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## Reasons for decision

Russ Cooper,

*complainant,*

*and*

Air Canada Pilots Association,

*respondent,*

*and*

Air Canada,

*employer.*

Board File: 28373-C

Neutral Citation: 2010 CIRB 553

November 30, 2010

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A panel of the Canada Industrial Relations Board (the Board) composed of Ms. Elizabeth MacPherson, Chairperson, and Messrs. André Lecavalier and John Bowman, Members, considered the above-noted complaint.

### **I–Introduction**

[1] Mr. Russ Cooper (the complainant) is a pilot who has been employed by Air Canada (the employer) since November 1999. After a February 2010 request to review his place on the seniority list was rejected by the employer, the complainant asked his union, the Air Canada Pilots Association (ACPA or the union), to file a grievance on the issue. In June 2010, the union advised the complainant that it would not be filing a grievance on the matter.

[2] On September 17, 2010, the complainant filed a complaint with the Board alleging that the union had breached section 37 of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*) by acting in an arbitrary manner when it refused to file his grievance. Although the complaint was filed on behalf of the complainant and several other pilots, there was no documentation provided which specifically authorized the complainant to act on behalf of any other employees. The Board is therefore treating the complaint as an individual complaint filed by Mr. Cooper. The Board’s ultimate decision in this matter was not affected by whether the complaint was filed as a group or an individual complaint.

[3] The question before the Board is whether the complainant has made out a *prima facie* case that the union acted in a manner that breached its duty of fair representation under the *Code* when it decided not to file a grievance on his behalf.

## **II–Overview**

[4] The complaint concerns the complainant’s placement on the pilot seniority list. The merger of Air Canada and Canadian Airlines International Ltd. (CAIL) in January of 2000 triggered a dispute regarding the seniority rights of the two groups of pilots who were being merged into one seniority list. When the parties were unable to reach a settlement, the issue was ultimately decided by binding arbitration. Arbitrator Brian Keller decided the matter and the result is sometimes referred to as the “Keller seniority list.” As with any seniority issue, the end result left some pilots unhappy and this led to further litigation before this Board and the courts. In *Air Canada*, 2006 CIRB 349 (RD 349), the Board advised the parties that the Keller award was final and binding in establishing the post-merger ranking of seniority for pilots at Air Canada. This message was reinforced in a more recent decision of the Board: *Rob McInnis*, 2009 CIRB 454 (RD 454), which was issued on June 5, 2009.

[5] On August 10, 2009, the union sent a bulletin to its membership stating that in light of the Board’s decision in RD 454, it would not be pursuing changes to the pilot seniority list during the current round of collective bargaining. Following the release of the 2010 Pilot Seniority List in January 2010, the complainant sent an email to the employer on February 7, 2010 contending that his position on the list was incorrect and asking to have his position on the seniority list corrected.

In the email, the complainant argued that the factors mandated by arbitrator Keller had served their purpose and should no longer be applied. On March 22, 2010, the employer sent a reply letter to the complainant, referring to CIRB decisions 349 and 454, and informing him that it would not adjust his seniority number.

[6] On April 18, 2010, the complainant sent an email to the union asking it to file a grievance seeking the “correction” of his seniority position on the list. The union requested further details regarding his proposed grievance which the complainant provided on May 10, 2010. In that email, the complainant again took issue with certain provisions of the Keller award, which he stated had “victimized me for seven long years.” On June 18, 2010, the union sent an email to the complainant stating that it would not file a grievance on his behalf. The email included the following paragraph:

The “adjustments” which you wish to reverse (and which ACPA has sought to reverse through many endeavours) are an integral part of the Award of Arbitrator Keller. The Keller Award and the relative seniority rankings that result from it established the seniority rights of the pilots that we represent. That Award and those rights are recognized as being part of our Collective Agreement because they are the final outcome of the merger seniority dispute resolution process which Air Canada, ACPA and ALPA established and agreed to be bound by. Therefore, the Association has decided that we will not support the filing of a grievance in this matter.

[7] The union’s email concluded with the statement that, “[w]hile the seniority list that is based on the Keller Award may be flawed, it cannot be changed through a grievance.” On July 14, 2010, the complainant sent an email to the union asking how he could appeal the union’s decision not to file a grievance on his behalf. The union replied by email on July 28, 2010, where it set out a number of options for appeal and also advised the complainant of his ability to pursue a complaint against the union under section 37 of the *Code*. The complainant pursued an internal union appeal of the decision that had not been concluded at the time of the filing of this complaint with the Board. The complainant ultimately filed his complaint with the Board on September 17, 2010.

### **III–Analysis**

[8] Because the complainant requested an oral hearing, it is necessary to point out that section 16.1 of the *Code* provides that the Board may decide any matter before it without holding a hearing. Having reviewed the materials provided by the complainant, the Board is satisfied that the written documentation before it is sufficient for it to decide this matter without an oral hearing.

[9] The complainant alleges that the union acted in an arbitrary manner by refusing to file a grievance regarding his position on the seniority list. The complaint takes issue with certain provisions of the Keller award and suggests that the union can file a grievance regarding those specific provisions without overturning the award itself. The complainant also stated that the union should have argued that there were new facts that justified revisiting the Keller award, namely a recent decision of the Canadian Human Rights Tribunal (CHRT), that found the provision in the parties' collective agreement requiring that pilots retire at age 60 is contrary to the *Canadian Human Rights Act* (CHRA). As a remedy for the alleged breach of section 37, the complainant seeks an order that the union advance his grievance to arbitration with the union paying for counsel of his choice to represent him at the arbitration.

[10] At first glance, this is a simple dispute between the complainant and the union. The complainant asked to file a grievance because he did not agree with the continued application of certain aspects of the Keller arbitration award, which forms part of the seniority provisions of the collective agreement between the parties. The union did not file a grievance because it accepted that the Keller arbitration award formed part of the collective agreement, and therefore the complainant's position on the seniority list was correct. As a result, there was no breach of the collective agreement and no basis for a grievance. A union is not normally required to file a grievance once it considers the matter and determines that there has been no breach of the collective agreement. On this basis alone, the complaint can be dismissed as the complainant has not shown that, in reaching its decision, the union acted in an arbitrary or discriminatory manner or in bad faith contrary to its duty of fair representation.

[11] However, the complainant is also seeking to have the union overturn certain aspects of the Keller award by filing a grievance regarding his seniority rights. On this issue, the Board has stated in previous decisions that a union's decision to appeal an arbitration award is not normally within the scope of its duty of fair representation under section 37 of the *Code*. In *Gordon Newell* (1987), 69 di 119 (CLRB no. 623), the Board addressed this issue as follows:

...In the Board's judgement, a refusal or failure to seek judicial review is not of itself a violation of section 136.1 (now section 37) in a circumstance such as this. The section specifies that the duty of fair representation applies to persons "with respect to their rights under the collective agreement that is applicable to them." There is no evidence before the Board that the collective agreement between CALPA and Air Canada at any time material to these proceedings gave anybody the right to have an arbitration

decision affecting him or her taken to the Court for judicial review. Mr. Newell thus had no right under section 136.1 to have the arbitrator's decision "appealed" as he put it."

(p. 128)

[12] While the complainant is seeking to challenge the Keller award through filing a new grievance, rather than through the courts, the principle noted above still applies. A union does not have any obligation under section 37 of the *Code* to appeal an arbitrator's award, unless there are specific provisions in the relevant collective agreement that give a bargaining unit member the right to require such an appeal. No such provisions were brought to the Board's attention regarding the ACPA/Air Canada collective agreement. In fact, the intent of the arbitration process, as noted in the union's June 18, 2010 email to the complainant, is that the parties involved accept the outcome as a final and binding settlement of the issues in dispute. For this additional reason, the Board finds that the union did not breach its duty of fair representation when it refused to file a grievance on the complainant's behalf which would have the clear effect of challenging certain provisions of the Keller arbitration award.

#### **IV–Conclusion**

[13] The Board finds that the complainant has not made out a *prima facie* case against the union. The complaint under section 37 is therefore dismissed.

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

Elizabeth MacPherson  
Chairperson

André Lecavalier  
Member

John Bowman  
Member