Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Quebec Port Terminals Inc.,

complainant,

and

Maritime Employers Association,

respondent,

and

Syndicat des débardeurs de Trois-Rivières (CUPE 1375),

certified bargaining agent.

Board File: 28505-C
Neutral Citation: 2015 CIRB **765**
March 9, 2015

The Canada Industrial Relations Board (the Board) was composed of Ms. Louise Fecteau, Vice-Chairperson, sitting alone pursuant to section 14(3) of the *Canada Labour Code* (*Part I–Industrial Relations*) (the *Code*). A hearing was held in Montréal on October 21 and 22, 2013, November 7, 2013, and January 13, 23 and 24, 2014.

Quebec Port Terminals Inc. (QPT) also filed an application for an interim order on December 23, 2010. The Board dismissed the application (*Quebec Ports Terminals Inc*., 2011 CIRB 580) on April 20, 2011.

Hearing dates in this matter were scheduled for 2011, but the parties chose instead to try to arrive at a settlement through mediation with the Board's assistance, to no avail. On a first day of hearing on May 9, 2012, counsel for QPT requested that the hearing be stayed until the Syndic of the Barreau du Québec determined an application for an investigation he filed on

behalf of his client. The Board granted the application for a stay until such time as counsel indicated that he was ready to proceed.

Finally, following a teleconference with the parties on June 27, 2013, the hearings got underway on October 21, 2013. They were completed on January 24, 2014, after which the parties submitted their arguments in writing. The parties' final arguments were filed in May 2014.

Appearances

Mr. Pierre Jolin and Ms. Guylaine Lacerte, for Quebec Port Terminals Inc.;
Mr. Patrick Galizia and Ms. Maude Grenier, for the Maritime Employers Association;
Mr. Richard Bertrand, for the Syndicat des débardeurs de Trois-Rivières (CUPE 1375).

I. Nature of the Complaint

[1] The Board has before it a complaint of unfair labour practice filed by QPT on December 17, 2010, pursuant to section 97(1) of the *Code*, alleging violation of section 34(6) of the *Code* by the Maritime Employers Association (MEA). QPT alleges that the MEA breached its duty of fair representation when it settled a grievance filed against it by the Syndicat des débardeurs de Trois-Rivières (CUPE 1375) (the union).

[2] The MEA is the designated employer representative under section 34 of the *Code* for four undertakings operating at the Port of Trois-Rivières/Bécancour: QPT, Somavrac, Logistec and Services Maritimes Laviolette.

[3] The union is certified to represent all employees involved in the loading and unloading of vessels and other related duties for all employers in the longshoring industry at the Port.

[4] In the grievance at issue in this matter, the union was alleging that QPT had violated the collective agreement by not using checkers. The activities in question involved the loading and unloading of trucks at the terminal. QPT claims that no checking was being performed at the Trois-Rivières/Bécancour terminal, whereas the MEA and union are of the view that there were checking operations.

[5] The allegations made by QPT in its complaint relate primarily to the fact that, after the first day of the grievance hearing before the arbitrator, the MEA decided to settle the said grievance through a settlement agreement reached between it and the union on November 5, 2010. QPT submits that the agreement of November 5, 2010, was entered into without its knowledge and

that the MEA never actually intended to proceed with arbitration since it was afraid that the arbitral award might include a work description for checking operations. QPT submits that the settlement agreement, which was approved by an arbitrator, denies it basic management rights and is an abuse of rights, and that an employer association cannot legally impose it on one of its members.

[6] The issue before the Board may be summarized as follows: did the MEA act in a manner that was arbitrary, discriminatory or in bad faith toward QPT in its handling of grievance D-2008-22 and in the way it negotiated the agreement to settle the grievance on November 5, 2010?

[7] In the grievance in question, filed on July 4, 2008, the union alleges that QPT, a member of the MEA, violated the collective agreement by assigning checking work at the Port of Bécancour to persons other than members of the union. According to the union, the work in question was required and performed by a QPT superintendent who is not a member of the union or part of the bargaining unit.

[8] QPT is asking the Board to find that the MEA failed to fulfill its duty of fair representation in the matter of grievance D-2008-22 and that it acted in an arbitrary and discriminatory manner that amounted to bad faith. QPT is also asking the Board to find that the MEA exceeded the powers conferred on it by law by arriving at an agreement that went beyond the scope of a grievance and the content of the collective agreement and by asking an arbitrator to approve it in an attempt to give it legal force. QPT is asking that the Board void the agreement of November 5, 2010, between the MEA and the union, which was approved by the arbitrator.

II. Previous Decisions

[9] It is worth noting that much has already been written regarding grievance D-2008-22.

[10] On June 11, 2010, the Board issued a decision respecting a different complaint of unfair labour practice and application for an interim order, filed by QPT on February 19, 2010, also in connection with the handling of grievance D-2008-22 (2010 CIRB LD 2368). In that matter, QPT alleged that the MEA had failed to investigate the grievance at issue and had forced QPT to act on its own behalf even though it did not have the mandate to do so. QPT asked the Board to order a stay of the hearing before Grievance Arbitrator Serge Brault on an interim basis.

[11] The Board dismissed the complaint and application for an interim order. The complaint was dismissed as not having been filed within the time limits set out in the *Code*. The Board also

found that QPT had not provided the MEA with the necessary information to pursue the grievance until January 2010 when the hearing of the grievance had been scheduled for February 2010. The Board noted that, on April 13, 2010, Arbitrator Brault had denied QPT's request for intervenor status and had decided to proceed with consideration of grievance D-2008-22 on the merits with the MEA and the union as the parties involved.

[12] The hearing before the grievance arbitrator got underway on April 16, 2010, and a second day of hearing was scheduled for October 26, 2010. However, the MEA decided to settle the grievance in the interim. Following the settlement agreement of November 5, 2010, which was approved by Arbitrator Brault, QPT filed the complaint in this matter along with a second application for an interim order, this time to stay the execution of Arbitrator Brault's award approving the agreement between the MEA and the union. On April 20, 2011, the Board dismissed the application for an interim order filed with the complaint in this matter and decided that it would hear the parties on the merits of the case to determine whether the MEA had breached its duty of fair representation under section 34(6) of the *Code* (RD 580). In its decision, the Board stated the following:

> [7] The facts in the matter now before the Board show that the grievance arbitration (file no. D-2008-22) finally proceeded and the first day of hearing took place on April 16, 2010, before Arbitrator Serge Brault. The second day of hearing was scheduled for October 26, 2010, but following legal advice from its counsel, the MEA decided to settle the grievance amicably on October 22, 2010.

III. Principle of *res judicata* in connection with the decision of June 11, 2010

[13] Both the MEA and QPT submitted arguments respecting the principle of *res judicata* in connection with the decision issued by the Board on June 11, 2010 (LD 2368). In the course of the proceedings, the MEA objected to the admissibility into evidence of facts dating back to before the filing of the complaint by QPT on February 19, 2010—in other words, facts relating to the first complaint that QPT had filed with the Board alleging that the MEA had breached its duty of fair representation.

[14] The MEA also submitted that the Board need not consider the issue of whether the investigation conducted by the MEA prior to the decision in LD 2368 violated the MEA's duty of fair representation.

[15] With respect to the admissibility of facts dating back to before the filing of QPT's complaint on February 19, 2010—facts related to the first complaint that QPT filed with the Board—it is

true that the Board began by allowing the objection of counsel for the MEA. However, it then allowed counsel for QPT to ask certain questions relating to those same facts, **subject to their relevance**, in particular during the examination-in-chief of Mr. Michel Brisebois on November 7, 2013, and the cross-examination of Mr. Jean-Pierre Langlois on January 23, 2013.

[16] The Board considers that the questions or evidence allowed at the hearing in regard to the facts relating to LD 2368 served as useful background for the matter now before it. However, the Board cannot use those earlier facts to reconsider issues determined in LD 2368. Indeed, the matter now before the Board is not an application for reconsideration of LD 2368, but rather a second complaint, which essentially deals with the MEA's decision to settle the grievance as it did. Thus, the Board must determine, among other things, whether the investigation conducted prior to the settlement agreement was thorough or cursory.

IV. Uncontested Facts

[17] On April 16, 2010, the MEA and union attended a hearing day before Arbitrator Brault in relation to grievance D-2008-22. The union presented its evidence first and the MEA reserved the right to suspend the hearing prior to starting or proceeding with the cross-examination of the witnesses. On July 16, 2010, counsel for the MEA sent counsel for QPT a summary of the evidence and a copy of the exhibits filed by the union at the hearing of April 16, 2010, along with a document titled "Questions following the hearing of April 16, 2010—grievance D-2008-22" (translation) intended to help the MEA analyze the merits of the grievance. The next grievance hearing date had been set for October 26, 2010.

[18] Three meetings were subsequently held with the representatives of QPT, including two meetings held on QPT premises, on September 8, 2010, and September 14, 2010, at which QPT employees were interviewed to elicit information regarding grievance D-2008-22. There were as many representatives of the MEA as of QPT at the meetings. The MEA and QPT representatives met with Mr. Jean-François Papillon and Ms. Josée Vincelette, the persons concerned by the grievance at issue in this matter.

[19] Once it had the information from QPT regarding grievance D-2008-22, the MEA directed its counsel to draft an opinion on the chances of grievance D-2008-22 succeeding.

[20] On October 1, 2010, counsel for the MEA sent counsel for QPT a draft opinion on the chances of success of grievance D-2008-22, for input. The draft legal opinion summarized the evidence adduced by the union on the first day of hearing and the meetings held with certain

employees on QPT premises, and provided an overview of applicable jurisprudence in matters of this kind. The draft opinion read in part as follows:

> (f) Impossible to refute union's evidence
>
> Based on the information obtained from Jean-Pierre Langlois, it will not be possible for MEA representatives to refute the oral evidence given by Mario Lamy to the effect that the tasks performed by Ms. Vincelette on June 30, 2008, clearly included checking tasks. In fact, the MEA has always recognized that this type of work is work that falls to unionized checkers.
>
> Furthermore, **based on the information obtained from Jean-Pierre Langlois, were MEA representatives to be questioned in this regard, they would have no choice but to confirm that they have, since 1992, always understood that the loading and unloading of trucks involving cargo from vessels or to be loaded onto vessels is to be performed by unionized checkers.** They would confirm that the MEA has always operated on the basis of that understanding, whether for purposes of applying the collective agreement or in connection with collective bargaining with the union.
>
> …
>
> IX. Conclusions
>
> We are of the opinion that MEA may be successful in having the union's evidence in regard to case no. 2, that is, the work allegedly done by Jean-François Papillon, thrown out. In our view, the union will not be able to establish the necessary factual basis for the grievance to be successful in this regard. However, had the union established the necessary factual basis, we would not have been able to get the grievance dismissed.
>
> With regard to case no. 1, respecting the work performed by Josée Vincelette, we are of the opinion that the MEA will not succeed in having the grievance dismissed.
>
> We accordingly recommend that the MEA approach the union about settling the grievance. The MEA should agree to allow the union's grievance and pay the amounts claimed as a result of the violation of the collective agreement in accordance with practice and the case law in this regard. **In addition, we suggest that the settlement agreement between the parties contain admissions respecting checking work.**
>
> (translation; emphasis added)

[21] On October 12, 2010, counsel for QPT sent counsel for the MEA its input concerning the draft opinion on the chances of success of grievance D-2008-22 and the recommendations made. Counsel for QPT commented on several aspects of the opinion sent to it, called into question the credibility of certain union witnesses in regard to the identity of persons who, according to the union, had done checking work, and indicated that in its view the tasks performed by Mr. Papillon and Ms. Vincelette had been management and organizational tasks that did not fall under the provisions of the collective agreement. Counsel for QPT concluded by stating the following:

> In our view, grievance D-2008-22 is without merit, in particular because the work performed on June 30, 2008, was in keeping with the collective agreement. If the MEA has placed itself in an uncomfortable position because of positions taken in the past without adequate analysis of the work actually performed by QPT in Bécancour, that should not affect QPT's rights to a proper defence in the circumstances.
>
> However, Mr. Galizia, please be assured that our client and the undersigned have full confidence in the work you are doing and in your integrity. They merely wish to remind you that the interests you are defending are QPT's interests, even though they are being managed by the MEA.
>
> (translation)

[22] On October 15, 2010, counsel for the MEA presented its clients with a legal opinion as to the chances that grievance D-2008-22 would succeed. The opinion read the same way as the opinion previously sent to counsel for QPT except for a few amendments.

[23] On October 19, 2010, the MEA directed its counsel to settle grievance D-2008-22. The MEA and the union arrived at a memorandum of agreement on October 22, 2010.

[24] On October 22, 2010, counsel for the MEA advised counsel for QPT that the MEA and the union had arrived at a memorandum of agreement in relation to grievance D-2008-22, but did not provide it with the said agreement. The letter reads as follows:

> Dear Brother:
>
> For your information, following receipt of your letter of October 12, 2010, we took your input into account and, on October 15, 2010, we sent our opinion to our client to obtain its instructions as to how to proceed with the case.
>
> On October 19, 2010, we were directed by our client to approach the union to settle grievance no. D-2008-22.
>
> We therefore wish to inform you that the parties have arrived at a memorandum of agreement to settle grievance no. D-2008-22 and that the hearing of October 26, 2010, has been cancelled. We will be sending you the details of the settlement reached in the next few days.
>
> Jean-Pierre Langlois will inform your client's representatives of the cancellation of the hearing of October 26, 2010, and we understand that your clients will deal with informing Ms. Josée Vincelette.

Sincerely,

…

(translation)

[25] The memorandum of agreement was signed on November 5, 2010. It reads as follows:

> **WHEREAS** the MEA is the representative of the employers, including QPT, in respect of their operations at the Port of Trois-Rivières/Bécancour, pursuant to section 34 of the *Canada Labour Code* following a decision of the Canada labour Relations Board (file no. 555-3208) dated June 12, 1992;
>
> **WHEREAS** the union holds the geographical certification in respect of all employees involved in the loading and unloading of ships and other related duties for all employers in the longshoring industry in the geographic region comprising the Port of Trois-Rivières/Bécancour;
>
> **WHEREAS** the union filed grievance no. D-2008-22 (Exhibit S-2) on July 4, 2008, alleging that, on June 30, 2008, Quebec Port Terminals (hereinafter, QPT) had had persons excluded from the bargaining unit perform checker or head checker work normally performed by members of the union;
>
> **WHEREAS** one (1) day of hearing was held, on April 16, 2010, before Mr. Serge Brault, an arbitrator designated by the parties to deal with the grievance;
>
> **WHEREAS** the evidence adduced on April 16, 2010, showed that, on June 30, 2008,
>
> - QPT did not summon a checker or head checker to work at its Bécancour terminal;
> - cargo warehoused at the QPT terminal was loaded onto trucks by a longshoreman who was a member of the union's bargaining unit;
> - a superintendent with QPT gave the longshoreman instructions about what items to load on the trucks and how to load them;
> - that same QPT superintendent checked the truck drivers' papers and the load prior to shipping;
> - on that same day, cargo was delivered by carriers to QPT's Bécancour terminal;
> - that cargo was unloaded and placed in the terminal by a longshoreman who was a member of the bargaining unit;
> - a superintendent from QPT checked the cargo on the truck (quantity, quality, conformity);
> - a QPT superintendent instructed the longshoreman to unload the truck and directed him as to where and how to place the cargo in the terminal;
> - a QPT superintendent took the measurements related to the unloaded cargo, made appropriate notes and tagged the cargo;
> - a QPT superintendent signed the papers of the truck driver making the delivery;

THE PARTIES HAVE RESOLVED TO TERMINATE THE ARBITRATION OF GRIEVANCE NO. D-2008-22, SUBJECT TO THE FOLLOWING CONDITIONS:

1. The preamble is deemed to be part of this agreement;

2. The MEA recognizes that the work performed by the QPT superintendents and described in the preamble to this agreement

   a. is checking work that is to be performed by a longshoreman who is a member of the union and holds a checker classification;

   b. pursuant to article 1.09 of the collective agreement, must be performed by a longshoreman classified as a checker and who is a member of the union;

3. The union, for its part, recognizes that the MEA's admissions set out at paragraph 2 of this agreement shall not prevent any employer represented by the MEA from giving instructions to a longshoreman who is a member of the union regarding the movement and handling of cargo in a terminal where such handling is in no way related to the receipt of bulk or other cargo at the terminal or shipping of bulk or other cargo from the terminal;

4. Therefore, the MEA allows grievance no. D-2008-22 and undertakes to pay the longshoreman member of the union who should have been called to work on June 30, 2008, for eight (8) hours of work at the rate he should have been paid at the time, minus the usual deductions, within 15 (fifteen) days of the signing of this agreement;

5. The parties agree to request that Arbitrator Serge Brault give effect to the decision of the MEA to allow grievance no. D-2008-22, by reproducing this agreement in its entirety in order that it may serve as a precedent in the same way that Mr. Brault's arbitral award would have, had the parties not agreed to terminate the arbitration process;

6. The parties further agree to review all grievances alleging a violation of article 1.09 of the collective agreement and to share the relevant factual information with a view to attempting to settle any grievances that can be settled before resorting to the process involving arbitration;

7. The parties agree that this agreement shall constitute the entire agreement between the parties and that the terms set out herein shall be contractual terms and not a mere statement of facts;

8. The parties recognize that they have had the opportunity to consult legal counsel respecting this agreement and declare that they have had the time to read and consider this agreement, and further declare that they have given their consent to it freely and voluntarily, understanding all of its terms and agreeing with them;

9. The parties recognize that this agreement shall constitute a transaction within the meaning of articles 2631 *et seq.* of the *Civil Code of Québec*.

(translation)

[26] On November 30, 2010, Arbitrator Brault issued an arbitral award giving effect to the agreement reached between the MEA and the union, and appended the agreement of November 5, 2010, to the said award. On December 8, 2010, counsel for the MEA sent a copy of Arbitrator Brault's arbitral award to counsel for QPT.

V. Positions of the Parties

[27] The parties submitted several volumes of documents and case law in support of their respective positions. The Board will not go over all of the parties' written arguments in detail in these reasons for decision. What follows is therefore a summary of the principal arguments respecting the issue before the Board, that is, whether the MEA acted in a manner that was arbitrary, discriminatory or in bad faith toward QPT in handling grievance D-2008-22 and in its negotiation of the agreement reached on November 5, 2010.

A. QPT

[28] Essentially, QPT submits that the memorandum of agreement reached by the MEA and the union on November 5, 2010, goes well beyond the scope of grievance D-2008-22.

[29] QPT referred the Board to a number of clauses of the collective agreement, including clauses 1.09, 3.01, 5.01(g) and 8.05(a) and (f), to show that only the substance of those clauses would have warranted the MEA's filing of the grievance with an arbitrator to obtain a ruling on the scope of each.

[30] According to QPT, the MEA had sufficient cause to object to the factual elements contained in the summary of the first day of hearing, held on April 16, 2010.

[31] Also according to QPT, it did not receive the official legal opinion given to the MEA or the MEA's direction concerning settlement of the grievance, and was left out of the exchange of draft agreements that led to the settlement agreement of November 5, 2010, and of Arbitrator Brault's arbitral award of November 30, 2010.

[32] According to QPT, grievance D-2008-22 at issue in this matter is nothing more than an application grievance and, if the MEA's interpretation of the situation warranted allowing the grievance, which QPT disputes, all it had to do was allow the grievance, without signing an agreement such as that signed on November 5, 2010. QPT adds that, when an arbitrator has a grievance before him or her and the party that the arbitrator may rule against agrees that the grievance should be allowed, the legal role of the arbitrator is limited to recognizing that admission and proceeding on the basis of his or her findings.

[33] QPT submits that the MEA did not want an analysis or assessment of the scope of clause 1.09 of the collective agreement by a grievance arbitrator and that the settlement reached on November 5, 2010, went far beyond the scope of grievance D-2008-22.

[34] QPT draws the Board's attention to paragraphs 5 and 7 of the agreement of November 5 to point out that the MEA's sole objective in paragraph 5 was to ensure that QPT would never be able to express its viewpoint in an arbitration context, thereby denying it a fundamental right under the collective agreement. In addition, in reference to paragraph 7, QPT submits that, by indicating that the terms of the agreement were "contractual," the MEA was amending the collective agreement without giving the members of the MEA a say, for the sole purpose of denying QPT its rights. In QPT's view, this was nothing more than arbitrary conduct and conduct in bad faith.

[35] QPT adds that the agreement was in no way necessary and that MEA's sole objective was to settle a matter to QPT's disadvantage, in total disregard of its rights. QPT submits that the MEA had an obligation to represent QPT and that the agreement of November 5, 2010, shows that the MEA never intended to take the grievance to arbitration.

[36] QPT submits that the MEA's conduct carried major consequences for it. It submits that the MEA wanted to resolve the problem once and for all through a grievance that, when all is said and done, required nothing more than an analysis of the facts. QPT submits that, through the agreement of November 5, 2010, the MEA introduced concepts that would force QPT to use checkers for receiving and shipping operations involving truck cargo, which QPT has never required, since there has never been a need for such. It adds that, by signing the agreement of November 5, 2010, the MEA imposed an obligation on QPT that it did not previously have, significantly amended the collective agreement, and imposed a working model on QPT, which is clearly not its prerogative to do.

[37] QPT submits that there is no need for the Board to consider what the outcome of the grievance would have been had a hearing been held. It need only consider whether a representative acting in good faith on the basis of the information entered into evidence could decide not to go to arbitration and, more importantly, to enter into an agreement such as the one entered into on November 5, 2010, the purpose of which was to "seal" (translation) QPT's fate in regard to checkers without giving it the opportunity to be heard.

[38] According to QPT, the MEA clearly breached its duty of fair representation and acted in an arbitrary manner that was tantamount to bad faith.

[39] QPT filed several Board decisions respecting breach of the duty of fair representation to provide examples of conduct deemed arbitrary or in bad faith in connection with a complaint under section 37 of the *Code* (union's duty of fair representation).

[40] QPT is asking the Board to find that the MEA failed to fulfill its duty of fair representation in the matter of grievance D-2008-22 and acted in an arbitrary and discriminatory manner that was tantamount to bad faith. Further, it is seeking a finding by the Board that the MEA exceeded the powers conferred on it by law by entering into an agreement that went beyond the scope of the grievance and substance of the collective agreement, in a manner that was detrimental to QPT, and also by asking an arbitrator to approve the agreement in an attempt to give it legal force.

B. MEA

[41] In regard to the complaint filed by QPT, the MEA submits that QPT failed to provide any evidence that would lead to a finding that it breached its duty of fair representation either in settling the grievance or in entering into the agreement. It submits that, according to the Board's jurisprudence, employees—and therefore, by analogy, the employer represented in this matter—do not have an absolute right to arbitration, are not parties to the collective agreement, and have no right of veto in respect of decisions made by their representative.

[42] The MEA submits that it decided to allow the grievance and enter into the settlement agreement of November 5, 2010, after considering the following:

- the lack of dispute between the parties to the collective agreement, that is, the MEA and the union, regarding the merits of the grievance and the parties' common interpretation of the concept of checking, at least as applicable to the occurrences of June 30, 2008, based on past practice;
- the need to ensure industrial peace with the union;
- the need to act in an equitable manner toward the other employers at the Port of Trois-Rivières/Bécancour, which assign checkers for truck loading and unloading.

[43] The MEA submits that it conducted a thorough investigation and obtained an objective and reasoned legal opinion that took into account QPT's comments. According to the legal opinion, the grievance could not be successfully challenged. It recommended a settlement that would include admissions regarding the checking work allegedly performed on June 30, 2008.

[44] The MEA adds that it was not required to send the final legal opinion to QPT, involve QPT in negotiating the settlement, or obtain QPT's agreement to the signing of the agreement. It stresses that QPT's position was taken into account and that it was up to the MEA to make a decision based on the investigation conducted, the legal opinion obtained, the interest of all the employers it represents, and the need to foster sound labour relations with the union.

[45] The MEA submits that sending the final legal opinion to QPT or involving QPT in negotiating the settlement would not have changed the latter's longstanding position that it does not assign checkers for truck loading and unloading. The MEA adds that merely allowing the grievance, as QPT submitted it should have done, would not have led to a settlement by the parties, since the union was demanding an end to QPT's practice. The MEA further submits that it was within its authority to arrive at an agreement that would serve as a basis for the parties to settle outstanding and future grievances involving facts that were sufficiently close to those adduced on April 16, 2010, respecting the occurrences of June 30, 2008.

[46] The MEA submits that the parties to the collective agreement have always included truck loading and unloading of cargo truck in their interpretation of the concept of checking work. It adds that QPT's disagreement can in no way give rise to a finding of a breach of the duty of fair representation. Similarly, the fact that the MEA and the union share a common interpretation of the concept of checking work cannot give rise to a finding of the existence of collusion or conspiracy.

[47] The MEA submits that a difference of opinion on the interpretation to be given to the collective agreement does not constitute a conflict of interest or evidence of poor representation of any kind, especially given that, in this case, the MEA is not favouring any one employer but is merely applying the interpretation of checking work to all the employers it represents.

[48] The MEA's decision to accept the union's counter-proposal that a settlement agreement have the same effect as an arbitral award in favour of a grievance is not only reasonable but is based on the legal opinion it obtained, which recommended a settlement with admissions concerning checking work. The MEA submits that such a decision falls within the normal authority attributed to it as the representative of the employers at the Port of Trois-Rivières/Bécancour.

[49] The MEA further submits that, during the term of the collective agreement, it has the authority to enter into agreements with the union to ensure effective management of labour

relations and foster harmony. It states that accepting QPT's arguments would amount to denying the MEA its representation authority and giving QPT a veto over its decisions.

[50] The MEA also filed a number of Board decisions and decisions of other labour relations boards in regard to the duty of fair representation. The MEA is asking that the complaint of unfair labour practice filed by QPT be dismissed for lack of evidence.

C. Union

[51] The union submits that QPT's rationale in support of its arguments betrays its refusal to recognize the role of an employer association pursuant to section 34 of the *Code*.

[52] The union asks the following question: how could the Board find that the MEA acted in an arbitrary or discriminatory manner or in bad faith by allowing a clearly well-founded grievance and arriving at a settlement that reflected the common understanding of the parties—the employer representative and the union—of the scope of clauses 1.05 and 1.09 of the collective agreement?

[53] According to the union, the first day of hearing was dedicated to the union's production of its evidence, which gave the MEA the opportunity to hear the detailed facts on which the union was relying in its grievance. At that hearing, counsel for the MEA reserved the right to cross-examine the union's witnesses again once it had completed its investigation involving QPT.

[54] The union adds that the evidence filed with the Board shows that the MEA conducted a meaningful investigation with QPT and carefully examined the union evidence put before Arbitrator Brault.

[55] The union submits that it turned down the MEA's first offer aimed at settling the grievance, which merely involved paying the amount claimed, since it wanted QPT to cease its practice and wanted the employer to have members of the longshoreman union do the checking work from then on. That is how a settlement came to be reached, at its request. The union submits that it does not exceed the scope of the collective agreement, or practice, or the findings sought in the grievance, but rather establishes the context of the grievance and sets out the employer's reasons for allowing it.

[56] In regard to paragraph 5 of the settlement agreement of November 5, 2010, to which QPT objects, the union submits that the wording is nothing more than the logical follow-up on the decision to allow the grievance. It points out that the grievance specifically sought an immediate

end to the “way of doing things” (translation), that is, the practice of using non-unionized workers to do the work of unionized longshoremen, and use by the employer of members of the longshoreman union to perform checker and/or head checker work.

[57] The union points out that the MEA was careful to obtain its consent for all other grievances alleging a violation of article 1.09 of the collective agreement to be considered, in order to either settle them or refer them to arbitration if the employer has a case to make.

[58] The union reminds the Board that its role in this matter is not to settle the differences between the MEA and QPT flowing from the geographical certification but rather to determine whether the MEA acted in a manner contrary to section 34(6) of the *Code* in settling a specific grievance.

[59] The union adds that the uncontradicted evidence shows that, on signing the collective agreement, the employer and the union agreed to renew articles 1.05 and 1.09(a) despite QPT’s dissenting opinion. They also agreed that the employer would maintain the checker classification and that union members would continue to use that classification. It adds that the substance of the checker job is known to both parties and there is no dispute between them in this regard.

[60] The union is asking that QPT’s complaint be dismissed.

D. QPT’s Reply

[61] QPT submits that the hearing before the Board showed that the MEA did not really bother to gather all possible evidence. If it had done so, the evidence would be shown that some union witnesses, whose credibility was questionable even without cross-examination, were unfamiliar with practically every aspect of operations at the QPT terminal and with QPT’s management on behalf of its clients.

[62] QPT also submits that the evidence showed that the MEA does not usually allow grievances without the agreement of the employer affected by said grievances. It submits that, by acting unilaterally as it did and disregarding the import of the grievance for QPT and the ramifications of a settlement for its operations, the MEA clearly acted arbitrarily. QPT submits that the other employers would in no way have been affected by the pursuit of the grievance at arbitration or a decision in QPT’s favour.

[63] According to QPT, the MEA and the union were very careful to ensure that the agreement of November 5, 2010, included a preamble containing a description of facts that they knew QPT strongly disputed but that gave the agreement an appearance of legitimacy.

[64] QPT indicates that, as made clear by Mr. Langlois's testimony, the MEA in no way wanted the checker job to become subject to any definition, and it is in regard to that point that the dispute arises. How can the MEA claim that checking was being performed when the concept of checking is not defined in the collective agreement? QPT was seeking only one thing: to appear before an arbitrator so that the arbitrator could, first, set the parameters for characterizing checking operations and, second, determine if the work done at the Bécancour/Trois-Rivières terminal constituted checking work.

[65] QPT adds that the reality of the situation is that MEA never intended to defend QPT's interests and that the circumstances surrounding this whole matter show that the MEA was afraid that an arbitral award would contain a work description decided on by the arbitrator. QPT is of the view that, as stated by Mr. Langlois, the MEA in no way wanted that to happen and the only way to avoid that was to avoid proceeding with the grievance at arbitration.

[66] Finally, QPT submits that the evidence adduced by the MEA and the union shows that they had one sole objective: to put QPT on trial rather than make a case for its rights. QPT submits that all these things put together clearly show the bad faith behind the MEA's actions from the beginning to the end of the matter.

VI. Evidence

[67] The Board heard eight witnesses at the hearings into this matter:

- For QPT: Mr. Jean-Pierre Langlois, Senior Labour Relations Advisor for the MEA; Mr. Jean-François Papillon, Terminal Superintendant for QPT, who held a supervisor position on June 30, 2008; Ms. Josée Vincelette, who held a supervisor position for QPT in 2008; Mr. Mario Lamy, Longshoreman at the Port of Trois-Rivières/Bécancour and President of the union; Mr. Jean Poliquin, QPT Manager at the Port of Trois-Rivières/Bécancour; Mr. Michel Brisebois, Director of Human Resources for Arrimage Québec, the head office of QPT.

- For the MEA: Mr. Jean-Pierre Langlois and Mr. Stéphane Morency, Director, Labour Relations, MEA.

- The union did not adduce any separate evidence.

[68] The Board has carefully considered the oral evidence. It will not go over the testimony of each witness in detail but rather will refer to the most relevant testimony in the course of its analysis.

VII. Analysis and Decision

A. Duty of Fair Representation and Section 34(6) of the *Code*

[69] Section 34(6) reads as follows:

> 34.(6) In the discharge of the duties and responsibilities of an employer under this Part, an employer representative, or a person acting for such a representative, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employers on whose behalf the representative acts.

[70] The duty of representation of an employer association is not an issue that the Board has addressed very often. There are few decisions relating to complaints filed against an employer representative under section 34(6) of the *Code*. However, the fundamental principles applicable to section 37 complaints must, by analogy, be applied in this case, with the appropriate adjustments of course. At least, that is what the Federal Court of Appeal ruled in *Quebec Ports Terminals Inc. v. Canada (Labour Relations Board),* [1995] 1 F.C. 459; (1994) 175 N.R. 372; (1994) 29 Admin. L.R. (2d) 189; and (1994) 95 CLLC 210-010 (FCA, file no. A-1584-92).

[71] In that matter, QPT, the complainant in the matter now before the Board, challenged the designation of the MEA as the "employer representative." One of the arguments presented by QPT was the lack of a community of interest among the employers concerned. The Federal Court of Appeal dismissed QPT's application and explained the powers and obligations of the employer representative as follows:

> If the employers cannot agree, the Board has a legal duty under subsection 34(4) of the *Code* to select the "employer representative." The latter "shall be deemed to be an employer." "By virtue of having been appointed under this section," it is then invested with the necessary powers to discharge all the duties and responsibilities of an employer under Part I of the *Code* on behalf of all the employers of the employees in the bargaining unit, including that of entering into a collective agreement "on behalf of those employers," that is, in place of them and on their account. ... If Parliament had not intended to create a special statutory system, why would it have imposed on the "employer representative" in subsection 34(6) [as am. *idem*] a duty to fairly represent all those affected by its bargaining, when the Civil Code contains its own means of redress against an agent who goes beyond his instructions? Why would it have thus codified the Civil Code in the *Canada Labour Code*? **One cannot help being struck by the parallel that exists between subsection 34(6),**

> **dealing with the employer, and section 37, dealing with the union.** In the case at bar it was entirely reasonable for the Board to conclude that the employer representative, deemed to be the employer, possessed a power similar to that of the bargaining agent, namely that of negotiating the collective agreement.
>
> (pages 473-474; emphasis added)

[72] In *Quebec Ports Terminals Inc.*, 2008 CIRB 410, another Board decision involving QPT and the MEA, the same parties as in the instant case, the Board summarized principles that apply to the duty of fair representation of an employer representative. In that matter, the Board found that the MEA had not violated section 34(6) of the *Code* when it had entered into specific agreements for one of its members. While the Board dismissed the complaint as untimely, it stated the following concerning the merits of the complaint:

> [39] That being said, just as the union must not breach its duty of fair representation toward the employees that it represents, the employer representative must not act in a manner that is arbitrary, discriminatory or in bad faith toward the employers that it represents.
>
> [40] The employer representative has the authority to negotiate on behalf of the employers that it represents and it has the right to decide which contract proposals to submit and which negotiation strategies to use to promote the employers' interests. Just as the union that represents employees, the employer representative is not required to consider the wishes of individual members; not considering the individual contract proposals of all the members—for example, accepting conditions that disadvantage certain employers—does not per se constitute a violation of section 34(6) of the *Code*, as long as the employer representative's decisions are made rationally, and the representative recognizes and takes into account the rival interests of all the employers that it represents (see *Bugay*, 1999 CIRB 45; and *Soulière*, 2002 CIRB 205, regarding the union's duty of fair representation).

[73] Hence, in this matter, it is in the light of the principles previously set forth and the Board's jurisprudence in the area of a union's duty of fair representation that the Board must consider the points raised by the parties, carefully weigh the relevant facts and evidence adduced over the course of the six days of hearing, and determine whether the MEA breached its duty of fair representation toward one of its members, QPT, in handling grievance D-2008-22.

[74] The questions that the Board must answer to determine whether or not the MEA breached its duty of fair representation in this matter are as follows:

- Considering the context in this matter, did the MEA violate the *Code* by deciding to settle the grievance rather than pursue it further at arbitration?
- Did the MEA violate the *Code* by entering into a settlement agreement of the type entered into on November 5, 2010?

B. Did the MEA violate the *Code* by deciding to settle the grievance rather than pursue it further at arbitration?

[75] The existence of checking work at the Trois-Rivières/Bécancour terminal has been an issue since the first collective agreement was signed in 1992. In fact, the union has filed numerous grievances alleging that QPT violated the collective agreement by failing to use checkers. None of the grievances of this nature except the grievance at issue in this matter were taken to arbitration.

[76] Witness Mario Lamy, currently President of the union, indicated that the numerous grievances relating to checking, a list of which was entered into evidence, had not been referred to arbitration because of the preparations being made for bargaining in 2003 to renew the collective agreement, which had not been renegotiated since 1992. The witness indicated that, in the end, the grievances in question as well as others had been included in a comprehensive settlement when the collective agreement had been signed in 2006, though he pointed out that the union had not waived its jurisdiction. Other grievances relating to checking had been filed by the union after 2007 and prior to the grievance in this matter. It seems that they were dropped because of a lack of evidence.

[77] A letter that Mr. Jean Pierre Langlois, Senior Labour Relations Advisor for the MEA, sent to Mr. Michel Brisebois, Director of Human Resources at QPT, on May 12, 2008, reads as follows:

> **SUBJECT: Outstanding grievances**
>
> Michel,
>
> In response to your request, please find below a report on the outstanding grievances involving QPT in Bécancour.
>
> **Grievances relating to checking (11):**
>
> 2007-01 / 2007-04 / 2007-05 / 2007-06 / 2007-13 / 2007-18 and 2007-19;
> 2008-02/ 2008-03 /2008-05 and 2008-10
>
> All of these grievances were discussed at two (2) Grievance Committee meetings. The union is challenging the performance of checking work by workers who are not members of the union. Most of the grievances relate to the checking of iron but there are also some that relate to the checking of cargo other than iron, in particular, coastal vessel cargo.
>
> The union intends to take the grievances to arbitration following the next Grievance Committee meeting. As you know, the position of the Maritime Employers Association in regard to checking was very clear during bargaining and has been very clear since: where checking work is done, that work must be performed by longshoremen in accordance with

> the provisions of article 1.09(a). Not having received any specific explanations or rationale from you in regard to these grievances, we consider the grievances payable. As it was explained during the last round of bargaining, the Maritime Employers Association does not have the mandate to handle such grievances at arbitration and your company will accordingly have to assume responsibility for doing so if the union decides to take the grievances to arbitration.
>
> (translation)

[78] In an email dated September 24, 2009, the MEA stated the following, this time in relation to grievance D-2008-22:

> Attached is correspondence I sent you on May 12, 2008, in which the MEA's position regarding checking grievances was laid out. **As indicated and as clearly discussed by the employers at the conclusion of bargaining with the Syndicat des débardeurs, CUPE Local 1375, checking work comes under their jurisdiction and the Maritime Employers Association does not have the mandate to handle such grievances at arbitration. As discussed on several occasions, your company will accordingly have to handle the grievance.**
>
> …
>
> (translation; emphasis added)

[79] Based on the letter of May 12, 2008, and the email of September 24, 2009, the MEA's position is very clear. Where a grievance is considered to relate to checking, the work to be done must be performed by longshoremen in accordance with article 1.09(a) of the collective agreement unless the employer provides it with evidence to the contrary.

[80] The complaint in this matter concerns the grievance filed on July 4, 2008, bearing number D-2008-22. On October 16, 2008, the union referred the said grievance to arbitration in accordance with the collective agreement, and Arbitrator Brault was designated to hear the matter. The MEA's initial position was that it would not handle the grievance since it considered that it involved checking work. It advised QPT that it would have to handle the grievance itself. Further, the MEA alleged that it had never received any information from QPT that would have made it possible for it to handle the grievance. It was only once QPT provided the necessary information for the MEA's investigation that the latter decided to represent QPT at arbitration.

[81] Several proceedings before the Board and the courts ensued. Finally, on April 13, 2010, Arbitrator Brault decided to consider the grievance on its merits with the MEA and union as the parties, after refusing to grant QPT intervenor status. He did, however, give QPT permission to attend the arbitration hearing.

[82] The first day of hearing before the arbitrator was on April 16, 2010. QPT did not attend.

[83] In September 2010, following the first day of hearing, the MEA attended three meetings, including two on QPT premises, to obtain QPT's version of the facts. It met with Mr. Papillon and Ms. Vincelette, the persons concerned by the grievance. The testimony regarding the nature of those meetings is contradictory. On the one hand, Mr. Papillon, the person directly concerned by the said grievance, described the meeting as superficial but did not explain what he meant by that. On the other hand, Mr. Jean Poliquin, QPT Manager at the Port of Trois-Rivières/Bécancour, who had worked there for 33 years, indicated that counsel for the MEA had asked Mr. Papillon questions to check, "point by point" (translation), the facts reported by union witnesses on the first day of hearing, April 16, 2010.

[84] The Board prefers to accept Mr. Poliquin's more precise testimony and concludes that the investigation conducted by the MEA after April 16, 2010, was not cursory. To begin with, since QPT had not attended the April 16 hearing, the MEA sent QPT a summary of the evidence and a copy of the union's exhibits along with a list of questions intended to enable it to consider the merits of the grievance. Further, the MEA met with QPT several times to obtain its version of the facts and questioned those concerned by the grievance, in the presence of QPT's representatives, to check the evidence adduced by the union at the hearing.

[85] The MEA then sought a legal opinion concerning the grievance's chances of success and sent the draft opinion to QPT for its input. According to counsel for the MEA, the grievance regarding the work performed by Ms. Vincelette was unlikely to succeed. Counsel moreover recommended that the MEA settle the grievance by agreeing to pay the worker the amounts claimed and entering into an agreement that would include "admissions concerning checking work" (translation). That recommendation was included in the draft opinion sent to QPT.

[86] Mr. Langlois stated several times during his testimony that it was following the investigation conducted by the MEA after the first day of hearing was held before the arbitrator and after its counsel provided a legal opinion that the MEA directed its counsel to settle the grievance with the union.

[87] The MEA initially offered the union financial compensation. However, the union rejected that offer and insisted that the settlement include a clause forcing QPT to cease its practice.

[88] The Board is not convinced that the MEA acted with malice or in bad faith or that, as QPT alleges, it led QPT to believe that it was defending its interests when it had already made its decision to proceed as it did.

[89] The evidence shows that the MEA entered into the agreement on November 5, 2010, after seeking a legal opinion from its counsel following the investigation it had conducted after the first day of hearing. The evidence further shows that the draft opinion was sent to counsel for QPT for input. While the MEA did not send QPT the final opinion, that opinion contained the same recommendation to settle the grievance and to have whatever settlement agreement was reached contain admissions concerning checking work. QPT accordingly had the opportunity to provide input to the MEA regarding the facts at the basis of the draft opinion and counsel's recommendation. QPT therefore knew that MEA might be settling the grievance in the manner that it did.

[90] The MEA states that it took QPT's input into account but disagreed with QPT's position concerning the interpretation and application of the collective agreement. QPT was convinced that the work performed by both Mr. Papillon and Ms. Vincelette was management and not checking, and that no checking work was performed at the terminal. The disagreement was not between the union and the employer, but between the MEA and QPT. In his testimony, Mr. Poliquin made it very clear that, in all the time he had worked at the Port of Trois-Rivières/Bécancour (33 years), he had never used checkers at the Bécancour terminal.

[91] The respective positions of the MEA and QPT were therefore diametrically opposed and irreconcilable. Following the first day of hearing before the arbitrator and the investigation involving QPT, the MEA determined that checking work had been performed at the Bécancour terminal on June 30, 2008, at least by Ms. Vincelette.

[92] The MEA informed QPT that it had directed its counsel to settle the grievance, but did not involve QPT in the negotiations. As pointed out by Mr. Langlois in his testimony, any involvement by QPT in the negotiation of the settlement agreement would have been useless since, contrary to the MEA's interpretation, QPT did not believe that any of the duties that had been performed on June 30, 2008, had been checking duties.

[93] The duty of fair representation under section 37 of the *Code* (and, by analogy, to section 34(6)) has been the subject of many Board decisions and relies on the general

principles set forth by the Supreme Court of Canada (SCC) in *Canadian Merchant Service Guild v. Gagnon et al.,* [1984] 1 S.C.R. 509 (*Canadian Merchant Service Guild)*:

> The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.
>
> 1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.
>
> 2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.
>
> 3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.
>
> 4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.
>
> 5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.

[94] The teachings of the SCC indicate that an employee—and, by analogy, the employer member in this case—does not enjoy an absolute right to arbitration and is not a party to the collective agreement. Thus, QPT may not discuss the collective agreement, its interpretation or its application directly with the union in the place of the MEA.

[95] This reasoning has been followed by the Board on a number of occasions, including in *McRaeJackson*, 2004 CIRB 290 (*McRaeJackson*). In that matter, the Board relied on the decision of the SCC in *Canadian Merchant Service Guild*, *supra*, and stated the following concerning a union's obligations and responsibilities toward its members:

> [22] In making a decision of whether or not to proceed with a grievance or refer a grievance to arbitration, the union is in fact doing its job of representing employees. It is called upon to assess the workplace conditions that gave rise to an alleged breach of the collective agreement, the interpretation to be given to the collective agreement based on its experience with the employer, as well as the effect of a successful outcome of the grievance on other employees in the bargaining unit. To the extent that this assessment is based on relevant workplace considerations, the union is free to decide the best course of action in a particular set of circumstances.

[96] A union's representation of employees and, by analogy, an employer representative's representation of member employers, involves rights under the collective agreement and, as a

consequence, considerable latitude on the part of the MEA in this case in determining how those rights should be applied. As in *McRaeJackson*, *supra*, the Board considers that, to the extent that the employer representative investigated a grievance, put its mind to its merits in light of all the circumstances, and made a reasoned judgment about its possible outcome, there is no cause for the Board to intervene.

[97] The Board considers that, given the difference of opinion between QPT and the MEA, the discretion lay with the MEA to interpret and apply the collective agreement binding it to the union. In fact, like a union, the employer representative has ultimate responsibility for deciding on its interpretation of the collective agreement. Differences of opinion between a complainant and a bargaining agent on the interpretation of the collective agreement are not sufficient to show that the bargaining agent—or in this case, an employer representative—acted in a manner that was arbitrary, discriminatory or in bad faith (see *Pelletier,* 2010 CIRB 490).

[98] In the matter before the Board, the MEA conducted a thorough investigation of the grievance by obtaining QPT's version of the facts, meeting with the persons concerned by the grievance, and considering the evidence adduced by the union at the hearing. The MEA then obtained a draft legal opinion, which it sent to QPT for input. In the end, given the circumstances, the MEA decided that it was preferable to settle the grievance. The MEA informed QPT that it intended to settle the grievance, which it proceeded to do on November 5, 2010.

[99] For all of the foregoing reasons, the Board finds that the MEA did not act in a manner that was arbitrary, discriminatory or in bad faith in taking steps to settle the grievance.

C. Did the MEA violate the *Code* by entering into a settlement agreement of the type entered into on November 5, 2010?

[100] QPT maintains that the agreement reached is far beyond the scope of the grievance and amends the collective agreement without giving the members of the MEA a say.

[101] As indicated previously, the MEA's position that checking is being performed at the Bécancour terminal is very different from the position of the QPT. When questioned by counsel for QPT, Mr. Poliquin stated categorically that checkers have never been used in all the time he has worked at the Bécancour terminal. When cross-examined by counsel for the union, he explained that he was referring to the work involving taking cargo and loading it onto or

unloading it from trucks or trains. He recognized that checkers were used as required for the work of loading and unloading vessels, as required by the collective agreement.

[102] When cross-examined by counsel for the QPT, Mr. Jean-Pierre Langlois, Senior Labour Relations Advisor for the MEA, indicated that, in his view, the collective agreement between the MEA and the union provides that there is checking work at the Trois-Rivières/Bécancour terminal and that employers are therefore required to use unionized checkers to perform such work. Mr. Langlois stated that there was no ambiguity in regard to grievance D-2008-22, at least in regard to Ms. Vincellette: according to the investigation, part of the work she had performed on June 30, 2008, had been checking work.

[103] When Mr. Langlois was asked why the MEA had not let the arbitrator decide the matter, he responded that it was because there had been no dispute between the union and the MEA on that issue. Mr. Langlois also admitted that the MEA had not wanted a work description, whether in the collective agreement or in connection with an arbitral award, since it had wanted more flexibility in the event of a dispute. The MEA had initially proposed financial compensation to settle the grievance, but the union had turned down the offer because it had wanted an end to QPT's practice.

[104] Subsequently, in an email to counsel for the MEA in connection with the settlement of the grievance with the union, Mr. Langlois indicated that he did not want the agreement to contain a work description. Mr. Langlois stated the following in regard to the draft agreement that counsel for the MEA planned to submit to the union:

> As we discussed, I also have a problem with paragraph 1 of the conditions, as it amounts to a work description that we in no way want and that we especially don't want confirmed by a tribunal. I'm sure you understand that the next step would be to introduce it in the next round of bargaining for the collective agreement and even if we were to refuse, it would create a precedent.
>
> …
>
> (translation)

[105] The first paragraph of the draft agreement in question described in detail the duties of the checker or head checker at the Bécancour terminal. The first and third paragraphs were removed following the comments made by Mr. Langlois, to take into account the MEA's philosophy with regard to checking duties at the Bécancour terminal. While it recognized that some checking duties were performed at the terminal regardless of what QPT claimed, the MEA

wanted to maintain some flexibility to give itself a greater margin of discretion in the interpretation of the collective agreement and minimize any restriction on the management rights of the employers it represents.

[106] The preamble to the agreement of November 5, 2010, sets out relevant details respecting certification, the evidence adduced on the first day of the arbitration hearing, the joint understanding of the parties, and the work performed on June 30, 2008, and indicates that the work in question was the work of a checker. In arriving at this agreement, the MEA took into account the need to foster sound labour relations between the union and the MEA and to maintain industrial peace while avoiding the inclusion of a detailed description of checker work. The fact of merely allowing the grievance as QPT wanted would definitely not have enabled the parties to settle the grievance, since the union was demanding an end to QPT's practice.

[107] As the employer representative, the MEA had the discretion to settle the grievance in question despite QPT's objection. In fact, an employer representative, like a union, may decide which grievances will be referred to arbitration and which will be settled (see *Kasim*, 2008 CIRB 432). As with section 37 complaints, the Board will generally not uphold a complaint where the complainant has rejected a reasonable settlement obtained by the employer representative (see *Misiura*, 2000 CIRB 63). In deciding to settle a grievance or to continue to pursue it at arbitration, the employer representative can take into account the potential negative consequences of an arbitral award on the other members it represents (see *McRaeJackson*, *supra*).

[108] As set out in previous Board decisions, the employer representative is not the agent of the employers it represents, and it has the authority to bind the members it represents provided it does not act in an arbitrary or discriminatory manner or in bad faith (see *Quebec Ports Terminals Inc. et al.* (1992), 89 di 194; and 93 CLLC 16,036 (CLRB no. 968), affirmed by the Federal Court of Appeal in *Quebec Ports Terminals Inc. v. Canada (Labour Relations Board),* [1995] 1 F.C. 459; (1994) 175 N.R. 372; (1994) 29 Admin. L.R. (2d) 189; and (1994) 95 CLLC 210-010 (FCA, file no. A 1584 92)).

[109] The MEA submitted a decision of the Ontario Labour Relations Board (OLRB) in *Anna Wilson* v. *Ontario Public Service Employees Union Local 110,* (1990) OLRB Rep. November 1167, which is also relevant in this matter, in regard to the power of a bargaining agent to settle a grievance. In that matter, the OLRB found that the union had the power to settle the complainants' grievance despite their objection.

[110] QPT relied on *Riley*, 2008 CIRB 419, in which the Board found that the union had breached its duty of fair representation in particular when it had refused to continue pursuing at arbitration a grievance involving a provision of the collective agreement that had not been the subject of an interpretation by an arbitrator. However, unlike the situation in *Riley*, *supra*, the employer representative in this matter obtained a legal opinion and made a decision based on the interests of its members as a whole.

[111] While an arbitral award might have prevented the filing of the complaint before the Board, the MEA believed that it was in the best interests of all of the members it represents to avoid an arbitral award that might define checking work and thus limit its members' management authority.

[112] Mr. Langlois also indicated that he had settled the matter in the way he had in order to ensure some stability in industrial relations with the union. He stated the following:

> …we, from the moment…based on the legal opinion obtained following our investigation, well, as I explained this morning, it was necessary to bring the case to a close. The fact of merely allowing the grievance would not have settled the issue then or for the future. We wanted to lay a foundation to settle the issue then and in the future while respecting, on an individual basis, the cases as a whole...
>
> (translation)

[113] The Board finds that the MEA took into account all relevant factors in deciding to enter into an agreement of the kind it entered into on November 5, 2010. The MEA's decision to settle the grievance was based on the following: (1) the MEA's interpretation of the collective agreement; (2) the desire to maintain some management flexibility for the members of the MEA by avoiding the inclusion of a work description in an arbitral award; and (3) the desire to maintain industrial stability with the union.

[114] In addition, the Board finds that, while QPT was not given the opportunity to take part in the negotiation of the agreement, the MEA did obtain QPT's views concerning the grievance and the existence of checking work at the Bécancour terminal on a number of occasions prior to entering into the agreement. The MEA also obtained QPT's input regarding the draft opinion, which recommended that the grievance be settled and that the settlement agreement include admissions concerning checking work, and informed QPT that it intended to settle the grievance.

[115] The Board moreover notes that the agreement between the MEA and the union describes the occurrences of June 30, 2008, and concludes that the work performed was checking work. There is nothing in that agreement to indicate that, as maintained by QPT, it would be prevented from exercising its management duties in respect of the Trois-Rivières/Bécancour terminal so long as those duties are not the same duties as described in the agreement reached on November 5, 2010, to settle the grievance.

[116] For all these reasons, the Board is not satisfied that the employer representative acted in an arbitrary or discriminatory manner or in bad faith by settling the grievance in the manner it did, and there is nothing to lead the Board to find that the complaint filed by QPT is justified.

VIII. Conclusion

[117] In conclusion, the facts of each case determine whether or not the conduct of an employer representative such as the MEA has fallen below the standard found acceptable to the Board. The representation of employers by an employer representative such as the MEA involves rights under the collective agreement and, as a consequence, gives the employer representative considerable latitude in determining how those rights are to be applied.

[118] The evidence in this matter shows that the MEA considered the grievance, conducted a meaningful investigation, and decided to settle the grievance based on a legal opinion and the interests of all of its members. For all the foregoing reasons, the Board finds that the MEA fulfilled its duty of fair representation.

[119] For the above reasons, the complaint is dismissed.

Translation

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Louise Fecteau
Vice-Chairperson