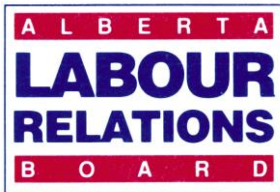

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July 23, 2019

Directed to: Complainant, ALSTOM Power and Transport Canada Inc. - Henry Geerts, Blair Chahley Lawyers - Leanne Chahley, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 146 - Labour Relations

RE: A duty of fair representation complaint brought by the Complainant affecting the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 146 - Board File No. GE-07577

[1] This decision addresses a duty of fair representation complaint filed under section 153 of the *Labour Relations Code* (the "*Code*") against the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 146 (the "Union"). The Complainant takes issue with the Union's refusal to pursue a grievance when ALSTOM Power and Transport Canada Inc. ("ALSTOM" or the "Company") refused to hire him following a pre-access alcohol and drug test.

[2] The complaint was sent to an in-person hearing before a panel of the Board (Schlesinger, Bokenfohr, Farkas). For the following reasons, we dismiss the complaint.

Background

[3] The Board heard evidence from four witnesses: Union representative, Blair Savoie; a representative from the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (the "International"), Cory Channon; Union member Stephen Northrup; and the Complainant. By agreement of the parties, the Union presented its evidence first, with the burden of proof remaining with the Complainant. Based on the evidence presented, we set out the following relevant facts.

On September 2, 2016, the Union dispatched the Complainant to work for ALSTOM at a site owned by a third party. Work done by the Union's members at the site in question is performed pursuant to the National Maintenance Collective Agreement ("NMA"). The *Canadian Model for Providing a Safe Workplace – Alcohol and Drug Guidelines and Work Rules* (the "*Canadian Model*") is part of the NMA.

[4] The scheduled report-to-work date on the Complainant's dispatch slip was September 13, 2016. As indicated on the slip, pre-access drug and alcohol testing was required. The Complainant attended for testing on September 8, 2016.

[5] Following the administration of the drug and alcohol test, ALSTOM denied the Complainant access to the worksite and refused to hire him. The Complainant sought the assistance of the Union in mid-September, meeting with Union representative, Blair Savoie. The Complainant voiced his objection

to not being hired, indicating he had a valid medical marijuana card. In particular, he mentioned he had previously worked for ALSTOM after undergoing a drug test. He questioned why he was being treated differently this time.

[6] Soon after this initial meeting, the Complainant provided the Union with copies of his September 8th test results. In relation to the drug screen, the results indicated: "Result #1: Negative (Confirmed by MRO) – Safety Sensitive". The results also included a comment indicating the Complainant had a valid medical marijuana card.

[7] Mr. Savoie contacted a representative from ALSTOM, asking for information about why the Complainant was not hired and pointing out ALSTOM had hired the Complainant in the past.

[8] The Company's Area Construction Manager explained the refusal to hire related to the results of the pre-access test and said he would look into whether ALSTOM had any non-safety sensitive positions available for the Complainant. This initial response was followed with a letter from ALSTOM, dated October 3rd, indicating:

> In relation to [the Complainant] and the results of his A&D test we are unable to accommodate him to work at the … site, due to the fact that we have no area for his skill set that is classified as non-safety sensitive. Site access rules determine that an A&D test in compliance with the Canadian model is required.

[9] On October 6, 2016, the Union filed a grievance on the Complainant's behalf. ALSTOM responded by denying the grievance. In so doing, it asserted the Complainant was not hired because his test results from September 2016 were not in compliance with acceptable levels. In response to concerns raised by the Union about differential treatment, ALSTOM explained the test results in relation to the earlier employment (in March 2016) were in full compliance with the relevant drug screen. ALSTOM advised there were no positions at the site that were non-safety sensitive. It was unwilling to allow the Complainant to work in a safety sensitive position in the circumstances.

[10] The Union received a letter from the Complainant on October 19th asking for union charges to be brought against ALSTOM's representatives. Mr. Savoie responded by sending the Complainant a copy of the grievance that had been filed on his behalf and explaining the Union did not bring charges or grievances against Company representatives.

[11] By this stage, Mr. Savoie understood the Complainant had no interest in being accommodated to a non-safety sensitive position. Given this context, Mr. Savoie focused his attention on the alleged differential treatment flowing from the March and September drug test results. Mr. Savoie asked the Complainant to provide a copy of his test results relating to his earlier March 2016 employment with ALSTOM. Mr. Savoie wanted to compare them with the results from September 2016. The Complainant did not comply with Mr. Savoie's request. As explained in his testimony, he was very busy at the time and could not easily respond to the Union's request. He also maintained he did not understand how the earlier results would help his case. However, during cross-examination, he acknowledged the Union explained why it wanted to review the March 2016 results.

[12] In November 2016, the Union advanced the grievance to the next step in the grievance process. Pursuant to the terms of the NMA, this step involved the participation of a representative from the International, Cory Channon. The Complainant was advised of the status of the grievance.

[13] The Complainant attended a subsequent meeting with Mr. Channon to review his grievance. By this point, it was clear the Complainant was taking the position his medical marijuana card entitled him to use marijuana and work in safety sensitive positions. He wanted to challenge the levels of impairment in the *Canadian Model*. Mr. Channon took a dim view of the grievance's chances of success, telling the Complainant he would not be able to "find an adjudicator in all of Canada that would take the case."

[14] Following this meeting, Mr. Channon verbally advised ALSTOM the grievance would likely be withdrawn. He never sent a letter to either ALSTOM or the Complainant confirming withdrawal of the grievance because, by that time, the complaint was filed under section 153.

[15] The Complainant did not provide a copy of the March 2016 drug test results until he filed his complaint with the Board. The results indicate the Complainant passed the March 2016 pre-access testing. During cross-examination, the Complainant admitted to cleansing his system of marijuana prior to undergoing the March 2016 test. He did not adopt the same approach prior to testing in September 2016 and knew at the time he was unlikely to pass the pre-access test.

Decision

[16] In this case, the Complainant was never hired by ALSTOM. A condition of his dispatch was that he pass a pre-access drug and alcohol test. This was a requirement set by the owner of the worksite.

[17] The duty of fair representation imposed by section 153(1) of the *Code* is limited to an "employee's or former employee's rights under the collective agreement." We find, at the relevant time, the Complainant was not an employee to whom section 153 could apply. The complaint is beyond this Board's jurisdiction. The Union's filing of a grievance does not clothe this Board with jurisdiction.

[18] Even if the Board had jurisdiction, we would dismiss the complaint for the following reasons.

[19] We find nothing unfair about the Union's refusal to pursue the grievance in the circumstances. The Union listened to the Complainant's concerns and looked into them. It sought additional information that would have allowed it to better evaluate the Complainant's concerns about alleged differential treatment arising out of the March and September 2016 test results. The Complainant failed to provide the information. As it turns out, there was a legitimate basis for why ALSTOM responded differently in the two situations.

[20] During cross-examination, the Complainant insisted he did not intend to mislead the Union about the earlier test results; he simply forgot he approached the earlier test differently. We do not find the Complainant's evidence on this point to be credible. The Complainant raised ALSTOM's differential treatment of him during his first discussion with Mr. Savoie in mid-September 2016. In fact, based on Mr. Savoie's evidence (which was not challenged during cross-examination or during the Complainant's evidence), we view the allegation of differential treatment as the principal concern raised by the Complainant when he first approached the Union for assistance.

[21] It is simply not believable that the Complainant would forget the circumstances of the March 2016 test and yet raise the prior employment as a basis for alleging unfair treatment by

ALSTOM. When coupled with the Complainant's failure to provide the March 2016 test results, the evidence suggests the Complainant deliberately misled the Union about the circumstances of his prior employment in the hopes of gaining the Union's support for a grievance. The Complainant had a duty to cooperate with the Union in the investigation of his grievance and this includes an obligation to be honest with the Union and provide the documentation it requests to carry out its investigation. The complaint fails on this basis. As noted in *Information Bulletin #18* (at page 2):

> Employees must protect their own interests. Employees do this by filing grievances, co-operating with the union, and minimizing their losses. If employees do not protect their own interests, claims of a breach of the duty of fair representation may not succeed.

[22] In addition, mid-way through the investigation of the grievance, it became apparent the Complainant was not interested in being accommodated to a non-safety sensitive position. He wanted to work in a position he acknowledged was safety sensitive and demanded that he be able to do so despite his test result. By the time his grievance was reviewed by Mr. Channon, it was clear the Complainant was taking issue with the levels of impairment contained in the *Canadian Model*, the standard used for pre-access testing at the relevant site. Mr. Channon refused to pursue the grievance. There is nothing unfair about that decision in the circumstances.

[23] For all the reasons set out above, the complaint is dismissed.

Nancy E. Schlesinger, Vice-Chair