Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Cowessess First Nation #73,

complainant,

and

Saskatchewan Government and General Employees' Union,

respondent.

Board File: 31286-C
Neutral Citation: 2015 CIRB **801**
November 25, 2015

The Canada Industrial Relations Board (the Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, sitting alone pursuant to section 14(3) of the *Canada Labour Code (Part I– Industrial Relations)* (*Code*).

Section 16.1 of the *Code* provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed all of the material on file, the Board is satisfied that the documentation before it is sufficient for it to determine this complaint without an oral hearing.

Counsel of Record

Mr. Nathan Phillips, for Cowessess First Nation #73;
Mr. Greg D. Fingas, for Saskatchewan Government and General Employees' Union.

I. Nature of the Complaint

[1] During the course of the Board's ongoing oral hearing in the main proceedings (file nos. 30493-C and 30715-C) involving these parties, the employer, Cowessess First Nation #73 (Cowessess), filed the instant unfair labour practice (ULP) complaint (Complaint) alleging intimidation and coercion of one of its witnesses.

[2] Cowessess filed this Complaint on September 11, 2015. The Saskatchewan Government and General Employees' Union (SGEU) filed its response on September 23, 2015. Pleadings closed after Cowessess did not file a reply.

[3] The Complaint was assigned to the current single-person panel on November 2, 2015.

[4] During the Board's oral hearing on October 27, 2015 in the main proceedings, the witness who had allegedly been intimidated and/or coerced, Ms. Claudette Alexson, testified. The Board subsequently asked counsel for Cowessess if he intended to proceed with this ULP complaint. He advised that he would.

[5] The Board, pursuant to section 16.1 of the *Code,* is not required to hold an oral hearing in every case. Depending on the pleadings, the Board may decide a ULP complaint based solely on the parties' submissions: *Lévesque*, 2011 CIRB 562, at paragraphs 10-12.

[6] The Board has considered the parties' submissions and has decided to dismiss Cowessess' complaint for the reasons which follow.

II. Facts

[7] The issues in the main proceedings have already been described in *Cowessess First Nation #73*, 2015 CIRB 762. The SGEU had filed two ULP complaints related to its organizing campaign.

[8] On September 11, 2015, Cowessess alleged that the SGEU and one of its advisors, Mr. Don Regel, who had been attending the Board's oral hearing in the main proceedings, knew that it intended to call Ms. Alexson as a witness. Ms. Alexson did not testify in the afternoon of August 19, 2015, despite a general understanding by all concerned that she would. This led to the loss of valuable hearing time, since Cowessess had prepared no alternative evidence for that afternoon to ensure the Board's time in Regina was used efficiently.

[9] Cowessess alleged that Mr. Regel contacted Ms. Alexson on the morning of August 20, 2015 and commented to her that:

i) the hearing should have taken 3 to 6 days, but was now on its 10th or 11th day;
ii) the hearing was "costing your band money";
iii) Cowessess' legal counsel was a liar and incompetent; and
iv) He (Mr. Regel) was on the union's side.

[10] Ms. Alexson's August 21, 2015 affidavit described these allegations:

> 4. Don Regal [*sic*] told me that the proceeding before the Canada Industrial Relations Board should have only taken 3 to 6 days, that they are now on their 10th or 11th day. Don Regel said that the proceeding was "costing your band money". Don Regel indicated that legal counsel for Cowessess is a liar and incompetent.
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> 5. I asked whose side Don Regel was on, and he said that he was "for the employees, the union".

[11] Ms. Alexson's affidavit further described how she felt after the phone call with Mr. Regel:

> 6. I did not understand why Don Regel was contacting me and saying these things.
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> 7. As a result of receiving the telephone call from Don Regel, I felt that it would be wrong for me to testify.

[12] In its September 23, 2015 response, the SGEU presented a different recollection of the telephone call between its instructing client, Mr. Regel, and Ms. Alexson. In its reponse, the SGEU noted that Ms. Alexson was a former Cowessess employee. The SGEU argued it held no position of authority over Ms. Alexson which would allow it to impact her employment or impose on her any sort of financial or other sort of penalty.

[13] The SGEU's response suggested the following occurred during Mr. Regel's phone conversation with Ms. Alexson:

i) Mr. Regel advised Ms. Alexson he was from the SGEU and she was not required to answer any of his questions;
ii) he asked why she had not testified on August 19, 2015, despite being scheduled;
iii) he responded to her question regarding how the hearing was going by indicating it was proceeding very slowly and that it was costing a lot of money; and
iv) he responded to her question about which side he was on i.e. the union's and the employees' side.

[14] Cowessess did not file a reply.

III. Analysis and Decision

[15] Cowessess alleged that the SGEU and Mr. Regel had jointly violated section 95(*i*) of the *Code*:

95. No trade union or person acting on behalf of a trade union shall

...

(*i*) discriminate against a person with respect to employment, a term or condition of employment or membership in a trade union, or intimidate or coerce a person or impose a financial or other penalty on a person, because that person

(i) has testified or otherwise participated or may testify or otherwise participate in a proceeding under this Part,

(ii) has made or is about to make a disclosure that the person may be required to make in a proceeding under this Part, or

(iii) has made an application or filed a complaint under this Part.

[16] The Board will assume Cowessess' allegations to be true, but solely for the purpose of conducting the required legal analysis. Evidently, had the Board believed that its decision was wholly dependent on determining the precise content of the conversation between Mr. Regel and Ms. Alexson, then it would have held an oral hearing.

[17] Complaints under section 95(*i*) usually arise where a person alleges a trade union has taken reprisals due to him or her seeking to exercise his or her *Code* rights.

[18] This Board's predecessor, the Canada Labour Relations Board (CLRB), in *Frank J. Nowotniak and Gordon E. Ostby et al.* (1979), 34 di 835; and [1979] 2 Can LRBR 466 (CLRB no. 194) (*Nowotniak*) described the purpose of section 95(*i*) (then section 185(*i*)):

> Section 185(*i*) is a companion section to sections 184(3)(*a*)(*iii*) to (*v*) and (*e*) which prohibit employer action against persons who have participated in Board or other proceedings under Part V of the *Code*. **These provisions of the *Code* have at least a twofold purpose. They are intended to ensure rights under the *Code* are real and not merely illusionary and capable of being frustrated by acts designed to discourage their exercise. They are also intended to encourage honest and candid testimony and free participation in proceedings before this Board and other bodies acting under Part V** (see *Giant Yellowknife Mines Ltd.*, 19 di 147; [1977] 1 Can LRBR 483; and (1977), 77 CLLC 16,082). To achieve these purposes, as with other antidiscrimination sections, motive is usually a constituent element (see *Canadian Imperial Bank of Commerce, North Hills Shopping Centre*, 34 di 651; [1979] 1 Can LRBR 266). However, for the many reasons cited in relation to alleged discrimination by employers against employees and for stronger reasons supporting the interest of free access to Board proceedings, the prohibited motivation in these sections need not be the sole motive (see *Yellowknife District Hospital Society* (1977), 20 di 281; 77 CLLC 16,083). It is essential to preservation of rights under the *Code* and the effective operation of the Board and other tribunals and the role of the Minister and other persons under Part V in the attainment of the objectives of the *Code* that employers and unions not act against one another or other persons by any motivation born out of reprisal for having used or participated in the processes of the *Code*.
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> (pages 845-846; and 475; emphasis added)

[19] The cases under section 95(*i*) usually examine whether a trade union took some retaliatory action against those who sought to exercise their *Code* rights. Parallel prohibitions applying to employers are found at section 94(3)(*e*) of the *Code.*

[20] In *Teamsters, Local Union 847*, 2011 CIRB 605, the Board found that a trade union violated the *Code* when it disciplined three members who had supported a raiding union's activities:

> [23] Applying the law to the facts of this case, which are not disputed, it is clear that the three employees were charged internally and disciplined for exercising their fundamental right under the *Code* to change unions. None of the three members held a position within the Guild. It was undisputed that the three members supported the Teamsters and campaigned on their behalf during the period leading up to the representation vote. The three individuals had a fundamental right to participate in a proceeding under the *Code*, in this case a raid (displacement) application. The Guild cannot penalize them for exercising their rights of association under section 8 of the *Code*. Clearly, the charges were a form of reprisal against the three individuals for their activities on behalf of the applicant. The Board finds that the charges are a clear violation of section 95(*i*)(*i*) of the *Code*. Given this finding, there is no need for the Board to determine whether the Guild breached sections 95(*f*) or 95(*g*), or section 96 of the *Code*.

[21] The Federal Court of Appeal in *Canadian Merchant Service Guild* v. *Teamsters, Local Union 847*, 2012 FCA 210, confirmed the Board's reasoning:

> [16] Sub-paragraph 95(*i*)(i) of the *Code* prohibits a trade union from imposing "a financial or other penalty on a person, because that person…has…participated…in a proceeding under" Part I of the *Code*. Since the Guild acknowledged at the hearing before this Court that the Teamsters' application for certification was a proceeding under the *Code*, and that the three concerned individuals were fined or suspended by the Guild for participating in this proceeding, I fail to understand how the Board misinterpreted or misapplied sub-paragraph 95(*i*)(i). The fact that the Board applied the reasoning in its decisions of *Paul Horsley et al*, above, and of *Nathalie Beaudet-Fortin*, above, is not a reviewable error, since that reasoning is fully compatible with the terms of sub-paragraph 95(*i*)(i). These decisions recognize the basic right of individuals to belong to the trade union of their choice, the right of union members to attempt to change their bargaining agent from time to time in the manner and in accordance with the timelines provided for in the *Code*, and the right of such individuals not to be disciplined or penalized for exercising such rights.

[22] However, as the CLRB noted in *Nowotniak*, section 95(*i*) also protects witnesses from intimidation or coercion arising from their participation in a *Code* process.

[23] Even if the Board assumes Cowessess' allegations are true for the sake of argument, there are several reasons why Cowessess did not convince the Board that the SGEU or Mr. Regel violated the *Code*.

[24] First of all, the evident reality is that Ms. Alexson testified on October 27, 2015 in the main proceedings. There was no indication during Ms. Alexson's evidence that she could not testify

fully before the Board. It was this reason which led the Board to inquire during the main proceedings whether Cowessess still intended to pursue this complaint.

[25] Secondly, the Board agrees with the SGEU that neither it, nor Mr. Regel, held any position of authority which would allow them to retaliate against Ms. Alexson in several of the ways described in section 95(*i*). Ms. Alexson was not a Cowessess employee in August 2015, since she had left her employment in 2014. Accordingly, she was not an employee in the SGEU's bargaining unit at the time of the conversation with Mr. Regel.

[26] Given those facts, it is difficult to see how the SGEU, or Mr. Regel, could discriminate in areas involving: i) Ms. Alexson's employment; ii) a term or condition of her employment; or iii) SGEU membership.

[27] Similarly, how could the SGEU or Mr. Regel impose a financial or other penalty on a former Cowessess employee like Ms. Alexson?

[28] While Ms. Alexson wrote in her affidavit that she "felt that it would be wrong for me to testify", she provided no basis for that conclusion. She evidently changed her mind sometime afterward and testified in the main proceedings.

[29] Thirdly, the Board in various decisions has commented on the meaning of *Code* terms like "intimidation" or "coercion". The *Code* does not use these terms lightly; they suggest serious misconduct on the part of another person.

[30] In *Intek Communications Inc.*, 2013 CIRB 683, the Board examined the use of these terms in other provisions in the *Code*:

> [182] A section 94(2)(*c*) analysis examines when an outwardly appearing personal point of view in fact constitutes "coercion, intimidation, threats, promises or undue influence". The terms creating an exception to an employer's "free speech", as that term was used in the Sims Report, suggest either a punishment or, conversely, a reward connected to an employee's fundamental *Code* rights.
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> [183] Some interpretation guidance for these terms comes from their use elsewhere in the *Code*.
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> [184] For example, section 96 also uses the terms "coercion" and "intimidation":
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> > 96. No person shall seek by **intimidation or coercion** to compel a person to become or refrain from becoming or to cease to be a member of a trade union.
> >
> > (emphasis added)

[185] In *Bell Mobility Inc.*, 2011 CIRB 579 (*Bell Mobility 579*), an employer had alleged that the CEP violated section 96 through its manner of obtaining membership cards. The Board concluded the CEP could not have engaged in coercion or intimidation given there was an absence of force or threatened force in all of the alleged (and unproven) actions:

> [34] The Board agrees that there is no specific allegation about how an employee had been intimidated or coerced. Even if there were, an allegation that an employee might have been misled during an organizing campaign, a suggestion that the CEP expressly denied, does not constitute intimidation or coercion under section 96 of the *Code*.
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> [35] In *TD Canada Trust* v. *United Steel*, 2007 FCA 285, the Board had considered more particularised allegations of intimidation or coercion than exist in the instant case. The Federal Court of Appeal stated the following about the Board's investigation of the allegations and conclusion:
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> > [2] Two issues of natural justice that were raised by counsel for TD and counsel for the seven employees deserve consideration. The first contention was that the investigation undertaken on behalf of the Board into allegations of intimidation and coercion by union representatives was insufficient and procedurally unfair, amounting to a failure to investigate. In my view, this ground cannot succeed.
> >
> > [3] The intimidation allegations made by the employees complained about unannounced evening visits by union representatives to their homes. These visitors were persistent and sometimes stayed beyond their welcome. The investigator found this conduct not to be serious enough to amount to intimidation or coercion. While perhaps not as thorough an investigation as the applicants would have liked, the investigator did interview three of the seven complainants before reporting to the Board, partially in confidence, as is customary to protect the employees. **None of the complainants alleged that they signed membership cards as a result of any intimidation, although the only one who did sign indicated that afterwards she was sorry she did so. There was no allegation of violence or threats of violence. There was merely persistent, perhaps overly enthusiastic largely unsuccessful attempts at persuasion.** The Board is entitled to considerable deference in procedural matters. (*Telus Communications* v. *Telecommunications Workers Union*, [2005] F.C.J. No. 1253) It is largely the master of its own procedure, which should not be examined under a microscope. There is no basis for finding any denial of natural justice on this ground.
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> [36] The Board has also considered the decision from the Ontario Labour Relations Board (OLRB) in *Atlas Specialty Steels*, [1991] OLRB Reports June 728, and agrees that intimidation and coercion require more than campaign promises:
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> > [12] The meaning of "intimidation or coercion" within the context of section 70 has been considered in a large number of prior Board decisions... **In order for there to be even an arguable case for a breach of section 70, there must be intimidation or coercion of a sort which seeks to compel a person, amongst other things, to refrain from exercising any of the rights they might enjoy**

> **under the Act. There must be some force or threatened force, whether of a physical or non-physical nature.**
>
> (emphasis added)
>
> [37] The Board agrees with the sentiments expressed by the OLRB and finds that, even accepting BMI's allegations, there is no evidence of intimidation or coercion in this case.

> [186] The terms coercion and intimidation in section 94(2)(*c*) similarly require some force or threat of force, whether physical or not. The concept of a "threat", a term also used in section 94(2)(*c*), is intertwined with the concepts of coercion and intimidation. They suggest a punishment for employees if they exercise, *inter alia*, their fundamental right to join a trade union.

[31] There is simply nothing in Cowessess' allegations even remotely approaching the concepts of "intimidation" or "coercion". Moreover, unless a witness is also a represented party, nothing prohibits any party in a proceeding from attempting to contact that person for evidence about the case. There is no property in a witness: *Murphy Canada Exploration Company* v. *Novagas Canada Ltd*., 2009 ABQB 585.

[32] On Cowessess' own facts, the Board could not find that Mr. Regel's call would cause a reasonable person to consider that they had been intimidated or coerced from testifying in a *Code* proceeding. Neither did those facts, as pleaded, convince the Board there was any intimidation or coercion by the SGEU or Mr. Regel directed towards Ms. Alexson.

[33] For the foregoing reasons, the Board dismisses Cowessess' Complaint.

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Graham J. Clarke
Vice-Chairperson