Case Name:

Riley (Re)

**Orville Riley et al., complainants, and
Amalgamated Transit Union, Local 1374, respondent, and
Greyhound Canada Transportation Corp., employer**

[2008] CIRB No. 419

[2008] C.I.R.B.D. No. 22

[2008] D.C.C.R.I. no 22

174 C.L.R.B.R. (2d) 80

CIRB Decision No. 419

Board File: 26244-C

Canada Industrial Relations Board

Ms. Julie M. Durette, former Vice-Chairperson, André Lecavalier and Norman Rivard, Members

Heard: Edmonton, Alberta, March 6, 2008.
Decision: October 15, 2008.

(69 paras.)

Tribunal Summary:

This is an application pursuant to section 37 of the Canada Labour Code, Part I (the Code).

Duty of fair representation -- Dismissal -- Quality of representation -- Practice and procedure -- Complainants allege that the union violated section 37 of the Code by not properly representing them by withdrawing a group grievance contesting the decisions of the employer to terminate their respective contracts for services, without just cause -- Duty of fair representation exists as a counterpart to the union's exclusive authority to deal with grievances under a collective agreement and to remedy any abuse by the union in respect of its exclusive [page2] bargaining authority --

Union has broad discretion when deciding whether to refer a grievance to arbitration -- Duty of fair representation does not require a union to obtain a legal opinion in every case or to advise the grievor(s) at every stage of the grievance procedure -- Board's role is to review the union's investigation and decision-making process in regards to the complainants' grievance rather than to assess the merits of the grievance -- Board may review the facts and positions of the parties relating to the grievance in order to understand whether the union's decision-making process reflected the worthiness and seriousness of the matter -- Board will hold the union to greater scrutiny when the matter involves an employee's termination, serious discipline that affects gainful employment or a disability that requires accommodation -- Question for the Board is whether the union seriously considered the grievance and whether its handling of the matter in the present context constitutes reckless disregard for the complainants' interests -- Despite the fact that the issue raised by the grievance had never been arbitrated, the union did not seek legal advice -- Union did not consult the former President who had filed the grievance on behalf of the complainants -- Union did not in any way consult or advise the complainants regarding their grievance, prior to deciding to withdraw it -- It is only after their counsel wrote to enquire about the status of [page3] the grievance that the complainants were advised that their grievance was withdrawn -- Under the circumstances of this case, Board finds that the union breached its duty of fair representation by arbitrarily withdrawing the complainants' grievance without making a sufficient assessment of whether the grievance had a factual and legal basis to succeed.

Cases Cited:

Adams (Robert), 2000 CIRB 95.

Canadian Council of Railway Operating Unions v. Robert Adams et al., judgment rendered from the bench, no. A-719-00, February 13, 2002 (F.C.A.).

Canadian Merchant Service Guild v. Gagnon et al., [1984] 1 S.C.R. 509.

McRaeJackson (Virginia), 2004 CIRB 290.

Statute Cited:

Canada Labour Code, Part I, ss. 37; 44; 99(2).

Appearances:

Mr. Simon Renouf, for Mr. Orville Riley et al.;

Mr. William J. Johnson, for the Amalgamated Transit Union, Local 1374; and

Mr. Michael D.A. Ford, for Greyhound Canada Transportation Corp.

REASONS FOR DECISION

These reasons for decision were written by Ms. Julie M. Durette, former Vice-Chairperson.

I - Nature of the Complaint

1 This complaint was filed on April 12, 2007, by a group of employees represented by Mr. Orville Riley (the [page4] complainants). They allege that the Amalgamated Transit Union, Local 1374 (the ATU or the union) violated section 37 of the *Canada Labour Code (Part I - Industrial Relations)* (the *Code*) by not properly representing them and more specifically by withdrawing a group grievance contesting the decision of Greyhound Canada Transportation Corp. (Greyhound or the employer) to terminate their respective contracts for services, without just cause.

II-Facts and Background

2 At the beginning of the hearing in this case, the complainants and the union filed a partial agreed statement of facts. The following is a summary of those facts, as well as other relevant facts derived from the parties' written submissions and the evidence presented during the hearing.

3 The complainants were what is commonly referred to in the transportation industry as owner-operators. They worked for Greyhound, under contracts for services, in the city of Edmonton. The owner-operators are included in the all-employee bargaining unit at Greyhound, represented by the ATU. They are subject to different work conditions and compensation than the other employees in the ATU bargaining unit.

4 At the time of the complaint, Greyhound and the ATU were parties to a [page5] collective agreement with a term of January 1, 2003, to December 31, 2006. The parties have since concluded a new collective agreement; however, the contract language at issue in this complaint has not changed.

5 Pursuant to section 0/0-1 of the collective agreement, the union is recognized as the fully designated and sole collective bargaining representative of all owner-operators at Greyhound. Paragraph b) of this section, entitled "Relationship," reads as follows:

> (i) The parties hereby acknowledge and agree that this agreement is a Contract for Services and the Owner/Operator shall, for all purposes of this agreement, be deemed an **Independent Contractor** under **Canada Customs and Revenue Agency** legislation and other various tribunals, including but not limited to: Workers' Compensation Board, Employment Insurance and, Canada Pension Plan. This agreement shall not be construed in any respect to create between Greyhound Canada Transportation Corp. and the Owner/Operator a legal

relationship of partnership, employer and employee, master and servant or, principal and agent.

(ii) In keeping with previous *Canada Labour Code* [page6] and **Canadian [*sic*] Industrial Relations Board** decisions, the parties agree the Owner/Operator is a **Dependent Contractor** under Part I of the *Canada Labour Code* and, is not an employee under Parts II and III of said *Code*.

6 Pursuant to section 0/0-8 of the collective agreement, each owner-operator enters into an individual contract for services with Greyhound that provides the terms and conditions of their employment. Each contract for services contains the text of section 0/0-8 of the collective agreement.

7 Section 0/0-8(m) 2 of the collective agreement reads as follows:

> 2. **Right To Terminate**
>
> **1 This Contract for Services may be terminated by the Owner/Operator giving Greyhound fourteen (14) days written notice. Or** this Contract for Services may be terminated **immediately** by the Owner/Operator at any time by written notice to Greyhound setting out the effective date of the termination if Greyhound fails, without justifiable cause, to make punctual payment of all sums due to the Owner/Operator Service Equipment of this Contract for Services and the rights and liabilities of the parties shall thereafter be [page7] determined in accordance with the provisions of point 3.
>
> **2** If Greyhound terminates this Contract for Services without **a breach in the Contract for Services but as a result of the elimination of a territory.** Greyhound agrees that it shall give the Owner/Operator fourteen (14) day's notice or, **fourteen (14) day's** payment in lieu of notice.

8 By letter dated August 8, 2006, Greyhound advised the union of its intention to invoke Letter of Understanding no. 16 (LOU 16) of the collective agreement, which provides as follows:

> The Company reserves the right to contract out work currently performed by the Owner/Operator.
>
> 1. The Union will be provided with a minimum of thirty (30) calendar days notice.
> 2. The Company is prepared to receive submissions from the Union that would either avoid contracting out or present a viable alternative to contracting out.
> 3. The Company reserves the right to make the final decision.

[page8]

> It is agreed that the interpretation of this LOU is as follows:
>
> This LOU refers to contracting out of all Owner/Operator routes within a particular city. **The Company may contract out on a city by city basis without penalty or paying union dues provided the three steps identified above are applied.**
>
> In addition, it is agreed that the company has the right to contract out individual vacant routes on an interim basis within each city. If the duration of the contracting out exceeds 30 calendar days, the company will pay the union the normal dues applicable to that route. It is the responsibility of the company to notify the union when these circumstances exist.
>
> (emphasis added)

9 On September 1, 2006, the union served Greyhound with a notice to commence bargaining. Shortly before the commencement of negotiations, Greyhound advised the union that it would contract out all owner-operator routes in Edmonton, unless the union agreed to certain conditions, including allowing Greyhound the right to unilaterally change the owner-operator [page9] routes and introduce new technologies.

10 On October 19, 2006, during collective bargaining, Greyhound advised the union that it would be terminating the contract for services of all owner-operators in the Edmonton area.

11 On October 27, 2006, Greyhound advised the complainants that it had contracted out all owner-operator routes in Edmonton to a third-party contractor, Dynamex, and that their contracts for services were terminated. The first paragraph of the termination letters to the complainants reads as follows:

> Effective end of business day Friday, October 27th, 2006 we are terminating your business agreement with Greyhound Courier Express. In lieu of fourteen days notice we are providing an amount equal to ten working days revenue as averaged from June 8, 2006 to October 11th, 2006.

12 All routes for which the Edmonton owner-operators were responsible were transferred to

Dynamex pursuant to a contract with Greyhound. The vans used are identical to the owner-operators' Greyhound vans, and bear the Greyhound logo. The product picked up and delivered still comes and goes from the Greyhound depot.

[page10]

13 On November 8, 2006, the union filed an unfair labour practice complaint alleging a violation by Greyhound of several sections of the *Code* (Board file no. 25990-C). The union also filed an application for a declaration of sale of business from Greyhound to Dynamex, pursuant to section 44 of the *Code* (Board file no. 25995-C). Both the application and the complaint were subsequently withdrawn by the union.

14 By letter dated November 17, 2006, Mr. Riley, on behalf of all the complainants, wrote to Mr. Len Munter, then President of the union, requesting that the union file a grievance to contest Greyhound's decision. According to Mr. Riley, Greyhound had violated the provisions of the collective agreement since no routes were eliminated and, consequently, section 0/0-8(m) of the collective agreement could not apply. Mr. Riley advised Mr. Munter that the owner-operators would consider a compensation package based on two weeks' pay per year of service.

15 The complainants had worked for Greyhound for the following number of years:

Sheldon Prepes	9 years
Shane Beauregard	13 years
Ellery Daly	13 years

[page11]

Wade Ulmer	14 years
Doug McIssac	15 years
Pat Godsmen	18 years
Doug Goulden	18 years
Orville Riley	21 years

16 On November 23, 2006, the union filed a group grievance against Greyhound on behalf of the complainants. The union took the position that Greyhound had violated several provisions of the collective agreement, including sections 0/0-1(a) and 0/0-8(m). The grievance stated, in part:

> The Union is perplexed as to how the Company arrived at this arbitrary compensation for terminating the Owner Operators without just cause. For example there is a section in the CBA and SBA dealing with pay in lieu of 14-day's notice when terminated as the result of elimination of a territory, (section 0/0-8(m)(2)(2)). However, these terminations were obviously not as a result of eliminations of territories, they were as a result of Greyhound's decision to contract the Edmonton Owner Operators' territories out to a third party contractor, Dynamex.

17 The union sought a compensation package from Greyhound for having terminated the owner-operators [page12] without just cause. The grievance was filed without prejudice to the union's unfair labour practice complaint filed with the Board (file no. 25990-C), and was separate and apart from that complaint.

18 On December 5, 2006, one of the complainants emailed Mr. Munter to enquire about the status of the grievance. Mr. Munter responded on December 6, 2006, advising that he would verify the date of the grievance and follow through the next step of the grievance process, given that Greyhound had not yet replied.

19 On December 5, 2006, Greyhound denied the grievance at step two of the grievance process. Its position was that the existing routes were in fact abolished because the work was being contracted out. The union did not inform or provide a copy of Greyhound's response to the complainants.

20 On December 17, 2006, the union advanced the grievance to step three of the grievance process. It did not inform the complainants or provide them with a copy of its letter. Greyhound denied the grievance at step three for the same reason stated in its response given at step two of the grievance process.

21 The union never contacted any of the complainants with respect to the facts or the merits of the grievance or to inform them of the status of the grievance.

[page13]

22 Following an election in October 2006, the ATU elected a new executive. Because the results of this election were very close, a second ballot was necessary. Mr. Jim Higgs eventually replaced Mr. Len Munter as President and Business Agent. Mr. Barrie Smith of Calgary was elected Vice-President and Ms. Bonnie Hendricks was elected Secretary/Treasurer.

23 Mr. Higgs testified that he needed some time to move from Winnipeg, where he resided, to Calgary, where the union head office is located. He also explained that, when he took over as

President, Mr. Munter sent him a list of all outstanding grievances filed by the union, including the complainants'. He explained that, as the former Manitoba representative, he was a member of the union executive and was aware that Greyhound had invoked LOU 16 and contracted out the Edmonton routes. He also was aware that the ATU had raised the issue in collective bargaining with Greyhound.

24 Mr. Higgs testified that the ATU also represents owner-operators at the Saskatchewan Transportation Company (the STC), which offers courier services. According to Mr. Higgs, sometime prior to 2003, the Canada Customs and Revenue Agency (Revenue Canada) imposed significant charges on the STC and its owner-operators for failing to make statutory deductions, [page14] including income taxes, pension and unemployment insurance contributions. The charges imposed were based on a finding by Revenue Canada that the owner-operators were employees of the STC and not independent contractors. According to Mr. Higgs, during the 2002--2003 negotiations, Greyhound made significant efforts to amend the collective agreement to avoid future similar assessments by Revenue Canada. One of the changes to address the owner-operators' situation proposed by Greyhound was the right to contract out as found in LOU 16. Mr. Higgs explained that the union did not want the contracting out clause but ultimately withdrew its proposal to have this clause removed from the collective agreement.

25 In cross-examination, when questioned as to what discussions he may have had about the owner-operator grievance with Mr. Munter, Mr. Higgs stated there were none. He explained that Mr. Munter was hostile as a result of not being re-elected President and that he had since returned to Vancouver and had left his employment at Greyhound.

26 On or about December 26, 2006, and in preparation for the January meeting of the union executive, Messrs. Higgs and Smith reviewed all [page15] outstanding grievances. According to Mr. Higgs, they spent approximately one hour and a half reviewing the owner-operator grievance. According to Mr. Higgs, they considered two aspects of the grievance: the possible compensation and the possible application of Part III of the *Code*. Mr. Higgs explained that, from their previous knowledge of what had led to the inclusion of LOU 16 in the collective agreement and his understanding of it, they could not see any viability to the grievance or the unfair labour practice complaint and determined that they would advise the union executive accordingly.

27 The newly elected union executive met on January 5 and 6, 2007, to review various outstanding grievances. On January 6, 2007, on the basis of the recommendation made by Messrs. Higgs and Smith and after approximately a 30-minute discussion, the union executive decided to withdraw the complainants' group grievance.

28 Mr. Higgs admitted that, prior to the union's decision to withdraw the grievance, no one from the union communicated with the owner-operators to discuss the grievance. The union did not request any legal opinions on the grievance's chances of success. Also, no owner-operator was invited to attend or attended the January meeting when the executive discussed the grievance and

made the decision to withdraw it.

[page16]

29 By letter dated January 11, 2007, through their counsel, the complainants asked to be kept informed of the status of their grievance.

30 By letter dated January 15, 2007, the union's counsel advised the complainants' counsel that he had recently dropped the group grievance because he felt that it was not viable.

31 On January 30, 2007, the union informed Greyhound in writing that it was withdrawing the grievance. The union did not inform the complainants or provide them with a copy of that letter.

32 By letter dated February 21, 2007, the complainants' counsel asked the ATU's counsel to confirm that the grievance had been formally discontinued, or that a grievance had in fact been filed. By letter dated February 26, 2007, the ATU's counsel responded as follows:

> 2. A group grievance was filed claiming severance pay as a result of Greyhound's changes. The ATU Local 1374 Executive has communicated to Greyhound that it is not proceeding with such grievance. The reasoning of the Executive in general was:
> (a) The Executive did not see the grievance as being viable.

[page17]

> (b) The Executive saw the grievances as being in conflict with its alternate position that there were successor rights and there was as a result, no termination, but a continued employment.

33 The parties did not contest the fact that it was only after the complainants requested to be informed of the status of their grievance, through their counsel, that the ATU's counsel informed the complainants that the grievance had recently been dropped.

II--Positions of the Parties

A--The Complainants

34 The complainants submit that the union breached its duty of fair representation because of its arbitrary and negligent conduct, described as follows:

(1) filing a grievance and a complaint with the Board on the grounds that "no routes were eliminated" and then withdrawing the grievance on the grounds that "the routes were eliminated" where there was no change in the circumstances;
(2) failing to have any reasonable and justifiable explanation for withdrawing the grievance;
(3) failing to determine whether the issues raised by [page18] the complainants had a factual or legal basis;
(4) failing to give sufficient consideration to the complainants' interests when acting on their behalf;
(5) failing to make a reasonable assessment of the case;
(6) exhibiting a non-caring attitude and/or reckless disregard towards the complainants' interests;
(7) accepting the employer's reasons for denying the grievance as valid without challenge;
(8) failing to communicate with the complainants;
(9) failing to investigate the grievance;
(10) failing to inform the complainants of the status of their grievance;
(11) failing to inform the complainants of the employer's response to the grievance or to provide the complainants with the opportunity to respond to the employer's position;
(12) failing to provide the complainants with the opportunity to attend or present their position at the meeting where it was being [page19] decided whether or not to withdraw the grievance;
(13) failing to inform the complainants in a timely fashion that the grievance had been withdrawn;
(14) basing its decision to withdraw the grievance on an erroneous statement of the complainants' entitlement at common law; and
(15) relying on the complaint filed with the Board as a reason for withdrawing the grievance, then withdrawing that complaint without consulting the complainants.

35 With respect to the viability of their grievance, the complainants maintain that there are only two reasons for which the employer could terminate their contracts for services: for cause or if a territory is eliminated. The complainants submit that there was no cause and that, from the facts, it is obvious there was no elimination of territory given that Greyhound continued with the same routes through Dynamex.

36 The complainants assert that the specific language of the collective agreement as to whether contracting out amounts to an elimination of a territory has never been tested at arbitration. They state that the union never sought a legal opinion on the language of the collective agreement in issue, that it never kept them informed, that it did not consult Mr. Munter, the former President and [page20] business agent who had filed the grievance, and that they were not invited to attend and were not represented at the January 2007 meeting when the union executive decided to withdraw

the grievance.

37 The complainants maintain that the loss of employment is at the highest point on the scale of importance for a union to pursue a grievance. They also point to the fact that, despite their regular enquiries about the status of their grievance, they were kept completely in the dark and the union never contacted any of them. In fact, it was only as a result of their counsel's enquiries that they were finally advised that the union had dropped their grievance.

38 The complainants submit that those facts constitute a strong case of a non-caring attitude by the union and reckless disregard for their rights. They maintain that the fact there was a change in the union executive, including a change from Mr. Munter to Mr. Higgs as President, is no defence for the union.

39 The complainants are seeking the following remedies:

- a declaration that the union has violated section 37 of the *Code*;

- an order extending the [page21] applicable time limit to refer their grievance to arbitration;

- an order that the union pay the reasonable cost for counsel of their choice to represent them in processing their grievance before an arbitrator; and

- an order that the union co-operate with the complainants and their counsel in order to ensure an expeditious arbitration hearing of their grievance.

B--The Union

40 The union maintains that, for every grievance, it reviews, deliberates and assesses the viability of a grievance based on the current information, the historical practice relating to a matter, and its interpretation of the applicable wording of the collective agreement.

41 The union submits that it withdrew the group grievance because it was of the view that said grievance was without merit and would not succeed. It maintains that owner-operators are in a unique position and have always posed certain difficulties for the union in the context of collective bargaining. It observes that the continuing issue is the employer's desire to control the owner-operators' work while preserving their independent status as much as possible. The union submits that there is actually only one provision in the [page22] collective agreement that applies to the owner-operators, namely the provision that includes their contract for services.

42 According to the ATU, it understood the relevant provisions of the collective agreement to

mean that the owner-operators did not have the same status as employees and that Greyhound could contract out their services without penalty, that is, with no liability on Greyhound to pay compensation or damages to the owner-operators. Consequently, the union argues that, when the owner-operators' contracts for services were terminated, there was really no loss to the complainants and no meaningful remedy.

43 The union argues that whether it acted in an arbitrary manner depends on the context and circumstances of the case. It submits that, in the present matter, the situation was such that Greyhound was going to unload the Edmonton owner-operators in favour of contracting out their routes. According to the union, it made various attempts to help the owner-operators, all in vain. These attempts, according to the ATU, included:

- having discussions with Greyhound in an attempt to reach an agreement;

- taking the issue to collective bargaining;

- use of picketing to attempt [page23] to resolve this issue; and

- filing an unfair labour practice complaint, an application for a declaration of sale of business and a group grievance.

44 The ATU submits that, despite its efforts and the complainants' expectations, it felt in the end that it could not succeed and that is why it withdrew the complainants' group grievance. According to the ATU, it came down to Greyhound's right to contract out, the owner-operators' termination being the consequence of that right. Under the collective agreement, Greyhound had the right to contract out and there was clearly no meaningful remedy for the complainants.

45 The union restates that the duty of fair representation case law establishes that a union is not required to consult grievors or to obtain a legal opinion on the merits of a grievance prior to deciding to withdraw a grievance. It submits that, although December 26, 2006, and January 6, 2007, are key dates in the union's decision-making process, the Board must also consider the union's efforts throughout the fall of 2006. Finally, the ATU asserts that, by January 2007, the core facts relating to the grievance in question were well known and that the complainants could not have provided any additional facts, [page24] even if consulted.

C--The Employer

46 In its written response to the complaint, the employer states that the compensation paid to the owner-operators was derived from an express reading of the obligations in the collective agreement to provide 14 days' notice and that it was under no obligation to negotiate any severance pay. The

employer's position in regard to the grievance was summarized in its response to this complaint as follows:

> In a related adjudication involving Part III of the *Canada Labour Code* involving Greyhound owner/operators in Vancouver (see attached) the adjudicator ruled that owner/operators, while under Part I of the *Code* were not covered under Part III of the *Code* with the result that statutory obligations owed to employees were not owed to owner/operators. Greyhound informed or the union was aware of the fact that Part III of the *Canada Labour Code* was not applicable to owner/operators with the result that severance obligations under the *Code* were not applicable either.
>
> **The position of Greyhound is that absent an express obligation to provide severance for owner/operators who are contracted out of their [page25] position and the further non-applicability of Part III of the *Canada Labour Code* resulted in there being no obligation to provide a "compensation package for the termination of the owner/operators without just cause." This was communicated to the union.**
>
> Greyhound was not surprised when the group grievance claiming severance pay as a result of contracting out was discontinued by the union. While Greyhound cannot comment on the viability of the grievances from the union perspective, Greyhound certainly made it abundantly clear that the grievances were without merit (based on the matters referred to above) and the union was aware a vigorous defence was forthcoming.
>
> Greyhound believes we communicated to the ATU, Local 1374, that a compensation package for the termination of the owner/operators' contract would not be forthcoming, even if there was a general duty to provide it, because of the severe shortage of owner/operators in Edmonton and the owner/operators' duty to mitigate any such damages would have resulted in their immediate re-employment or re-engagement with no loss occurring.
>
> (emphasis added)

47 As is common practice in section 37 complaints, the [page26] employer assumed a role of observer at the hearing of the present matter and, other than its written response to the complaint, it did not present any evidence or arguments.

III--Analysis and Decision

48 The duty of fair representation exists as a counterpart to the union's exclusive authority to deal with grievances under a collective agreement and to remedy any abuse by the union in respect of its exclusive bargaining authority. In other words, a union's authority to deal with members' grievances is counterbalanced by its duty of fair representation. This duty is described 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.

49 The general principles applicable to complaints filed pursuant to section 37 of the *Code* have been reported in countless Board decisions and have been summarized in *McRaeJackson (Virginia),* 2004 CIRB 290. For this reason, the Board does not intend to review these principles in detail in the present decision [page27] but will refer to those principles as they apply to its determination of this complaint.

50 A union's conduct in the context of a duty of fair representation complaint is assessed in light of the five principles set out by the Supreme Court of Canada in *Canadian Merchant Service Guild* v. *Gagnon et al.*, [1984] 1 S.C.R. 509, which are summarized as follows:

1. The union, because of its status as the exclusive bargaining agent for a bargaining unit, must treat all members of the unit fairly.
2. An employee does not have an absolute right to arbitration; the union enjoys considerable discretion in this regard.
3. After conducting a thorough investigation and considering the impact of the grievance on the employee versus its legitimate interests, the union must exercise its discretion in good faith.
4. The decision must not be arbitrary, capricious, discriminatory or wrongful.
5. The union's representation must be genuine, undertaken with integrity and competence, and without serious negligence or hostility towards the employee.

[page28]

51 In the present matter, it is not disputed that the group grievance filed on behalf of the owner-operators addressed a fundamental right, that is, the termination of their work. Greyhound's decision to contract out the Edmonton routes resulted in the complainants' termination. As stated earlier, all the complainants had worked for Greyhound for a considerable number of years.

52 The ATU asserts that a union has broad discretion when deciding whether to refer a grievance to arbitration, and the Board agrees. The duty of fair representation does not require a union to obtain a legal opinion in every case or to advise the grievor(s) at every stage of the grievance procedure. These principles were reviewed in *Virginia McRaeJackson, supra*, where the Board stated:

> [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.

[page29]

> [38] Established unions usually have their own experienced staff to conduct investigations, assess the grievance and decide whether or not to pursue a grievance. Although the union may decide to obtain the advice of legal counsel, there is no requirement for the union to obtain a legal opinion before deciding not to refer a grievance to arbitration. The Board will not uphold a complaint based on the mere fact that the union did not obtain legal advice before deciding not to refer a grievance to arbitration, or that the union did not follow counsel's advice.
>
> ...
>
> [40] The union has carriage of the grievance and does not need to consult with the employee at every stage of the grievance procedure, although it may be advisable to communicate with the employee if a grievance or arbitration hearing is delayed, in order to avoid a complaint under section 37 (see *Ghislaine Gagné, supra*). Lack of communication per se does not constitute a violation of the *Code*, except where it prejudices the complainant (see *Crewdson* (1992), 93 CLLC 16,014 (CLRB decision no. 977) (decision subsequently rescinded following parties' agreement); *William Campbell, supra*; and *Robert Adams, supra*.

[page30]

53 The Board also agrees with the complainants' assertion that its role is to review the union's investigation and decision-making process in regards to the complainants' grievance rather than to assess the merits of a grievance. It is nonetheless recognized that, as part of the process of reviewing the union's investigation and decision-making process, the Board may review the facts and positions of the parties relating to the grievance in order to understand whether the union's decision-making process reflected the worthiness and seriousness of the matter. The Board has stated that it will hold the union to greater scrutiny when the matter involves an employee's termination, serious discipline that affects gainful employment or a disability that requires accommodation (see *Virginia MacRaeJackson, supra*).

54 The complainants do not agree with the union's interpretation of the collective agreement with respect to their right to a compensation package. They are of the opinion that an arbitrator should determine whether what occurred constituted an elimination of a territory pursuant to section O/O-8(m)(2) of the collective agreement and consequently whether they received the appropriate severance pay, and whether the employer fulfilled its obligations under LOU 16. The complainants also do not agree [page31] that the employer's right to contract out under LOU 16 "without penalty or paying union dues" translates into no severance being owed.

55 The complainants maintain that it was arbitrary and simply wrong, under the circumstances, for the union to conclude that, because the employer allegedly fulfilled its obligation under LOU 16, the complainants were not entitled to any compensation and for it to have withdrawn their grievance without advising or discussing the matter with them or providing them with an opportunity to present their case.

56 The ATU argues that it did not act in an arbitrary manner, that it in fact did a lot in an attempt to have the employer change its decision to contract out the Edmonton routes (it attempted to negotiate an agreement with the employer, including raising the issue in collective bargaining, it filed a successorship application and it filed an unfair labour practice complaint). The union maintains that it did consider the grievance, but that in the end, based on its previous experience and its knowledge of the background which had led to LOU 16, it determined that the grievance would not succeed.

57 This complaint illustrates some of the issues for the union and the employer regarding owner-operators and [page32] the continuing struggles that they have faced in collective bargaining to arrive at acceptable terms. The union has described it as "the employer's desire to control the owner-operator's work while preserving their independent status." Also, it is not disputed that the union attempted in different ways to convince the employer not to contract out the Edmonton routes.

58 In the context of this duty of fair representation complaint, the issue for the Board is not to determine whether the owner-operators are employees within the meaning of Part III of the *Code* or if they are independent contractors for the purposes of Revenue Canada legislation. The

owner-operators are included in the all-employee bargaining unit at Greyhound. The question for the Board is whether the union seriously considered the grievance and whether its handling of the matter in the present context constitutes reckless disregard for the owner-operators' interests.

59 Given that the complainants' grievance addressed issues such as severance as a result of their termination of employment, the union had to handle the grievance in a serious manner. For the reasons that follow, the Board concludes that, in the present matter, the union [page33] breached its duty of fair representation because it did not give the complainants' grievance the necessary consideration.

60 The uncontested facts establish that the union was positioned to refer the complainants' grievance to arbitration under the guidance of its former President, Mr. Len Munter. On November 23, 2006, the union filed a group grievance. In early December 2006, Mr. Munter confirmed to the complainants that he would refer the grievance to the next step of the grievance process. On December 17, 2006, the grievance was advanced to step three of the grievance process.

61 Following the change in the union executive, the complainants' grievance went from being advanced to step three of the grievance process to being withdrawn at the first meeting of the newly elected union executive, in early January 2007. The evidence establishes that, a few days prior to the first meeting of the newly elected union executive, Messrs. Higgs and Smith reviewed all outstanding grievances. On their recommendation, the union executive decided to withdraw the grievance.

62 Despite the fact that the issue raised by the grievance had never been arbitrated, the union did not seek legal advice. The evidence establishes that, although the union's counsel carried out a general review of all the union's business at the time [page34] the newly elected executive took office, it is not contested that no legal opinion was sought with respect to the chances of success of the group grievance. While the Board will not uphold a complaint based on the mere fact that the union did not obtain legal advice before deciding not to refer a grievance to arbitration, the fact the union did not obtain legal advice in this particular case is one among other factors to consider. The union did not consult Mr. Munter, the former President who had filed the grievance on behalf of the complainants. More specifically, Mr. Higgs stated that his recommendation was based solely on his knowledge of the particular circumstances that had led to LOU 16 (the STC case) and his understanding of the term "without penalty." He stated that he felt that the complainants' grievance for severance had no chance of success. Mr. Higgs also explained that there was no discussion with Mr. Munter about the complainants' grievance because when he took over as President from Mr. Munter, the atmosphere was "less than amicable."

63 The union did not in any way consult or advise the complainants regarding their grievance, prior to deciding to withdraw it. The complainants, first through Mr. Riley and then through their counsel, clearly made it known to the union that they [page35] wanted to be kept informed of the union's process and the progress of their grievance. The ATU does not deny that it did not

communicate with the complainants prior to withdrawing their grievance. Moreover, it did not offer any explanation as to why it did not communicate with the complainants or their counsel or inform them of the fact that it was going to review the grievance to make a determination on it. The complainants were not advised that their grievance was going to be discussed at the January meeting of the union executive. The union made no attempts to communicate with the complainants and none of them had the opportunity to address the executive prior to its deciding to withdraw the grievance. The complainants' grievance was reviewed by Messrs. Higgs and Smith a few days prior to executive meeting and was dealt with in a matter of 30 minutes by the union executive at its January 2007 meeting.

64 It is only after their counsel wrote to enquire about the status of the grievance that the complainants were advised that their grievance was withdrawn. At that time, the union advised that one of the considerations for withdrawing the grievance was the fact that it considered the grievance as being in conflict with its alternative position that there were successor rights and as a result no termination. Also, its unfair labour practice complaint against the employer, in which the union [page36] took the position the employer's contracting out of the Edmonton routes did not amount to the elimination of a territory, was still being pursued.

65 Although in itself, lack of communication by a union does not necessarily establish a breach of the duty of fair representation, it is noteworthy in this case. Even if poor communication does not necessarily lead to a violation of the *Code*, a union's actions are assessed taking into consideration the particular circumstances of each case (see *Robert Adams*, 2000 CIRB 95, upheld by the Federal Court of Appeal in *Canadian Council of Railway Operating Unions* v. *Robert Adams et al.*, judgment rendered from the bench, no. A-719-00, February 13, 2002). It is evident in this matter that to include the complainants or their counsel in the union's decision-making process or at the very least to advise them of what was going on in regard to their grievance, would have helped the situation for all concerned. The ATU argues that, since this was not a fact-finding grievance investigation, a consultation with the complainants would not have been of any value. It argues that the fact remains that the employer eliminated some routes, which resulted in the termination of the owner-operators, and that there was no meaningful remedy. The Board does not agree that a consultation with the complainants would not have been of value in this case, [page37] given the new executive had no previous knowledge of the specific facts brought forth by the complainants when the grievance was first filed. Given that the sections in question have never been arbitrated, the union's decision to proceed or not with the grievance would have been a more informed one if it had had the benefit of insight from the complainants and from Mr. Munter. In this respect, the Board agrees with the complainants' assertion that they should not be penalized for the lack of communication during the transition from the former to the current union president.

66 When the union dropped the grievance, it was still pursuing other avenues and it relied on that fact, at the time, to justify its decision to withdraw the grievance. As stated earlier, the union subsequently withdrew its application and complaint. It is not uncommon for a union to pursue more than one avenue in such circumstances by filing both a grievance and an unfair labour practice

complaint or application. At the very least, if the complainants or their counsel had been kept informed, as requested, they would have had the opportunity to try to convince the union to maintain their grievance.

IV--Conclusion

67 Under the circumstances of this case, the Board finds that the union breached its duty of fair representation by arbitrarily withdrawing the [page38] complainants' grievance without making a sufficient assessment of whether the grievance had a factual and legal basis to succeed. This includes the fact that Mr. Higgs relied strictly on his understanding of LOU 16 without consulting Mr. Munter, the former President who had filed the grievance, and without consulting or advising the complainants or their counsel after having been notified that the complainants were represented by legal counsel and wanted to be apprised of the status of their grievance. This also includes the fact that the union did not seek any legal advice on the merits of the grievance, although the contested provisions had never been arbitrated, that it did not provide the complainants or their counsel with an opportunity to have any input prior to a decision being made and that it relied on the fact that it had filed other proceedings to justify withdrawing the grievance.

68 It is not for the Board to determine whether, under the circumstances, Greyhound was under an obligation to provide a compensation package to the owner-operators for terminating their contracts without cause or whether the owner-operators suffered any damages, and the Board makes no finding in this regard. These are issues to be determined by an arbitrator.

69 Section 99(2) of the *Code* gives the Board broad remedial powers. The Board directs as follows:

[page39]

> - that the union immediately refer the owner-operator grievance to arbitration and that the time limits to refer the grievance to arbitration be waived; and
>
> - that the complainants be entitled to engage counsel of their choice to represent them in the arbitration process and that the reasonable fees and expenses be paid by the union.

The Board retains jurisdiction over any question that might arise in the implementation of this decision and appoints Mr. John Taggart, Labour Relations Officer, to assist the parties as required.

This is a unanimous decision of the Board.

70

Cases Cited:

Adams (Robert), 2000 CIRB 95.

Canadian Council of Railway Operating Unions v. Robert Adams et al., judgment rendered from the bench, no. A-719-00, February 13, 2002 (F.C.A.).

Canadian Merchant Service Guild v. Gagnon et al., [1984] 1 S.C.R. 509.

McRaeJackson (Virginia), 2004 CIRB 290.

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