Canada Industrial Relations Board Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4e étage Ouest, Ottawa (Ont.) K1A 0X8

Reasons for decision

Teamsters Canada Rail Conference,

complainant,

and

Canadian Pacific Railway Company,

respondent.

Board File: 30947-C
Neutral Citation: 2015 CIRB **783**
July 31, 2015

The Canada Industrial Relations Board (the Board) was composed of Ms. Ginette Brazeau, Chairperson, and Messrs. Richard Brabander and Norman Rivard, Members.

Counsel of Record

Mr. Denis Ellickson, for Teamsters Canada Rail Conference;
Mr. Nizam Hasham, for Canadian Pacific Railway Company.

These reasons for decision were written by Ms. Ginette Brazeau, Chairperson.

I. Nature of the Application

[1] On February 25, 2015, the Teamsters Canada Rail Conference (TCRC or the union), filed an unfair labour practice complaint alleging the Canadian Pacific Railway Company (CP Rail or the employer) had violated sections 8(1), 50, 89, 94(1)(*a*) and (3)(*a*), (*b*) and (*e*) of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*). The union alleges that the employer is not respecting the return-to-work protocol that was executed between the parties when they agreed to submit their collective bargaining dispute to binding arbitration pursuant to section 79 of the *Code*. Specifically, the union argues that the employer's unilateral decision to impose the manner in which union leave would be granted is contrary to the status quo that existed prior to the strike.

[2] The Board has decided to grant the complaint, in part, for the following reasons.

II. Background

[3] The union and the employer have been engaged in collective bargaining for the renewal of their collective agreements covering the running trades which expired on December 31, 2014. When the conciliation and mediation process failed, the union gave notice of strike to the employer on February 10, 2015 indicating it would commence strike action on February 15, 2015, the day on which they were acquiring their right to strike, and did in fact begin strike action on that date. On February 16, the parties entered into an agreement to end the work stoppage and to submit their collective bargaining dispute to binding arbitration pursuant to section 79 of the *Code*. On the same day, they also agreed to a Return-to-Work Agreement (RTWA) that set out the terms by which the employees would return to work the following day.

[4] Immediately prior to the commencement of the strike, union business leave was governed by the terms of an interim agreement reached by parties in the context of an unfair labour practice complaint that was heard by the Board in April and August 2014. The Board ultimately found a breach of the *Code* and imposed the agreement on the parties by Order no. 738-NB (see, *Canadian Pacific Railway Company*, 2015 CIRB 775). The Order was to be in effect until the earlier of the date on which parties entered into a new collective agreement or the provisions of section 89(1)(*a*) to (*e*) had been met. By issuing this Order, the Board in effect forced the issue of union business leave onto the bargaining table. However, the parties did not reach agreement on the issue of union business leave during collective bargaining.

[5] After the parties agreed to submit their outstanding issues to the arbitration process pursuant to section 79, the employees returned to work on February 17, 2015 in accordance with the RTWA agreed to by the union and the employer. On February 20, 2015, the employer sent a letter to the union advising that it was taking the position that the Board's Order no. 738-NB had expired and that it was implementing changes to the rules around the granting of union business leave. In its response of February 22, 2015, the union accused the employer of violating the agreement to end the work stoppage and the related RTWA.

[6] This led to the filing of the present unfair labour practice complaint (ULP complaint). The union concurrently filed an application for an interim order asking the Board's immediate intervention to address the issue of union business leave.

[7] The application for an interim order was processed on an expedited basis as per the *Canada Industrial Relations Board Regulations, 2012*. The Board held a hearing by teleconference on March 5, 2015 and issued an interim order directing the employer to abide by the terms of paragraphs 1 and 2 of the Interim Agreement which the Board had imposed in its Order no. 738-NB.

[8] During that teleconference of March 5, 2015, the Board also asked the parties to consult each other and provide it with dates for a potential hearing on the merits of the ULP complaint. When the Board communicated its interim order that same day, it reiterated its requests for the parties to provide it with dates.

[9] At the time of the hearing on the application for an interim order, the parties had not provided the Board with their written pleadings on the merits of the complaint as the timelines set for filing the response and reply had not yet expired. The employer provided its response to the application on March 12, 2015 and the union provided its reply on March 23, 2015.

[10] The parties also provided their availability for a hearing through letters dated March 19 and 23. However, the Board did not confirm the hearing dates or issue any notice of hearing on the merits of the ULP complaint.

[11] After reviewing the parties' thorough submissions, the Board concluded that a hearing was not necessary and informed the parties on June 5, 2015, that the Board would be issuing its decision based on the written record and that it was no longer necessary for the parties to hold the dates they had set aside for a hearing.

III. Decision not to hold an oral hearing

[12] After the Board informed the parties that it would not hold a hearing and would make its determination based on their written submissions, the employer wrote to the Board questioning the Board's decision not to hold a hearing after canvassing the parties for dates. It also requested that the Board not schedule a hearing at this time given that that parties are scheduled to appear before Justice George W. Adams, the mediator-arbitrator appointed by the Minister of Labour to resolve the collective agreement.

[13] It is well established that the Board can make a determination based on the written record. Section 16.1 of the *Code* clearly provides that the Board may decide any matter before it without holding an oral hearing. As an administrative tribunal, the Board is master of its own procedures

and has the discretion on a case-by-case basis to decide whether a particular matter warrants an oral hearing or whether the documents on file are sufficient to deal with a matter. The Board's authority to decide solely on the basis of written material filed was affirmed in *NAV CANADA*, 2000 CIRB 468, affirmed in *NAV Canada* v. *International Brotherhood of Electrical Workers*, 2001 FCA 30.

[14] In this case, the Board did canvass the parties for dates for a hearing in the event that it would be necessary to hear further evidence or arguments. Given the number of matters currently before the Board involving these two parties, the Board felt it was prudent to have dates set aside as early as possible so as not to unnecessarily delay the matter. However, after all the submissions were filed, and having had an opportunity to review the extensive written submissions, the Board concluded that a hearing was not necessary. The Board therefore uses its discretion pursuant to section 16.1 to decide the matter without holding an oral hearing.

IV. Merits of the complaint

A. Position of the parties

1. The union:

[15] The TCRC submits that it agreed to submit the collective bargaining dispute to the arbitration process on the understanding that the parties were returning to the terms and conditions of employment that were in place prior to the commencement of the strike. It argues that this agreement had the effect of reinstating the statutory freeze, including the terms of the interim agreement as extended by the Board's Order of August 7, 2014 and that the status quo was to be maintained until the completion of the arbitration process. As a result, it alleges that the employer is in breach of section 50 of the *Code*.

[16] It further argues that by unilaterally modifying terms and conditions of employment, the employer is violating the Memorandum of Agreement and the RTWA and that these changes amount to a lockout that is prohibited by the agreement reached pursuant to section 79 of the *Code*.

[17] The union alleges that as a result of the company's new policy, leaves of absence for union business that had been approved prior to the strike were cancelled, or new leave denied, thereby interfering with its ability to represent its members or otherwise interfering with the administration of the union contrary to section 94(1)(*a*) of the *Code*.

[18] It asks the Board to order the employer to cease and desist from violating the *Code* and the parties' agreement pursuant to section 79 as well as the Return-to-Work Agreement.

2. The employer:

[19] The employer takes the position that the Order of the Board expired when the union commenced its strike action. It relies on the language of the Board's Order and correspondence to argue that the intent of the Board was to have the parties put the issue of union business leave on the bargaining table. In the employer's view, the Board made it clear that the Order was to expire at the earlier date of a new collective agreement entered into or the acquiring of the right to strike or lockout.

[20] The employer takes the position that given that the Interim Agreement on union business leave had come to an end, it implemented a new policy that was not in violation of the collective agreement. The employer states that it has a right to manage union leave and that the union refuses to accept any changes to the practices that were in place. In support of this statement, the employer provides an overview of the extensive discussions that the parties had on this issue during collective bargaining.

[21] The employer indicates that there is an honest disagreement between the parties on the status of the Board's Order no. 738-NB that extended the application of the parties' Interim Agreement with respect to union business leave. It argues that the RTWA was intended to provide for the return to work of employees on the individual terms and conditions that governed their employment. However, in its view, the RTWA did not continue the terms of date specific agreements that had come to an end and that were outside of the authority of both parties to modify. It relies on *Aliant Telecom Inc.*, 2003 CIRB 237, to suggest that Board order no. 738-NB had a clear end date that was triggered when the parties acquired the right to strike and lockout.

[22] The employer acknowledges that it did announce a new union business leave policy on February 20, 2015. However, it denies any allegations that it has violated the *Code* and in fact affirms that its actions are consistent with its legal obligations. It cites several examples where leave was granted and suggests that the employer has a legal right and obligation to manage union business leave and indicates that all efforts in this regard have been met with negative responses from the union.

V. Analysis and Decision

[23] When parties to a collective bargaining dispute reach an agreement pursuant to section 79 of the *Code* to send all outstanding issues that remain in dispute to arbitration for final settlement of the collective agreement, this agreement ends the dispute and the parties are no longer able to resort to a strike or a lockout as a method of dispute resolution. Section 79 of the *Code* reads as follows:

> 79. (1) Despite any other provision of this Part, an employer and a bargaining agent may agree in writing, as part of a collective agreement or otherwise, to refer any matter respecting the renewal or revision of a collective agreement or the entering into of a new collective agreement to a person or body for final and binding determination.
>
> (2) The agreement suspends the right to strike or lockout and constitutes an undertaking to implement the determination.

[24] An agreement made pursuant to section 79 has the effect of concluding negotiations for a collective agreement and ending the parties' duty to bargain since the parties agree to be bound by the arbitrator's award. As stated *in Sécurité Kolossal Inc.*, 2004 CIRB 292:

> [31] In light of the foregoing, the Board is of the opinion that, from the moment the parties are engaged in a binding arbitration process pursuant to section 79 of the *Code*, after the original collective agreement has expired, it is no longer possible to consider that there is no collective agreement applicable to the bargaining unit and that this period remains open for a raiding union. In such a case, the employment conditions remain to be determined by the arbitrator, but the parties have undertaken, within the meaning of section 79(2) of the *Code*, to "implement the determination" of the arbitrator. This undertaking demonstrates the parties' intention to put an end to the duty to bargain.

[25] For all intent and purposes, the agreement made pursuant to section 79 is equivalent to concluding a new collective agreement and the parties are now bound by the terms of that new agreement even though certain terms of that agreement have yet to be determined through the implementation of the arbitrator's award. Section 79 of the *Code* operates prospectively and cannot be interpreted to mean that the freeze provision pursuant to section 50(*b*) of the *Code* as it was prior to the parties acquiring the right to strike or lockout is reinstated when the parties agree to send outstanding issues to binding arbitration.

[26] While the outstanding terms of the collective agreement are being submitted to a mediation-arbitration process, the parties are not free to make unilateral changes to any terms and conditions that exist. The parties remain bound by the terms and conditions of the former collective agreement until it is revised by the arbitrator's award. In some cases, the parties will

often include items already agreed to during the collective bargaining process or may agree to implement different terms but they will do so on mutual agreement.

[27] In the present matter, the parties expressly agreed to return to terms and conditions that were in place prior to the commencement of the strike. Part of the RTWA reads as follows:

> WHEREAS a legal strike commenced at CP Rail on February 15, 2015;
>
> AND WHEREAS the Company and the Union wish set rules to re-establish normal labour relations;
>
> AND WHEREAS the Company and the Union wish to set rules to re-establish an orderly return to work;
>
> THEREFORE the parties agree to the following:
>
> ...
>
> **4. All members of the bargaining units shall be returned to work on the same terms and conditions that applied to each member respectively prior to the commencement of the strike.**
>
> (emphasis added)

[28] The terms and conditions that existed and applied to members of the bargaining units when the union decided to exercise their right to strike, included the terms contained in the parties' Interim Agreement and extended by the Board's Order no. 738-NB. As the parties have not reached agreement on different terms related to union business leave, the employer is not in a position to unilaterally make changes to those terms anymore than it was free to do so prior to the parties acquiring the right to strike or lockout.

[29] The employer argues that the union knew that the Interim Agreement on union business leave as imposed by the Board's Order was spent when the union chose to go on strike. However, the same can be said of the terms and conditions contained in the collective agreement. Yet, when the parties agreed to end the dispute and refer all outstanding matters to a mediator-arbitrator, they agreed to go back to the terms and conditions that were in place prior to the commencement of the strike even though, in technical terms, the collective agreement had expired and was no longer binding on the parties when the union exercised its right to strike. Just as the terms and conditions contained in the collective agreement were no longer protected during the strike, neither were the provisions in the parties' Interim Agreement.

[30] The employer cannot, in this situation, cherry-pick the terms that will continue to apply during the period until the new collective agreement will be finally determined by the arbitrator. Once the parties agreed to end the dispute and submit the outstanding items to the arbitrator, they also agreed to be bound by the terms and conditions that existed prior to the strike, however those terms came to be in place. The RTWA does not allow one side or the other to unilaterally change any of those terms and conditions.

[31] The reason the order was issued in the first place was because the employer was attempting to unilaterally change the longstanding practices for union business leave which the Board found to be in breach of the employer's obligation under the *Code*. When the parties agreed to end their collective bargaining dispute, they agreed to go back to the status quo until all outstanding issues, including the issue of union business leave, could be determined by the arbitrator. The employer is not free to make unilateral changes to the terms governing union business leave or to any other terms and conditions of employment now in place while the arbitration process concludes.

[32] To accept the employer's proposition would amount to accepting that whatever was not agreed to during collective bargaining can be changed unilaterally by the employer during the mediation-arbitration process agreed to pursuant to section 79. The Board cannot accept this proposition as this is not the effect of section 79. Although the terms governing union business leave were not all in the existing collective agreement, the Board found in previous proceedings that the combination of local agreements and practices that governed union business leave could not be changed unilaterally. The Board's intent was to have the parties negotiate and come to agreement on leave provisions to replace what was in place prior to the Interim Agreement reached in April 2014. In the meantime, it ordered the parties to abide by an agreement that they negotiated themselves as an interim measure.

[33] The Board understands that the employer is seeking to make changes to the way it operates its business. However, the employer must also respect the fact that its employees are represented by a bargaining agent and that it cannot make unilateral changes to the terms and conditions of employment, including provisions related to union business leave, without the agreement of the bargaining agent through the process of collective bargaining.

[34] In this case, the employer communicated a new policy on union business leave without regard to the terms and conditions that were in place as a result of the agreement reached pursuant to section 79 and the RTWA. The Board concludes that the employer's letter of

February 23, 2015 in which it unilaterally imposes new conditions for the request and approval of union business leave is a violation of section 94(1)(*a*) of the *Code* as it ignores the rights and the obligations of the bargaining agent in its representation of employees in what are key terms and conditions of employment.

[35] The terms of the Interim Agreement as attached to the Board's Order no. 738-NB must from the day of this decision, continue to apply until such time as the parties mutually agree to different terms governing union business leave or the arbitrator imposes different terms for union business leave. The Board's order to this effect is attached to this decision and supercedes the Interim Order no. 754-NB that was issued on March 5, 2015.

[36] Given this conclusion on the complaint made pursuant to section 94(1)(*a*), the Board finds it unnecessary and of no useful labour relations purpose to deal with the other alleged violations of the *Code*.

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

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Ginette Brazeau
Chairperson

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Richard Brabander
Member

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Norman Rivard
Member