Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Parrish & Heimbecker, Limited,

complainant,

and

Maritime Employers Association,

respondent,

and

International Longshoremen's Association, Local 1654,

certified bargaining agent.

Board File: 30790-C
Neutral Citation: 2015 CIRB **786**
July 21, 2015

[Please note that the Board has decided to reissue this previously unreported decision in a Reasons for decision format to make it more easily accessible to the labour-management community.]

The Canada Industrial Relations Board (the Board) was composed of Ms. Annie G. Berthiaume, Vice-Chairperson, and Messrs. Daniel Charbonneau and André Lecavalier, Members.

Counsel of Record

Mr. Morton G. Mitchnick, for Parrish & Heimbecker, Limited;

Mr. John Mastoras, for the Maritime Employers Association;

Mr. Ronald A. Pink, Q.C., for the International Longshoremen's Association, Local 1654.

These reasons for decision were written by Ms. Annie G. Berthiaume, Vice-Chairperson.

I. Nature of the Complaint

[1] Section 16.1 of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*) provides that the Board may decide any matter before it without holding an oral hearing. In this case, the Board is satisfied that the evidence presented and the parties' comprehensive written submissions are sufficient for it to decide the matter without holding a hearing.

[2] The Board has before it a complaint of unfair labour practice filed by Parrish & Heimbecker, Limited (P&H or the complainant), on November 28, 2014, pursuant to section 97(1) of the *Code*, alleging violation of section 34(6) of the *Code* by the Maritime Employers Association (the MEA or the respondent). P&H alleges that the MEA breached its duty of fair representation (DFR) when it settled a grievance filed against P&H by the International Longshoremen's Association, Local 1654 (the ILA 1654 or the union).

[3] The MEA is the designated employer representative appointed by the Board under section 34 of the *Code* for all employers in the longshoring industry operating at the Port of Hamilton.

[4] The ILA 1654 is the certified bargaining agent for all employees of the employers in the longshoring industry in the Port of Hamilton, pursuant to the Board's order dated March 8, 1991, and confirmed in Board order no. 5893-U (the certification order).

[5] P&H is an integrated agri-business encompassing grain trading, flour milling, feed milling, farming and food production, with terminals in a variety of Canadian ports, including the Port of Hamilton, where it started operating in 2008.

[6] In the grievance at issue in this matter, filed on October 3, 2011, the union was alleging that P&H had violated the collective agreement by using its own regular staff to perform longshoring work at the Port of Hamilton terminal instead of members of the ILA 1654. The activities in question involved the loading of grain on vessels at P&H's terminal. P&H denied any violation of the collective agreement, disputing that the work at issue constituted longshoring work covered by the collective agreement between the union and the MEA. The MEA was also of the view that the work constituted longshoring work.

[7] The allegations made by P&H in its complaint relate primarily to the fact that, further to the Board's August 28, 2014, bottom-line decision in a referral pursuant to section 65 of the *Code* (the section 65 referral) between the same parties and as a result of unresolved issues in the grievance, the MEA decided to settle the grievance through a settlement

agreement reached between it and the union on September 12, 2014. P&H submits that the agreement of September 12, 2014, was entered into precipitously, without its consent, and that the MEA ignored its objections to it, siding with the ILA 1654. More specifically, P&H submits it disagreed with the proposed settlement given its inability to assess its position on the litigation without having the benefit of the full reasons of the Board's decision on the section 65 referral. P&H submits that the MEA deprived it of a hearing of the full measure of its available defences on the merits.

[8] The issue before the Board is whether the MEA acted in a manner that was arbitrary, discriminatory or in bad faith toward P&H when it handled the grievance and settled it on September 12, 2014.

[9] P&H is asking the Board to find that the MEA failed to fulfill its DFR by settling the grievance notwithstanding P&H's opposition. Accordingly, P&H is asking the Board to void the settlement agreement between the MEA and the union and direct that the grievance proceed to be scheduled for hearing in consultation with the complainant. Finally, P&H is requesting that it be granted status to present its various defences at arbitration and be entitled to representation by counsel of its own choosing.

II. Uncontested Facts

A. The Grievance and the Section 65 Referral

[10] A geographic certification has been in effect, pursuant to section 34 of the *Code*, in the Port of Hamilton for the employers in the longshoring industry. At all material times, a collective agreement, running from 2010 to 2017 (the collective agreement), was in effect between the union and the MEA. Through a combination of articles 1.02 and 2.03 of the collective agreement, longshoring work is reserved to ILA 1654 members.

[11] P&H has been working at the Port of Hamilton since 2008. Its operations involve, among other things, the loading of grain onto ships. Its operations began from an existing shed leased from the Hamilton Port Authority. In 2011, it began operations in a newly constructed terminal at Pier 10 in the Port of Hamilton. P&H has its own ground forces for its operations and also uses, when required, a stevedoring company bound by the collective agreement to assist at its terminal.

[12] As a result of an incident where ILA 1654 believed that P&H was using its own staff to perform longshoring work, in or about November of 2009, the ILA 1654 filed an application seeking to have P&H added to the list of employers covered by the geographic certification order in the Port of Hamilton. That application was resolved by a Memorandum of Agreement (the MOA) between P&H, the ILA 1654 and the MEA on August 10, 2010. On August 31, 2010, the Board issued the order no. 615-NB (under Board file no. 27820-C), which incorporated the MOA as a full and final settlement of the ILA 1654's application to add P&H as an employer bound by the geographic certification order.

[13] In the MOA and order no. 615-NB, P&H agreed that it was an employer bound by the geographic certification order in the Port of Hamilton and that it would adhere to the collective agreement unless it contracted any longshoring work to a stevedoring company already covered by the collective agreement. In addition, by virtue of the second paragraph of the MOA, the labour requirement provisions of the collective agreement applicable to P&H's competitor, James Richardson International (Richardson), applied to P&H, provided that P&H's longshoring operations were "functionally comparable and conforming in every respect" to the operations at the Richardson terminal. More specifically, under Article 13 of the collective agreement, when Richardson is loading grain to vessels at its piers in Hamilton, the manning requirements are for ship-side only, being three members of the union, including the working leader. Under the exception, there is no requirement for union members to be utilized on any company "pay-loaders" operating dock-side, that is, in the company's terminals (the Richardson exception).

[14] Up to the date of the filing of the grievance, P&H used a stevedoring company for its longshoring work; however, it used one of its front-end loader operators to assist with the loading of vessels at its terminal. For P&H, it was not required to hire ILA 1654 labour, given that the work at issue was "ground" work, comparable to that of Richardson and, thus, not considered longshoring work falling under the applicable collective agreement.

[15] The ILA 1654 disagreed and, on October 3, 2011, the union filed a grievance alleging that P&H had violated articles 1.02 and 2.03 of the collective agreement, among others, by performing longshoring work in the Port of Hamilton without using labour supplied by the ILA 1654. As a remedy, the ILA 1654 sought compensation for lost wages and benefits retroactive to when P&H began performing the disputed work, in the amount of $57,000. The ILA 1654 also

sought an order requiring that P&H comply with the collective agreement and the MOA by using ILA 1654 members as loader operators (the front-end loader operator grievance).

[16] The MEA was also of the opinion that the work at issue, done by a loader operator, was directly related to the loading of vessels and, as a result, considered longshoring work. By letters dated January 25 and March 27, 2012, Mr. Joe Walsh, Labour Relations Representative for the MEA, asked that P&H pay the appropriate wages and benefits owed to the union.

[17] In a letter dated September 14, 2012, P&H, relying on the Richardson exception in the MOA and reminding the MEA that it used a stevedoring company bound by the collective agreement, denied any violation of the collective agreement and maintained its position that the collective agreement did not extend to the front-end loader operator work in question since it was not longshoring work.

[18] In a letter dated October 5, 2012, the MEA responded to P&H, summarizing the conclusion of its investigation of the grievance. The MEA advised P&H that since there was no front end loader or any other machine used in the loading of vessels at Richardson, P&H's operations were not functionally comparable to that of Richardson's. The MEA again asked that P&H pay the appropriate wages and benefits to the ILA 1654 or suggest another remedy.

[19] As parties were unable to resolve the matter, on June 13, 2013, the union and the MEA appointed Arbitrator Christopher Albertyn to hear the dispute. P&H was advised by email dated June 26, 2013, that the grievance had been referred to an arbitrator. The hearing was initially scheduled for March 28, 2014**.**

[20] From June to early September 2013, discussions between counsel for the MEA, the ILA 1654 and P&H took place regarding how the MEA would proceed with the grievance. In light of P&H's position that the front-end loader operator work was not longshoring work covered by the collective agreement, both the MEA and P&H suggested that the question be put before the Board pursuant to section 65 of the *Code*.

[21] On September 17, 2013, disagreeing with the MEA's execution of its mandate as designated employer representative, P&H sought consent from the MEA to take primary carriage of the matter. In addition, given that the MEA had not yet filed the section 65 referral with the Board, P&H advised the MEA that it would proceed with the filing of the said referral.

[22] On September 27, 2013, the MEA's counsel at the time advised P&H's counsel that it would be filing a section 65 referral since the MEA believed that the ILA 1654's position in the grievance had merit. However, the MEA advised P&H it deferred to the Board to decide whether the collective agreement extended to the loader operator work in question. The section 65 referral was filed on the same day.

[23] The grievance arbitration hearing initially scheduled for March 2014 was thus held in abeyance until September 17, 2014, pending the Board's determination on the section 65 referral, which was heard over three days in May 2014. P&H participated as a party before the Board, in addition to the union and the MEA.

[24] Prior to the scheduled September 2014 grievance arbitration hearing, on August 28, 2014, the Board issued a bottom-line decision setting out its determination that P&H was a party bound by the collective agreement in effect between the MEA and the union in the Port of Hamilton for the work at issue. The Board's August 28, 2014, decision was followed by reasons dated December 18, 2014.

B. The Board's Bottom-Line Decision in the Section 65 Referral

[25] In the section 65 referral, the MEA described the issue to be determined as a dispute of jurisdiction between the ILA 1654 and P&H, raised in the October 3, 2011, front-end loader operator grievance. The MEA asked the Board to determine the scope of longshoring work, pursuant to its geographic certification order.

[26] In its response to the referral, filed on October 15, 2013, P&H recognized that, prior to the grievance at issue, it had, through a combination of its own ground forces and a stevedoring company, loaded seven boats of grain. P&H submitted that all of the grain, however, was owned by P&H and was being shipped in the course of its normal business of procuring and selling grain. P&H, relying on the Board's decision in *Rideau Bulk Terminal Inc.,* 2011 CIRB 608, took the position that, as an employer who sends out or receives products on its own account, the disputed work was therefore outside the scope of the geographic certification order.

[27] In its August 28, 2014, bottom-line decision, the Board summarized the issue to be determined in the section 65 referral as "whether P&H is one of the parties bound by the collective agreement." The Board unanimously determined that, by virtue of the MOA, P&H was an employer bound by the collective agreement and, as such, was "no longer able to invoke the 'own product/own employees' exception."

C. The Settlement Agreement

[28] Following receipt of the Board's bottom-line decision, in an email dated September 2, 2014, Mr. Walsh wrote to Mr. Rob Bryson, Vice-President at P&H, and questioned the need for the arbitration hearing. He also asked to discuss possible settlement options. Further to various exchanges between the MEA, P&H and the ILA 1654, on September 12, 2014, the union and the MEA agreed to resolve the grievance in the amount of $12,000. The terms of the settlement agreement were executed on October 7, 2014.

D. Post Settlement Agreement

[29] On November 4, 2014, the MEA sent an invoice to P&H, in the amount of $12,000, which represented the quantum of the September 12, 2014, settlement agreement.

[30] The Board released its comprehensive reasons in a decision issued on December 18, 2014, (*Parrish & Heimbecker, Limited*, 2014 CIRB LD 3337). In its reasons, the Board stated that P&H was a party bound by the collective agreement in effect between the MEA and the ILA 1654, following the same analysis as its August 28, 2014, bottom-line decision.

[31] P&H did not seek a reconsideration of either the August 28, 2014, bottom-line decision or the reasons for that decision issued on December 18, 2014. P&H attempted to have the Board's December 18, 2014, decision judicially reviewed and filed a motion with the Federal Court of Appeal for an order extending the time limit to file its application for judicial review, which was dismissed on March 10, 2015.

[32] P&H filed this complaint with the Board on November 28, 2014.

III. Positions of the Parties

[33] The Board will not go over all of the written submissions of the parties and jurisprudence in detail since they are not all relevant to this DFR complaint. The following 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 P&H when it handled the grievance, accepted the ILA 1654's settlement offer on September 12, 2014, and did not proceed to arbitration.

A. P&H

[34] P&H alleges that the MEA failed in its DFR from the onset of the grievance by taking the position that the grievance was valid notwithstanding the existence of the MOA, and by requesting that P&H pay the wages of the front-end loader operator being claimed. In summary, P&H alleges that the MEA failed in its DFR by:

- Selecting an arbitrator and setting the initial grievance arbitration hearing date in March 2014, without consulting P&H;
- Vigorously supporting the ILA 1654's position at the section 65 referral hearing before the Board that the work in question was longshoring work and thus subject to the collective agreement;
- Failing to investigate the actual number of hours required on the front-end loader operator to validate the damages claimed by the ILA 1654;
- Failing to accept P&H's position that the Board's reasons for its August 28, 2014, bottom-line decision were necessary for P&H to make a decision on the grievance—which was not unreasonable in the circumstance—and engaging in settlement discussions with the union despite P&H's objection;
- Accepting the ILA 1654's offer and cancelling the hearing, despite the unavailability of P&H's counsel as well as P&H's expression that doing so was neither "a reasonable nor a prudent thing to do" and being unable to validate the ILA 1654's claim, which was premised on erroneous assumptions;
- Acting jointly with the ILA and abiding by its artificial deadline for responding to the offer even though P&H's counsel was unavailable;
- Accepting the settlement offer and cancelling the September 17, 2014, grievance arbitration hearing, therefore thwarting P&H's ability to place its various defences before an arbitrator to have them adjudicated;
- Wrongfully refusing to reconsider P&H's position regarding the settlement and re-affirming the settlement and its expectation that the amount agreed to will be P&H's responsibility.

[35] P&H acknowledges the Board's recognition of the right of an employer representative to settle grievances brought against an employer it represents, provided that the employer representative abides by its duty to represent the employer fairly, as required by section 34(6) of the *Code.*

[36] P&H argues that where a certified representative fails to meet that standard, the appropriate remedy is to direct that the settlement be abrogated in order for the merits to be heard through the arbitration process. Furthermore, P&H argues that when the representative's interests diverge from the party it is representing, the latter is entitled, on the grounds of natural justice, to independent representation at arbitration. Finally, P&H states that typically in circumstances where there has been a breach of the DFR, the cost of this representation will be borne by the employer representative.

[37] P&H is asking that the Board find and declare that the MEA, in purporting to come to a settlement of the union's grievance in the manner that it did, was in violation of the DFR that the *Code* imposes upon it, and that the Board void the settlement accordingly.

[38] Further, P&H is asking that the Board order that the grievance proceed to be heard in consultation with the complainant before the current arbitrator, that the complainant have full status to present its various defences at arbitration, and that it be entitled to representation by counsel of its own choosing.

[39] Finally, in light of the additional costs incurred by P&H in the present proceeding, P&H is asking that the Board order the MEA to bear the cost of its legal representation at arbitration.

B. The MEA

[40] The MEA reminds the Board that it has consistently held that it is up to the employer representative to determine matters such as whether a grievance will proceed to arbitration, whether a matter should be settled and how to plead a particular case, and that it does not need P&H's consent to fulfill its obligations under this unique regime.

[41] The MEA submits that a review of the process by which it arrived at the settlement of the grievance—which is what the Board should be concerned with in a DFR complaint—clearly demonstrates that it did not act in a manner that was arbitrary, discriminatory or in bad faith either in the handling of the grievance or in the settling of it. The MEA submits that it met its obligations as employer representative by investigating the grievance, considering the merits of the grievance in all of the circumstances including the section 65 referral, and making a reasoned judgment about the grievance's possible outcome.

[42] The MEA states that, upon receipt of the grievance, it promptly commenced an investigation of the ILA 1654's allegations, which were then communicated to P&H so that it

would have an opportunity to respond. The MEA alleges that, notwithstanding the unsatisfactory explanation from P&H, it continued its investigation in pursuit of a possible credible defence to the grievance.

[43] The MEA submits that it consulted with its legal counsel and gave careful consideration to the language of the collective agreement, the relevant case law on the disputed work, the MOA and Board order no. 615-NB, in order to assess whether the front-end loader operator work in dispute amounted to longshoring work reserved for members of the ILA 1654.

[44] Although it had sufficient evidence to refute P&H's arguments and was under no obligation to do so given its authority to deal with the grievance, the MEA commenced the section 65 referral in order to provide P&H with a full and fair hearing before the Board and the opportunity to convey to the Board why it believed the collective agreement did not apply to the disputed work. The MEA further submits that the section 65 referral demonstrates its open and honest attempt to satisfy P&H that the MEA's position in the grievance was reasonable in all the circumstances.

[45] In addition, the MEA alleges that P&H failed to collaborate with the MEA and has been neglectful in providing information necessary to assess the grievance and calculate the financial exposure in order to assess the offer. It also submits that it was completely unaware of P&H's "own product" argument prior to reading P&H's response to the section 65 referral.

[46] The MEA denies that it failed in its DFR since it reserved its decision regarding the merits of the grievance and exercised its discretion to settle the matter until after it had obtained sufficient facts from both P&H and the ILA 1654; it consulted legal counsel and considered the application of the collective agreement, the MOA and previous jurisprudence; it assessed possible defences available to P&H; and, moreover, it proceeded with the section 65 referral and obtained the Board's decision rejecting P&H's "own product" argument. The MEA further submits that its conclusions were also communicated to P&H on numerous occasions and that the complainant was given ample opportunity before and after the section 65 referral to provide a rebuttal or a remedy to the grievance in its communication with the MEA.

[47] The MEA submits that, although it was under no obligation to obtain P&H's opinion or consent in order to accept the ILA 1654's settlement offer, it undertook efforts to consult P&H.

[48] Consequently, the MEA submits that the decision to settle the grievance was not made in an arbitrary manner, but rather that it was the product of a reasoned judgment by the MEA

regarding the merits of the grievance. The MEA is asking that the DFR complaint filed by P&H be dismissed for lack of evidence. It further submits that the complaint should be dismissed given that P&H failed to respond and provide relevant information relating to the subject matter of the grievance.

C. The Union

[49] The union states that the complaint misconstrues the role of the employer representative in the geographic certification system provided for in the *Code*. The MEA exercises all powers of an employer on behalf of all employers bound by the certification order in the Port of Hamilton, including P&H. In this system, the union reminds the Board that the parties to the collective agreement are the ILA 1654 and the MEA. P&H, an individual employer, although bound by the collective agreement, is not a party to it. In this system, the MEA is the only employer representative with which the ILA 1654 will deal.

[50] The union submits that the MEA had full carriage of the grievance on behalf of P&H, which included the power to select an arbitrator, to set a date for the hearing and to advance the MEA's own interpretation of the collective agreement. It submits that the MEA also has the power to negotiate with the union a resolution to any grievance alleging a violation of the collective agreement.

[51] The union further submits that, given that P&H is not a party to the collective agreement, the complainant did not have standing to participate independently in the front-end loader operator grievance. As a result, the union states that it is inaccurate for P&H to take the position in its complaint that the MEA has frustrated P&H's ability to have its various defences fully adjudicated.

[52] The union also submits that an employer representative enjoys considerable discretion in determining whether to take a grievance to arbitration and does not necessarily breach section 34(6) by adopting an interpretation of the collective agreement that differs from that of an employer it represents.

[53] The union contends that P&H did not establish that the MEA acted arbitrarily or in bad faith in accepting a settlement of $12,000 for the grievance, even over the objections of P&H. The union submits that the settlement negotiated between the MEA and the union was fair and reasonable in the circumstances, especially since the union tendered unchallenged evidence of damages in the range of $50,000 during the hearing of the section 65 referral before the Board.

[54] The ILA 1654 further submits that it was not arbitrary either, for the MEA and the union, to rely on the bottom-line decision of the Board instead of waiting for the Board's full reasons to be issued. The Board's bottom-line decision held that the activities at issue constituted longshoring for which ILA 1654 labour was required. Given that decision, the only issue remaining to be determined in the grievance consisted of the quantum of damages. The union asserts that the settlement represented a reasonable compromise and that there was no need for the parties to await more detailed legal reasons from the Board to resolve the matter fairly.

[55] The union submits that the complaint does not allege any breach of the DFR owed by the MEA and, given that the complainant bears the onus, the complaint should be dismissed as P&H has not discharged that onus.

D. P&H's Reply and the MEA's Surreply

[56] P&H adds in its reply that there was nothing in the circumstances, as they existed on the day of the settlement, that justified the MEA to commit to the settlement with the union. The reply also contains several reiterations of P&H's earlier submissions as well as new assertions, none of which the Board will summarize since either they are not relevant to the issues in this complaint or they constitute an improper reply. The essence of P&H's submissions in its reply, which the Board will consider, is as follows:

- P&H denies being non-responsive to the MEA's request for information necessary to calculate its exposure.
- P&H states that the only information the MEA had in order to evaluate the potential liability was the amount put forward by the ILA 1654 at the section 65 referral hearing, based on estimated tonnage of product being shipped. For P&H, until the Board's full reasons were issued, there remained the possibility, based on the "own product" facts, that the liability would be zero.
- P&H also disputes the union's assertion that the ILA 1654 put forward unchallenged evidence regarding its estimated damages. P&H submits it took the position at the section 65 referral hearing that a detailed analysis would be required to determine the actual usage of the pay-loader, which, for P&H, was a matter for arbitration.
- P&H submits it was not afforded an opportunity to respond to the ILA 1654's settlement offer before it was accepted by the MEA.

- Responding to the union's submissions that further to a cost-benefit analysis the settlement constituted a compromise, P&H submits that the analysis should be different when the compromise results in an agreement to commit someone else to the costs.
- P&H alleges that by settling the matter as it did and by not allowing P&H to assess its position once it received the Board's full reasons in the section 65 referral, the MEA was not acting out of a duty to mitigate P&H's potential liability, but was instead rushing ahead with the settlement in collaboration with the ILA 1654.
- P&H also suggests that the settlement deprived it of its right to see the Board's full reasons and any rights flowing from it.

[57] P&H also made several submissions regarding the Board's detailed reasons issued in December 18, 2014, allegedly in reply to the MEA's response. However, given that the reasons were issued after the filing of the instant complaint, the Board is of the view that they are not pertinent to the issue to be determined and, therefore, P&H's submissions regarding them will not be summarized nor addressed.

[58] In its surreply, the MEA takes the position that certain components of P&H's reply constitute improper reply submissions, which should be given no weight by the Board. As the Board has not summarized the new allegations of P&H, it will also not summarize the MEA's surreply to them.

[59] The MEA also submits that P&H made several misstatements in its reply. Notably, with regard to the assessment of damages, the MEA states that it used a numerical calculation based on the numbers of hours the ILA 1654 members would have spent performing the disputed work. The MEA submits that P&H never disputed the ILA 1654's valuation nor provided alternate calculations.

[60] Finally, the MEA submits that both P&H and its counsel were made aware of the settlement offer and commented on it before the MEA and the ILA 1654 agreed to the settlement.

IV. Analysis and Decision

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

[61] Section 34(6) of *Code* 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.

[62] As complaints regarding an alleged violation of this section are not common, the Board's jurisprudence in this area is limited. The Board commented on this recently in *Quebec Ports Terminals Inc.,* 2015 CIRB 765 (*Quebec Ports Terminals Inc. 765*), stating:

> [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).
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> [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:
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> > 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)
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> [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).

(bold italics added)

[63] An employer representative's DFR is equally similar to that of a union in the context of the handling of grievances as well. The general DFR principles in this regard were set out 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.
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> 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.
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> 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.

(page 527)

[64] The Board's role is also very specific when evaluating a DFR complaint under section 37 of the *Code*. As explained in *Scott*, 2014 CIRB 710 (at paragraphs 93 and 94), the Board does not sit in appeal of a trade union's decision. It only concerns itself with the trade union's process in the handling of a grievance, including the steps it took in arriving at its ultimate decision regarding whether to take a grievance to arbitration or to settle it. The Board is not examining the correctness of the union's decision.

[65] The Board has previously explained that an employee is not entitled to have a grievance taken to arbitration and that the decision to settle a grievance rests with the union, provided it is made in accordance with its DFR. In *Blakely,* 2003 CIRB 241, the Board stated this principle:

> [36] Unions have considerable discretion in the conduct of their business. Section 37 of the *Code* does not give members of a bargaining unit an inherent right to have a grievance submitted to arbitration. That decision is the sole prerogative of the bargaining agent, provided that it makes its decision in a manner that is not arbitrary, discriminatory, or in bad faith. It is up to the Board, when considering a complaint against the union, to determine whether the union turned its mind to the matter, considered it in a genuine fashion, and ultimately dealt with it in a manner consistent with the requirements of section 37.

[66] Considerable latitude is also afforded to unions in determining how best to handle grievances involving its members. As stated in *McRaeJackson,* 2004 CIRB 290, the Board considers that, to the extent that a bargaining agent investigated a grievance, put its mind to its merits in light of all the circumstances, and made a reasoned judgment about its possible outcome, the Board will not intervene.

[67] These statements can be equally applied by analogy to an employer representative in the context of its role under section 34(6) of the *Code*.

[68] In light of P&H's allegations, it is also necessary for the purposes of this complaint to consider how the Board has defined arbitrary and bad faith conduct in the context of a DFR complaint. In *McRaeJackson, supra*, the Board explained that arbitrariness refers to actions of the union that have no objective or reasonable explanation, that put blind trust in the employer's arguments or that fail to determine whether the issues raised by its members have a factual or legal basis. It further offered the following examples to illustrate what can constitute arbitrary conduct:

> [30] It is arbitrary to only superficially consider the facts or merits of a case. It is arbitrary to decide without concern for the employee's legitimate interests. It is arbitrary not to investigate and discover the circumstances surrounding the grievance. Failure to make a reasonable assessment of the case may amount to arbitrary conduct by the union (see *Nicholas Mikedis* (1995), 98 di 72 (CLRB no. 1126), appeal to F.C.A. dismissed in *Seafarers'*

> *International Union of Canada* v. *Nicholas Mikedis et al.*, judgment rendered from the bench, no. A-461-95, January 11, 1996 (F.C.A.)). A non-caring attitude towards the employee's interests may be considered arbitrary conduct (see *Vergel Bugay et al.*, *supra*) as may be gross negligence and reckless disregard for the employee's interests (see *William Campbell*, [1999] CIRB no. 8).

[69] If the decision to settle the grievance is based on a thorough consideration of the merits of the grievance, the process will generally not be considered arbitrary (*Lacroix*, 2014 CIRB 740, at paragraph 97, citing *Noël* v. *Société d'énergie de la Baie James*, 2001 SCC 39; [2001] 2 S.C.R. 207, at paragraph 50).

[70] In *Blakely*, *supra*, the Board described bad faith conduct as arising in circumstances where a union acts fraudulently, for improper motives, or out of hostility or revenge. Citing *Rousseau* (1995), 98 di 80; and 95 CLLC 220-064 (CLRB no. 1127), the Board stated:

> "Bad faith" refers to a subjective state of mind or conduct which has been motivated by ill-will, hostility, dishonesty, malice, personal animosity, political revenge, lack of fairness or impartiality, lack of total honesty such as withholding information, flagrant dishonesty such as lying, or sinister purposes. ...

[71] Again, these concepts will apply by analogy to an employer representative's handling of a response to a grievance.

[72] Keeping in mind that the complainant bears the onus of establishing that there has been a breach of the DFR (*Lacroix*, *supra*, at paragraph 94), it is consequently in light of the above-noted principles, that the Board will consider the submissions and evidence filed by the parties to determine whether the MEA breached its DFR first, when it handled the grievance, and second, when it decided to settle it rather than pursue it further at arbitration. For the purpose of the first determination, the Board will only review the process followed by the MEA before it decided to settle the grievance.

[73] There is no dispute that a geographic certification is in effect at the Port of Hamilton and that the MEA is the certified employer representative as per section 34(5) of the *Code*. As such, the MEA stands in place of P&H in all dealings with the ILA 1654 concerning matters covered by the collective agreement. One such matter is the requirement that any employer performing longshoring work must retain ILA 1654 labour.

[74] It is not disputed that, when the ILA 1654 filed the grievance in October 2011 alleging that P&H was performing longshoring work without using ILA 1654 labour, the MEA was responsible for responding to the grievance. In doing so, the MEA commenced an investigation. It consulted

with P&H and confirmed that the front-end loader operator work had been carried out by a P&H employee. It determined that P&H presented no valid defence and therefore concluded that the grievance had merit.

[75] Despite this preliminary conclusion, the MEA went on to consider P&H's position denying any violation of the collective agreement based on the Richardson exception. The Board accepts that once the MEA further investigated the matter over the course of the following year, it determined that P&H's operations were not functionally comparable to that of Richardson's and confirmed that the front-end loader operator work disputed in the grievance constituted longshoring work.

[76] As such, the MEA concluded that P&H's position was not defensible and that it would not likely succeed in defending the grievance at arbitration. In light of P&H's insistence that the work in dispute did not constitute longshoring work and its refusal to pay the wages claimed, in or around September 2013, both parties ultimately agreed that a section 65 referral to the Board might resolve the issue, where P&H, unlike in an arbitration hearing, would have full standing.

[77] The Board accepts that the MEA conducted a thorough assessment of the grievance by first investigating the issue at the outset of the grievance and then exchanging positions and considering possible defences with P&H. In this particular case, the MEA's investigation and assessment went further and included the section 65 proceedings, where P&H fully participated as a party. The Board finds that there is no evidence that during this process, the MEA failed in its DFR. The Board also accepts that, up to that point, P&H was actively involved in the process and that the MEA respected its position, notwithstanding its disagreement and its powers as employer representative.

[78] As of August 28, 2014, it became clear to the MEA that P&H's position that the work in dispute did not fall under the scope of the collective agreement would not be defensible at arbitration given the Board's unanimous ruling in its section 65 referral.

[79] The events and exchanges between the parties that followed will now be examined in order for the Board to determine if the MEA failed to meet its DFR when it ultimately decided to settle the grievance.

[80] The Board accepts that, once the MEA had a chance to consider the Board's bottom-line decision, the MEA considered its impact on the grievance and shared its views with P&H by email on September 2, 2014, inquiring as to the need for further litigation and the possibility of

settling the matter. On the same day, counsel for P&H communicated with counsel for the ILA 1654 and requested that the grievance arbitration hearing be adjourned until after the Board had released its full reasons for its decision in the section 65 referral.

[81] Before the MEA obtained a response from P&H to its September 2 email, the MEA received an offer to settle from the union on September 4, 2014, which the MEA considered and communicated to P&H, seeking its input, prior to settling the matter. Mr. Walsh wrote to Mr. Bryson the following email on September 10, 2014:

> After speaking with the ILA they are willing to settle the grievance for $12000. I don't know if you have put a value on the work but I recall them asking for $57000 at the hearing. Let me know your thoughts on this.

[82] On September 11, 2014, the record shows that counsel for the ILA 1654 advised the MEA and P&H's respective counsels that the union would not agree to adjourn the hearing date of September 17, 2014, as requested by P&H. Counsel for the union also stated that the ILA 1654's offer to settle the matter for $12,000 would expire at noon on September 12, 2014.

[83] Counsel for P&H responded to the MEA's September 10 request for input on September 12, 2014, shortly after the expiry of the noon deadline, at 12:18 p.m. In his email response, P&H's counsel reiterated the request for an adjournment, failing which he advised that P&H would make a request to the arbitrator to defer proceedings, seek a ruling on the scope of the grievance and deal with P&H's status at the hearing, if required. The email stated, in part:

> Am surprised at the timing of the ILA's response on the adjournment question, but as I indicated last week, P & H is not able to assess its position until the Board has rendered the full Reasons for its "bottom-line" finding of estoppel in this matter. In order to allow time for that to happen, P & H is willing to undertake that it will continue its current practice of engaging ILA members for the loading of vessels ship-side, at least until such time as the question of the application of the 2010 MOS has been finally determined, whether by P & H accepting the finding of the Board based on the pending Reasons, or seeking to have the matter determined through Judicial Review. In the latter regard, P & H agrees to file any Judicial Review application within 3 weeks of its receipt of the Board's Full Reasons, or be deemed to have waived its right to seek Judicial Review of the Board's decision.
>
> ...
>
> I will be out of E-mail range entirely now for the rest of today and the week-end, but will be back in Toronto first thing Monday morning.

[84] The MEA wrote to P&H on September 12, 2014, at 2:09 p.m., again attempting to seek P&H's point of view on the proposed settlement:

> As you may be aware the ILA offer to settle the grievance for $12000 ends today. Our legal counsel has recommended that we accept the offer considering the "bottom line decision" issued by the CIRB. We don't require the consent of P&H to settle the matter however we would like your point of view on this. It is our intention to cancel the arbitration hearing scheduled for September 17th.

[85] P&H responded to the MEA's last request for input by email at 3:37 p.m. on September 12, 2014, and advised the MEA that P&H had not yet assessed the reasonableness of the ILA 1654's offer or "any other aspect of the situation" and cautioned the MEA that a settlement would not be a reasonable or prudent thing to do in the circumstances. P&H also warned the MEA not to do "anything to harm the business of P&H". By that time, the MEA had already accepted the union's offer.

[86] The Board finds that these exchanges demonstrate that the MEA not only turned its mind to the chances of succeeding with the grievance in light of the Board's decision, but was also taking into account P&H's interests as part of its decision-making process.

[87] The Board will now pursue its analysis further and determine if, throughout the last steps leading to the settlement, there was any evidence of arbitrariness or bad faith on the part of the MEA as suggested by P&H.

[88] The Board finds that the fact that the MEA accepted the settlement—despite P&H's objections and its counsel's unavailability—while perhaps not the ideal course of action, does not, in the circumstances, amount to bad faith. The MEA had clearly indicated its views to P&H after it considered the impact of the bottom-line decision on the grievance and confirmed its intention to settle it only after attempting to obtain P&H's input on the offer. In addition, the deadline had been imposed by the union and not the MEA, which had determined that the Board's full reasons would unlikely change its assessment of the merits of the grievance.

[89] In the circumstances, the Board also does not accept P&H's allegation that it was not provided with an opportunity to respond to the offer before it was accepted. P&H received the offer on September 10, 2014. Despite the ILA 1654's refusal to adjourn the grievance arbitration hearing as requested by P&H's counsel and the union's deadline to accept the offer, P&H's counsel did respond to the MEA, after the expiry of the deadline, reiterating that P&H was simply unable to assess its position until after the Board had released its full reasons.

[90] Furthermore, the Board does not accept P&H's allegations that the full reasons of the section 65 referral were necessary for P&H to assess its position. The Board finds that the conclusion and brief analysis of the bottom-line decision, wherein the Board was clear that the

"own product" exception did not apply, were sufficient for the MEA and P&H to determine whether it had any chance of successfully defending the grievance at arbitration. The Board accepts that, by that time, P&H had also admitted to loading the seven vessels that were at issue in the grievance. As such, the Board accepts that the only issue for the MEA to consider in terms of the settlement offer was the potential damages.

[91] The Board is also not persuaded by P&H's argument that the MEA did not have sufficient information on which to assess a reasonable quantum of damages. The Board accepts that the MEA assessed the quantum of the settlement offer relative to the risk of loss and likely financial exposure based on reasonable assumptions stemming from the section 65 referral in respect of P&H's tonnages and operations. Based on its evaluation, the MEA's estimated financial exposure and duty to mitigate the cost P&H would have to pay in the grievance, the $12,000 offer was reasonable. For the MEA, it was therefore not unreasonable to conclude that in light of the amounts claimed and of the costs associated with further litigation, the best outcome was an immediate resolution. As such, the Board finds that there is no evidence that the MEA arrived at its decision that the quantum was reasonable in an arbitrary manner nor was it motivated by bad faith.

[92] The Board also does not accept P&H's allegations that, as a result of the settlement, the MEA has thwarted its ability to have its defences fully adjudicated. Ultimately, it is the employer representative who has carriage of a grievance arising out of an alleged violation of a collective agreement in the context of a geographic certification. This includes deciding on the strategy for defending a grievance or deciding on whether to even defend it at all. Provided that these strategic decisions are made in a manner that respects the employer representative's DFR, the Board will not interfere. In addition, the Board notes that the settlement did not prevent P&H from seeing and considering the Board's full reasons, nor from exercising any rights it might have had flowing from the section 65 referral. The Board further notes that while P&H did not seek a reconsideration of the decision, which it could have done, it did attempt to file a judicial review application. There is no evidence to suggest that the MEA interfered in any way with P&H's ability or efforts to exercise these rights.

[93] The Board also finds that there is no evidence suggesting that the MEA acted jointly with the union on September 12, 2014, and that it deliberately rushed into a settlement of the matter. The Board accepts that, after a thorough consideration of the merits of the grievance and risks further to the bottom-line decision, it was not unreasonable for the MEA to attempt to abide by

the deadline set by the ILA 1654 to finally resolve the matter. By that time, almost three years after the filing of the grievance, the MEA had had the benefit of considering the defences explored by P&H.

[94] The Board made the following comments concerning an employer representative's discretion regarding settling a grievance in *Quebec Ports Terminals Inc. 765*:

> [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)).

[95] The fact that the MEA ultimately decided to accept the union's offer on September 12, 2014, without P&H's consent, does not, in these circumstances, mean that it acted in a manner that was arbitrary, discriminatory or in bad faith (*Lacroix*, *supra*, at paragraphs 113-115).

[96] In the instant matter, the Board finds that the MEA's process was beyond reproach: it conducted a thorough assessment of the grievance by investigating the issue, exchanging positions and considering P&H's defences. As part of its overall assessment of the merits of the grievance, the MEA also included, in its analysis, consideration of the evidence and submissions presented at the section 65 referral hearing as well as the Board's determination that the collective agreement applied to the disputed work. The Board accepts that the MEA was diligent in its analysis of the grievance, gave the benefit of the doubt to P&H and deferred to the Board for guidance on the applicability of the collective agreement. Once it received the ILA 1654's offer, it also sought legal advice confirming it was preferable to settle the grievance.

[97] Looking at the overall process followed by the MEA, the Board is satisfied that the MEA carefully considered the facts and merits of the grievance. The MEA demonstrated that it also took into account P&H's interests in its treatment of the section 65 referral, throughout the

grievance process and following the bottom-line decision. While P&H did not agree with the MEA's ultimate decision, as mentioned in *Quebec Port Terminals 765*, this does not mean that the MEA failed in its DFR. The Board also finds that throughout the various stages of this lengthy three-year process, there is no evidence that the MEA acted in bad faith or in an arbitrary manner as defined in *McRaeJackson* and *Blakely*, *supra*.

V. Conclusion

[98] For all of the above reasons, the Board finds that P&H has not met its burden of demonstrating that the MEA's handling of the October 3, 2011, grievance and its ultimate decision to settle that grievance were conducted in a manner that violated the *Code*. The Board is satisfied that the MEA has fulfilled its DFR. As such, the Board must dismiss this complaint.

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

_____
Annie G. Berthiaume
Vice-Chairperson

_____
Daniel Charbonneau
Member

_____
André Lecavalier
Member