grievance cannot be formulated without all of the information and details made available. Without the aforementioned data, a conclusive report tailored to ACM with recommendations was not provided by Air Canada's Fatigue Expert. We have been told to expect one in the coming months.
>
> The "6 Day Rule" grievance is without resolve. However, it is encouraging the health and welfare of our membership and how fatigue plays a role has been brought to the forefront and all parties are aware.
>
> …
>
> Timely updates will be provided as they become available.

[14] There is no dispute between the parties that between 2019 and June 2023, the members affected by the 6-day rule did not approach the union regarding this matter.

[15] On June 19, 2023, Air Canada issued an internal communication advising the ACM group that considering the summer peak operations, it would be offering double overtime for certain business units. It is also not disputed that this communication brought the members' attention back to the

6-day rule and led them to start asking questions on the status of the 6-day rule grievance, as it could have an impact on the affected members seeking to work overtime. As a result of this situation and having understood that no progress had been made on the 6-day rule grievance since 2017, Mr. Pallares proceeded to file the present complaint on July 21, 2023.

[16] In the union's December 15, 2023, response on the merits, and as further detailed below, it disputed that it breached its DFR and emphasized the steps that it took in advancing the 6-day rule grievance before deciding not to proceed any further with it.

[17] However, in his reply, Mr. Pallares produced an updated grievance form that showed that on January 20, 2021, the employer indicated to the union that the 6-day rule grievance was "currently in the arbitration process with counsel" and that on January 28, 2021, the union confirmed to the employer: "As Legal is dealing with it. Union still wishes to advance the grievance to the next step." The complainant also produced an internal union email from Mr. Dave Flowers, the union's Transportation District 140 President and Directing Chairperson, dated August 14, 2023. In this email, Mr. Flowers responded to Ms. Chantale Bordeleau, an elected member and negotiator for the 2022 Technical Operations Negotiations Committee (the bargaining committee) in Montréal, Quebec, who was inquiring on the status of the policy grievance, that discussions were still "ongoing." In another email dated December 15, 2023, Mr. Flowers was unable to provide Ms. Bordeleau with an update on the status of the policy grievance, as the union was "still working with legal on how to proceed," thus suggesting that the grievance was active and might still be heard at arbitration.

[18] This contradictory information on the status of the policy grievance prompted the Board to seek clarifications from the union given the potential impact on its determination of the complaint. The Board convened the parties to a CMC.

[19] The union provided additional clarifications in its submissions at the May 22, 2024, CMC and in the written submissions that followed. It stated that it had in fact made more than one decision on whether to continue with the arbitration of the 6-day rule grievance: one in 2019 and one in 2024.

[20] Mr. Pallares was offered an opportunity to comment on the union's clarifications. He also filed emails that a fellow member had sent to the union between October 2023 and May 2024, in which the member inquired about the status of the policy grievance. The member in question first inquired about the status of his own individual grievance related to the 6-day rule and was advised by the union that until the 6-day rule grievance was resolved, it could not deal with his grievance. On October 30, 2023, a union representative advised the member that the 6-day rule grievance would be heard at arbitration. More specifically, an email from the "YWG IAMAW Shop Committee" stated as follows:

> … We have inquired and been made aware that the grievance is going to be heard at a national grievance Arbitration. The union is hoping that it will be heard at the next National Arbitration, however since it's been heard once before at arbs, the company may request that it is heard with the original Arbitrator. At this time, we don't have any confirmed dates, or the names of the Arbitrators, as we get more information we will keep you updated.

[21] In January 2024, the same member asked the union for another update. This time, the union's District Lodge 140 General Chair Alberta & NWT wrote the following:

> … we are currently working on dates to move forward!

[22] On April 3, 2024, the same member was provided with another update, this time by the union's District Lodge 140 General Chairperson Prairie Region, who explained the following:

> Currently I do not have an update on this matter. As mentioned before, the grievance is currently seized with Arbitrator Kelly, and we do not have an update on a date to meet with him.
>
> Agreed that it has been quite some time, it has been just over 6 years, and 9 months.

[23] In an email dated May 3, 2024, the same member asked the union for another update on the 6-day rule grievance, noting that when it was first brought up, he was promised that "it would be a top priority." The union's District 140 General Chair Alberta & NWT wrote back to the member on the same day, indicating as follows:

> Not too much to update right now. We had a meeting with legal 2 weeks back on the case and they will be sharing some info with the committee of General chairpersons to review. Lots of different bodies involved with very busy schedules. Once we have a proper update we will advise.

[24] Mr. Pallares also produced a will-say statement from Mr. James Burden, an AME with Air Canada and a member of the bargaining committee for the 2019 and 2022 rounds of collective

bargaining. He is also a former vice-president of District Lodge 140. In his statement signed on June 12, 2024, attaching his bargaining notes, Mr. Burden explains that contrary to the union's allegation in its response, the concept of bringing the 6-day rule to the table was strongly opposed by the union's General Chairperson and the six airport committee members. He notes, however, that the bargaining committee utilized an opportunity to bring the 6-day rule into focus while discussing a bargaining proposal on field and emergency work, where AMEs engage in out-of-town rescue missions to recertify grounded aircraft, which can exceed six days. Mr. Burden explains in his statement that on March 26, 2019, when the union asked the employer whether there was a policy on the 6-day rule, the employer's labour relations representative stated that the employer could not "put that onto paper because of the ongoing grievance" and that the matter came "down to the *Code*."

[25] Mr. Burden adds in his statement that the then President and Directing General Chairperson of District Lodge 140, Mr. Fred Hospes, was unable to provide information on the policy grievance when the bargaining committee inquired about it. However, Mr. Hospes committed to scheduling a conference call with the bargaining committee members and the union's legal counsel. The members were advised that the policy grievance was last before the arbitrator on January 31, 2019. When one member inquired into what the union should tell AMEs asking about the rule, the recommendation was to tell members that it was "being challenged legally."

[26] Mr. Pallares also included a statement from Ms. Bordeleau, dated January 5, 2024, in which she explains that she was part of the bargaining committee in the 2022–23 round of collective bargaining and that at no time was the committee asked to bring the 6-day rule to the table, highlighting that it was not an item that was included in the collective agreement.

[27] A second CMC was thus scheduled for January 29, 2025, to determine the status of the grievance. Following the CMC, the parties were invited to complete their submissions.

[28] Mr. Pallares filed submissions after the second CMC. He also attached a bulletin from the union dated May 27, 2024, signed by all eight general chairpersons, which had not been provided to the Board. In the bulletin, the union advised its members of the following:

> Your Committee of General Chairperson met to discuss the 6-day rule grievances. We met with our legal counsel which provided much needed information and context. Given the information provided, we have chosen to follow the recommendation that was presented to us.
>
> Unfortunately, we will not be moving forward at this time with the grievance in arbitration and will be attempting to obtain a resolution via the negotiations process. There is a willingness to put a process in place by both parties. If a resolution can be met prior to negotiations, we will advise the membership.
>
> Again, we understand the frustrations on this issue and the effects on the membership. We thank you for your patience and understanding and hope to be able to obtain fair and equitable solutions to this problem.

[29] The complainant also provided what appears to be an excerpt from a grievance management system, which shows that as of January 29, 2025, the 6-day rule grievance was "Scheduled for Arbitration." He also included another email from Ms. Bordeleau, dated February 19, 2025, in which she expands on her fruitless efforts during the 2022 collective bargaining and in 2023 to obtain information on the status of the 6-day rule grievance. In its additional submissions filed with the Board on February 10, 2025, the union confirmed that the 6-day rule grievance remains dormant but not withdrawn.

III. Positions of the Parties

A. The Complainant

[30] The crux of Mr. Pallares' complaint pertains to the union's failure to advance the 6-day rule grievance to arbitration, as it had told the membership it would do. The complainant argues that the union acted arbitrarily by failing to consider the impact of the 6-day rule on the affected members. Specifically, he states that the rule has a direct impact on the affected members' ability to earn overtime and argues that it is not based on any *Code* requirement, any employer policy or the collective agreement. He acknowledges that the employer's rule only affects a small portion of the entire bargaining unit but argues that this is why the union has a non-caring attitude towards the affected employees' interests.

[31] The complainant contends that the union purposely avoided thoroughly considering the issue at the basis of the policy grievance and resolving the matter quickly, as it was concerned that an unfavourable award would have negative consequences for the other groups in the bargaining unit that, when the complaint was filed, remained unaffected by the 6-day rule. In further support

of his position that the union has been delaying this matter, Mr. Pallares states that the union referred to arbitration grievances that were filed after the 6-day rule grievance.

[32] Mr. Pallares submits that his complaint is timely. He states that the employer's June 19, 2023, communication prompted AMEs to ask the union about the status of the 6-day rule grievance. He explains that this was when it was discovered that the grievance had been in abeyance. Mr. Pallares adds that the AMEs approached him as their representative on this issue. He explains that his subsequent research into the matter revealed that no progress had in fact been made on the issue for more than six years.

[33] Among other remedies, Mr. Pallares asks the Board to order that the 6-day rule grievance be referred to arbitration forthwith. He also asks the Board to schedule a hearing to determine this matter.

B. The Union

[34] The union first argues that the complaint is untimely and must be dismissed on that basis. In the alternative, it denies any breach of its DFR.

[35] In support of its preliminary objection, the union submits that the complaint should have been filed within the 90-day time limit imposed by section 97(2) of the *Code*. It further argues that the complainant's explanation for filing his complaint about a 2017 grievance in June 2023 is not grounds for the Board to exercise its discretion under section 16(m.1) of the *Code* to extend the time limit set out in section 97(2).

[36] The union asks the Board to dismiss the complaint on its merits. It argues that none of the alleged actions at the basis of the complaint, even if true, would be a violation of section 37 of the *Code*.

[37] It submits that at no time did it act arbitrarily in dealing with the issue raised in the 6-day rule grievance, nor did it act arbitrarily in handling the grievance. It highlights that the complainant does not allege that it failed to turn its mind to and consider the issues raised in the policy grievance. In fact, according to the union, the complainant puts forward alleged facts that show the opposite, such as that it filed a grievance on the issue raised by members, considered the impact of the

grievance on members of the bargaining unit as a whole, communicated with members about the grievance in several union bulletins and subsequently raised the issue in bargaining.

[38] More specifically, the union argues that it referred the policy grievance to arbitration, retained legal counsel and appeared before Arbitrator Keller for case management and two days of mediation on November 11, 2017, and on January 31, 2019. It adds that following an order from Arbitrator Keller, and before the mediation, it received from the employer a “list of the complaints and/or concerns regarding fatigue” raised since the fall of 2016.

[39] The union states that at mediation, the employer put forward that the basis for the 6-day rule was a concern that the safety of its employees, its customers and the public would be imperiled if the skilled technicians who assessed and repaired its aircraft were suffering from fatigue while performing their work. It adds that one of the world’s leading sleep and fatigue experts made a lengthy informal presentation.

[40] The union submits that between the first and second days of arbitration, the employer also provided it and the arbitrator with a confidential report prepared in part by the sleep and fatigue expert.

[41] The union contends that before deciding whether to pursue the 6-day rule grievance, it considered the information provided by the employer, the comments made by the arbitrator, legal counsel’s opinion on the likelihood of success at arbitration, the small number of members who were affected by the 6-day rule and the number of employees who might be affected by pursuing the grievance further. The union submits that it decided not to pursue the policy grievance further at arbitration in favour of having the bargaining committee pursue the issue in collective bargaining, if it wished. It states that the issue was raised in the 2019 round of collective bargaining but not in the 2022–23 round. The issue was also not included in the list of issues to be submitted at interest arbitration before Arbitrator Ready in 2019 or in 2022–23.

[42] At the May 22, 2024, CMC, the union argued that although it had decided not to pursue the 6-day rule grievance at arbitration, the policy grievance was not withdrawn, to provide the union with extra leverage in the collective bargaining of the issue. According to the union’s additional clarifications following the first CMC, the grievance forms dated January 2021 provided by

Mr. Pallares represent the union's response to the employer indicating that it was continuing to pursue this issue. The union further explained that it was in collective bargaining with the employer at the time, which it stated was why it did not issue any communication to its membership.

[43] The union states that after changes to the employer's scheduling practice in June 2023 brought new attention to the issue, its elected representatives and leadership, who were different persons from those in office in 2019, decided in late 2023 and early 2024 to review the issue again and to consider whether to revive the 6-day rule grievance. It stated that its process was completed in early May 2024 and that following its consideration of the matter, it once again decided not to pursue this grievance any further at arbitration.

[44] At the January 29, 2025, CMC and in its subsequent written submissions, the union stated that it communicated to members verbally and by email in the fall of 2023 that it was reviewing the 6-day rule issue and considering whether to revive the 2017 policy grievance at arbitration. It also stated that the 6-day rule grievance remains dormant but not withdrawn. It also confirmed to the Board that, through its submissions in the instant complaint, it had advised Air Canada that it would not proceed to arbitration.

C. The Complainant's Reply and His Submissions at the CMCs

[45] Mr. Pallares disputes that the grievance only affects AMEs and instead argues that it affects all "Tech-Ops" employees. He also vigorously disputes the assertion that the grievance has already been "presented at arbitration" (translation). In support of his position, he relies on the grievance forms dated January 2021 indicating that the matter was scheduled for arbitration and the emails between Mr. Flowers and other members demonstrating that the grievance was still active up to December 2023.

[46] The Board will not summarize the complainant's allegations pertaining to the merits of the grievance, as they are not pertinent to its analysis. It suffices to say that Mr. Pallares is of the view that the employer erred in its interpretation of the *Code* when it introduced the 6-day rule. As such, he submits that the union arbitrarily and superficially considered the matter by focussing its analysis on the documents submitted by the employer in relation to fatigue issues and by not properly evaluating the impact of the rule on its members' remuneration.

[47] Mr. Pallares also disputes the union's allegation that it had decided to instead have the matter dealt with at collective bargaining and relies on the statements from Mr. Burden and Ms. Bordeleau in support. In addition, Mr. Pallares highlights that as of May 2024, the union was still advising members that it was proceeding with the grievance. He maintains that the 6-day rule grievance is active and still scheduled for arbitration.

IV. Analysis and Decision

A. Timeliness of the Complaint

[48] In view of the preliminary objection raised by the union regarding the timeliness of the complaint, the Board must begin by determining whether the complainant filed his complaint within the time limit set out in section 97(2) of the *Code*, which reads 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.

[49] The importance of abiding by the time limit set out in section 97(2) of the *Code* has been reiterated numerous times in many Board decisions, including in *McRaeJackson*, 2004 CIRB 290 (at paragraph 51).

[50] To address the issue of timeliness, the Board considers the time that has elapsed since the events giving rise to the complaint took place or, more precisely, the time that has elapsed since the date on which the complainant knew or ought to have known of the incident giving rise to the complaint.

[51] The complainant alleges that by its inaction following the filing of the 6-day rule grievance in 2017, the union breached its duty under section 37 of the *Code*, more specifically, by failing to refer the grievance to arbitration. The complainant indicates that he did not know that the 6-day rule grievance had not been referred to arbitration until June 2023, when he discovered that the union had not taken any steps to advance this matter.

[52] The Board notes that the union did not publish any bulletin or any other updates to the membership on the 6-day rule grievance between November 13, 2017, and June 2023. It is also not disputed that the employer's June 19, 2023, changes to its scheduling practice are what

brought new attention to the 6-day rule, which resulted in members inquiring about the matter and seeking Mr. Pallares' assistance, given that some members had been advised that the grievance was in abeyance.

[53] In these circumstances, the Board accepts that Mr. Pallares knew of the incident giving rise to the complaint sometime in June 2023, when he investigated the status of the 6-day rule grievance. The Board is of the view that it was reasonable for the members, including Mr. Pallares, to assume until June 2023 that the matter was proceeding to arbitration as planned (albeit at an extremely slow pace considering the time that had elapsed since the first bulletins), especially given the absence of any communications from the union to the contrary. More specifically, there was no reason for Mr. Pallares to believe that his union was not fulfilling its duties as exclusive bargaining agent on this matter before June 2023. As his complaint was filed on July 2, 2023, the Board is of the view that it is timely, as it was filed well within the 90-day time limit prescribed by section 97(2) of the *Code*.

[54] Accordingly, the Board dismisses the union's preliminary objection and will consider the merits of the complaint.

B. Merits of the Complaint

[55] The union's DFR is defined as follows in section 37 of the *Code*:

> **37** A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.

[56] In *Beaton*, 2017 CIRB 846, the Board explained that "[t]he protection offered by section 37 of the *Code* is granted as a corollary to the union's exclusive representational rights upon certification and to remedy any abuse by the union in respect of its exclusive bargaining authority" (paragraph 51). The purpose of section 37 of the *Code* is thus to ensure that the way a union acts in its role as the exclusive representative of employees in the unit meets certain standards.

[57] To do so, the Board assesses the union's conduct in light of the principles established by the Supreme Court of Canada in *Canadian Merchant Service Guild* v. *Gagnon et al.*, [1984] 1 S.C.R. 509 (*Gagnon*). These principles require the union's representation to be fair, objective,

honest and not merely apparent, undertaken with integrity and competence, without serious or major negligence and without hostility toward employees.

[58] Having said that, a union has considerable discretion in connection with its exclusive representational rights. The Board's role is to ensure that, in making decisions, the union does not act in a manner that is arbitrary, discriminatory or in bad faith.

[59] Furthermore, absent evidence of arbitrary, bad faith or discriminatory conduct, section 37 of the *Code* does not allow the Board to evaluate whether the union made the right decisions in relation to a grievance. The union is free to decide the best course of action in each situation (see *McRaeJackson*; and *Leduc*, 2010 CIRB 495). The Board only examines the process that the union followed to reach its decision, not the merits of that decision.

[60] This also means that employees do not have an absolute right to arbitration. Unions have broad discretion in determining how a grievance is handled, including whether to advance it to arbitration (see *Gagnon*; and *Blakely*, 2003 CIRB 241).

[61] In looking at the process that a union followed in reaching its decision concerning a grievance, the Board also bears in mind the difficulties encountered by unions in considering competing interests. In *Gendron* v. *Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298, the SCC explained the duty incumbent on the union in such a situation:

> The principles set out in *Gagnon* clearly contemplate a balancing process. As is illustrated by the situation here a union must in certain circumstances choose between conflicting interests in order to resolve a dispute. Here the union's choice was clear due to the obvious error made in the selection process. The union had no choice but to adopt that position that would ensure the proper interpretation of the collective agreement**. In a situation of conflicting employee interests, the union may pursue one set of interests to the detriment of another as long as its decision to do so is not actuated by any of the improper motives described above, and as long as it turns its mind to all the relevant considerations. The choice of one claim over another is not in and of itself objectionable. Rather, it is the underlying motivation and method used to make this choice that may be objectionable.**
>
> (pages 1328–1329; emphasis added)

[62] In view of the complainant's allegations, it is also important to consider how the Board has defined arbitrary conduct in the context of a DFR complaint. In *McRaeJackson*, the Board reviewed its jurisprudence and defined arbitrary conduct as follows:

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

[63] Finally, in a DFR complaint, the burden of proof is on the complainant. Accordingly, a complainant must provide sufficient facts to show, on a balance of probabilities, that the union breached its duty under this section of the *Code* (see *Connolly et al.* (1998), 107 di 120; and 45 CLRBR (2d) 161 (CLRB no. 1235)).

[64] Mr. Pallares argues that the union acted arbitrarily by failing to refer the 6-day rule grievance to arbitration. He also argues that the union did not properly assess the merits and impact of the grievance. Finally, he contends that the union prioritized the interests of the rest of the bargaining unit over the members affected by the 6-day rule.

[65] The Board is unable to conclude that the union performed a perfunctory analysis of the matter. The Board notes that it is not disputed that the union turned its mind to the issue raised by the 6-day rule. It retained counsel, and even initially considered a cease-and-desist order. It also agreed with the employer on an arbitrator who was seized of the policy grievance. Contrary to the allegation raised in the complaint, the union referred the policy grievance to arbitration in 2017. However, following two days of mediation and its consideration of the matter in early 2019, the union had concerns about the likelihood of succeeding at arbitration.

[66] The Board also accepts that at that point in time, the union knew that it would not proceed to the hearing of the 6-day rule grievance given the absence of resolution between the parties. The Board notes that the union's consideration of the matter included reviewing the information

obtained through the process with the arbitrator, considering the small number of employees who were affected by the rule and considering advice from its legal counsel that it would unlikely succeed at arbitration and that a loss could have a wider negative impact on the bargaining unit as a whole. Up to that point, the Board is thus unable to find a breach of its DFR.

[67] The complainant criticizes the union's consideration of the matter, arguing that it should not have focused on the physical impact of consecutive work shifts and should instead have concentrated its analysis on the absence of any legal, policy or contractual requirement for the rule and adequately assessed its impact. While Mr. Pallares recognizes that the 6-day rule affects a smaller portion of the unit, he argues that it affects all "TechOps" employees as opposed to only AMEs. The Board finds that these submissions deal largely with the merits of the grievance, not the process followed by the union.

[68] As previously explained, unless there is evidence of arbitrariness, bad faith or discrimination. the Board's role is not to second-guess the union's assessment of the grievance or determine whether it properly evaluated the impact of the grievance. Unions can also make mistakes. As the Board remarked in *Adams*, 2000 CIRB 95, "its role is not to sit in appeal of decisions taken by union representatives, but rather to remedy abuses of the exclusive bargaining authority of unions" (paragraph 49). Further, evaluating whether the union's consideration of the matter was adequate or whether it was correct in determining whether it had any chance of succeeding at arbitration would result precisely in an assessment of the merits of the grievance. This is not the purpose of a section 37 complaint.

[69] In considering the impact of the grievance, Mr. Pallares also argues that the union gave preference to the unaffected members who represent most of the bargaining unit, at the expense of the "TechOps" members, who represent a much smaller portion. However, that of itself is also not a breach of the DFR.

[70] Indeed, a union may make decisions that adversely affect a group of employees if there is no unlawful motive or prohibited conduct such as arbitrariness, discrimination or bad faith (see *Bugay*, at paragraphs 41 and 43). The Board finds that there is no evidence on the record that the union was guided by any such unlawful considerations.

[71] While a union is free to decide on its strategy in relation to a grievance, it is unclear to the Board whether the union decided to have the issue raised at bargaining, as alleged, after it decided not to proceed with the grievance to arbitration. Mr. Burden and Ms. Bordeleau both deny being asked to raise this issue at the table. However, the Board notes that a discussion took place in 2019, when the rescue missions were addressed. It is, however, unable to conclude, given the contradictory evidence, whether this was done informally and at the initiative of the bargaining committee, as Mr. Burden alleges, or whether this was because of a formal request by the union to bring the matter to the table, as the union alleges.

[72] Even if the Board is prepared to accept that the union kept the 6-day rule grievance alive in a last attempt to resolve the matter through bargaining in 2019, the union clearly knew by the end of the 2019 round that it would not advance the grievance to arbitration. In light of the documentary evidence filed, in particular the emails from Ms. Bordeleau dated January 5, 2024, and February 19, 2025, as well as the written statement from Mr. Burden dated June 12, 2024, both of whom were at the bargaining table in the 2022 round, the Board also accepts that the bargaining committee members were not asked to raise this issue at that time. This is where, in the Board's opinion, the union failed in its obligations.

[73] In the summer and fall of 2017, the union diligently communicated with its members, keeping them informed of the progress of the grievance. Although the Board notes that in its November 13, 2017, bulletin, the union implied that it had proceeded to the hearing of the grievance instead of the mediation agreed upon by the parties, the Board is satisfied that the union nevertheless provided sufficient information to its membership on the issue. What matters is that as of November 2017, members knew that the union was advancing this matter and that it had not yet been resolved, by arbitration or otherwise.

[74] For the Board, the problem lies in the fact that between November 2017 and May 2024, the union kept its membership in the dark and was not transparent on the matter, letting them believe that the grievance was still active and going through the process. It did not inform its membership of its decision not to proceed to arbitration, even after the 2019 round of collective bargaining when it could have done so, and that is assuming it had asked the bargaining committee to raise the issue at the table. In fact, the Board finds it noteworthy that the union did not inform its members of its alleged efforts in trying to seek a resolution through bargaining.

[75] The union claims that the new leadership decided to reconsider the matter in late 2023 up to May 2024 once members started asking questions in June 2023. Although the union submits that it advised its membership by email and verbally in the fall of 2023 that it was reconsidering the matter, it did not produce any email that it had sent to the membership. The Board finds that for the approximately four years that followed its initial decision in 2019 not to pursue the grievance, the union misled its membership by failing to advise them that it would not bring this grievance to arbitration or advance the matter any further.

[76] Even if the Board were to accept that the events from January to May 2024 unfolded as presented by the union, that is, that it undertook to reexamine whether the grievance should proceed to arbitration, the union was still not transparent with its members and even its own representatives, as demonstrated by the emails produced by Mr. Pallares dated between October 2023 and May 2024. Until early January 2024, executive members of the union's District Lodge 140 were communicating to members that the grievance was still going to be heard at arbitration. Further, the Board cannot help noticing that the May 27, 2024, bulletin issued after the CMC—during which the Board remarked that members should not have to file a DFR complaint to know the status of a grievance—indicates that the union would not be moving forward with the grievance "at this time." Given the union's significant efforts in trying to convince the Board that a clear decision was made on the grievance as early as 2019 and again in May 2024, the Board is puzzled by the wording used in the bulletin implying that it may proceed later.

[77] In *Adams*, the Board summarized the circumstances in which the poor state of communications between a union and a complainant can lead to a breach of the union's DFR:

> [53] In *Luc Gagnon* (1992), 88 di 52 (CLRB no. 939), the Board also considered that the poor state of communications between the union and the complainant did not in itself constitute a breach of duty of fair representation. What must be established is that there has been gross negligence on the part of the union in its handling of the complainant's grievance. However, in *Jacqueline Brideau* (1986), 63 di 215; 12 CLRBR (NS) 245; and 86 CLLC 16,012 (CLRB no. 550), the Board did not definitively eliminate the possibility that a breakdown in communications could not lead to a violation of section 37. Thus, inadequate communication between the union and the complainant prejudicial to the latter's position could lead to a breach of duty of fair representation. In *Ronald Shanks* (1996), 100 di 59 (CLRB no. 1157), the Board found that the central issue "is by no means simply poor communication but rather one of sustained neglect and inaction on the part of the Union in the exercise of its exclusive authority" (page 71). On this jurisprudence is founded the principle that even if poor communication does not inevitably lead to a violation of section 37, the union's actions should be assessed in each case.

[78] There is no doubt in the Board's mind that the union failed to adequately inform its membership of the status of the grievance and that, in doing so, it misled its membership. However, a lack of communication per se does not constitute a breach of the DFR, except where it prejudices the complainant's position, which is not the case here. Indeed, even if the complainant had been given more explicit or correct information about the status of the 6-day rule grievance, his situation would have been the same, as the union did not breach its DFR when it decided not to proceed to arbitration (see *Trudeau*, 2010 CIRB 541, at paragraphs 48, 51 and 70, in which the reconsideration panel addressed this issue in detail). If there is any prejudice in this case, it is the loss of trust in the union because of its actions.

[79] The main problem here is thus not the poor quality of the communications but, in fact, the carelessness and prolonged inaction on the union's part in exercising its exclusive powers. As noted earlier, a union has significant discretion in its role as an exclusive bargaining agent. However, as the SCC commented in *Gagnon*, this discretion "must be exercised in good faith, objectively and honestly," and the "representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence" (page 527). The Board is unable to conclude that by its lengthy silence and prolonged inaction on the 6-day rule grievance after the 2019 round of collective bargaining and its subsequent misleading communications up to 2024, the union carried out its obligation in accordance with the standards set out in *Gagnon*.

[80] While unions have considerable latitude in handling grievances, there is a limit to passivity. According to the union, it had already determined in 2019 that it would not pursue the 6-day rule grievance any further at arbitration but decided not to withdraw it. Even if the union chose not to withdraw the grievance for strategic reasons related to collective bargaining, as it alleges in its submissions dated June 3, 2024, it has provided no reasonable explanation for why it could not or did not provide the concerned members with any information at all following those negotiations in 2019, or again in 2022 when the grievance had clearly not been addressed during collective bargaining, which it could have done without compromising its objective. To conclude otherwise would essentially result in concluding that a union can keep members completely in the dark and do nothing with a grievance for as long as it wants, so long as the union has identified that grievance as a potential negotiating tool.

[81] By failing to inform its membership diligently and honestly about the status of the 6-day rule grievance and by misleading members about its decision not to advance the grievance to arbitration for such a long period, the Board finds that the union acted arbitrarily, as its conduct clearly demonstrates a non-caring attitude towards the interests of the employees like Mr. Pallares, particularly those affected by the 6-day rule. This is also an abuse of its role as the exclusive bargaining agent. The Board cannot endorse such prolonged inaction and lack of integrity. If the Board were to accept the union's position, this would in effect relieve the union from fulfilling its responsibilities toward its membership.

[82] Accordingly, the Board is satisfied that Mr. Pallares has met his burden of proof and finds that the union acted arbitrarily and violated section 37 of the *Code*. It therefore allows Mr. Pallares' complaint.

C. Remedy

[83] Sections 99(1)(b) and 99(2) of the *Code* provide the Board with its remedial authority for situations where a union has breached its DFR under the *Code*. Sections 99(1)(b) and 99(2) provide as follows:

> **99 (1)** Where, under section 98, the Board determines that a party to a complaint has contravened or failed to comply with subsection 24(4) or 34(6), section 37, 47.3, 50 or 69, subsection 87.5(1) or (2), section 87.6, subsection 87.7(2) or section 94, 95 or 96, the Board may, by order, require the party to comply with or cease contravening that subsection or section and may
>
> ...
>
> **(b)** in respect of a contravention of section 37, require a trade union to take and carry on on behalf of any employee affected by the contravention or to assist any such employee to take and carry on such action or proceeding as the Board considers that the union ought to have taken and carried on on the employee's behalf or ought to have assisted the employee to take and carry on;
>
> ...
>
> **(2)** For the purpose of ensuring the fulfilment of the objectives of this Part, the Board may, in respect of any contravention of or failure to comply with any provision to which subsection (1) applies and in addition to or in lieu of any other order that the Board is authorized to make under that subsection, by order, require an employer or a trade union to do or refrain from doing any thing that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of those objectives.

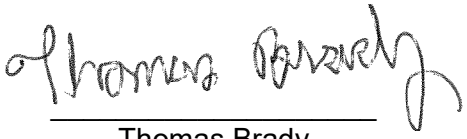
[84] The overriding principle is that any remedy must be rationally connected to the violation of section 37 of the *Code*. Further, to the extent possible, the Board "endeavours to put the injured party back into the position that he or she would have enjoyed, had the wrong not occurred" (*Pepper*, 2010 CIRB 551, paragraph 23).

[85] Considering the Board's conclusion that Mr. Pallares would be in the same situation even if the union had been honest about the status of the 6-day rule grievance and its intentions, the Board finds that it is sufficient in the circumstances to order the union to post without delay a copy of this decision on any intranet and/or internet site of the union, for three months.

[86] The Board also appoints Patrick Saulnier, Industrial Relations Officer, to oversee the implementation of the remedy. Furthermore, the Board reserves jurisdiction to resolve any issues arising from the implementation of its decision.

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

Annie G. Berthiaume
Vice-Chairperson



Thomas Brady
Member

Daniel Thimineur
Member