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

WestJet Professional Flight Attendants Association,

*applicant,*

*and*

WestJet, an Alberta Partnership,

*respondent,*

Board File: 31510-C
Neutral Citation: 2016 CIRB **813**
March 4, 2016

The Canada Industrial Relations Board (Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. Richard Brabander and Daniel Charbonneau, Members.

Section 16.1 of the *Canada Labour Code (Part I–Industrial Relations)* (*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 issue this decision without an oral hearing.

**Counsel of Record**

Mr. Jesse Kugler, for WestJet Professional Flight Attendants Association;
Ms. Joyce A. Mitchell, for WestJet, an Alberta Partnership.

These reasons for decision were written by Mr. Graham J. Clarke, Vice-Chairperson.

## I. Nature of the Application

[1] On January 28, 2016, the Board received from the WestJet Professional Flight Attendants Association (WPFAA) an application for an interim reinstatement order pursuant to section 19.1 of the *Code*:

> **19.1** The Board may, on application by a trade union, an employer or an affected employee, make any interim order that the Board considers appropriate for the purpose of ensuring the fulfilment of the objectives of this Part.

[2] A companion Unfair Labour Practice (ULP) complaint contested WestJet, an Alberta Partnership's (WestJet) termination of flight attendant, Mr. Daniel Kufuor-Boakye, during the WPFAA's ongoing organizing campaign (Board file no. 31511-C). Mr. Kufuor-Boakye is a founding member of WPFAA and its Treasurer.

[3] This decision deals only with the request for the Board to reinstate Mr. Kufuor-Boakye, on an interim basis, pending a final decision on the merits of the ULP. A differently constituted panel will deal with that ULP.

[4] For the reasons which follow, the Board has decided not to issue interim relief in the current situation.

## II. Alleged Facts

### A. WPFAA Materials

[5] Mr. Kufuor-Boakye is a 15-year service Calgary-based flight attendant at WestJet. He had no disciplinary record prior to his termination. The WPFAA alleged that WestJet terminated Mr. Kufuor-Boakye's employment, in whole or in part, due to his ongoing union activities.

[6] In his affidavit, Mr. Kufuor-Boakye identified the various activities he had carried out in promoting the WPFAA's efforts to be certified as a bargaining agent. He alleged that WestJet relied on false allegations when it concluded he was responsible for the posting of five Internet videos which depicted the airline in a negative light.

[7] Mr. Kufuor-Boakye stated that WestJet started investigating his involvement with the online videos after it had received a complaint. WestJet placed him on paid leave during its investigation. During a later investigation meeting, Mr. Kufuor-Boakye acknowledged having watched one of the videos online at the "Caption Generator" website.

[8] The "Caption Generator" website allows the user to place captions over existing film footage. Mr. Kufuor-Boakye agreed he had seen one video which had placed captions over a film of Adolf Hitler. Mr. Kufuor-Boakye advised that different people had stayed at his house and had had access to his Wi-Fi.

[9] On January 15, 2016, WestJet terminated Mr. Kufuor-Boakye's employment for cause.

[10] The WPFAA alleged that WestJet suspected a WPFAA member might be behind the videos and used that possibility to conduct an extensive investigation designed to gather evidence in order to discipline an organizer. The WPFAA argued that Mr. Kufuor-Boakye's termination hurt its organizing drive. As a result, it asked the Board to reinstate Mr. Kufuor-Boakye pending a final decision on the ULP complaint.

[11] The WPFAA raised an alternative argument, as it is entitled to do on a without prejudice basis, that the videos were protected by the guarantee of Freedom of Speech and Freedom of Association under the Charter.

**B. WestJet Materials**

[12] WestJet alleged that in July, 2015, it learned of six online videos which, in its view, were defamatory. Several of the videos used Hitler and North Korean broadcasts as the backdrop to the added captions.

[13] WestJet initiated significant legal proceedings, both in Canada and in the U.S., which it argued ultimately allowed it to identify the individual who had posted the videos on the "Caption Generator" website. WestJet submitted that the evidence it obtained identified the IP address used to post the videos, as well as the time and date for each posting.

[14] The IP address allegedly belonged to "Mr. Daniel Kufuor" and used Mr. Kufuor-Boakye's home address. WestJet only received this specific information identifying Mr. Kufuor-Boakye on or about December 23, 2015.

[15] During its subsequent investigation, WestJet showed Mr. Kufuor-Boakye the videos and alleged he had no explanation for how the videos could have been posted from his IP address. WestJet also alleged that its investigation demonstrated Daniel Kufuor's wife and others could not have posted the videos. Mr. Kufuor-Boakye had apparently not worked as a flight attendant on any of the video posting dates.

[16] WestJet concluded that, despite his denials, Mr. Kufuor-Boakye had posted the videos. As a result, it decided to terminate him on a just cause basis.

[17] WestJet did not deny that it knew of Mr. Kufuor-Boakye's extensive involvement with the WPFAA. However, it suggested that it only learned of Mr. Kufuor-Boakye's involvement in the posting of the videos near the end of its investigation.

## III. Interim Orders

[18] Both the WPFAA's application for an interim order, as well as the ULP complaint, are governed by the Board's expedited process, as set out at section 14 of the *Canada Industrial Relations Board Regulations*, *2012* (*Regulations*).

[19] Section 19.1 of the *Code* provides the Board with a very broad discretion to issue interim orders, a discretion which must be exercised having regard to the objectives of Part I of the *Code*:

> **19.1** The Board may, on application by a trade union, an employer or an affected employee, make any interim order that the Board considers appropriate for the purpose of ensuring the fulfilment of the objectives of this Part.

[20] As noted in *Transpro Freight Systems Ltd.*, 2008 CIRB 422 (*Transpro 422*), the *Code* does not provide the Board with the same type of analytic framework provided to, for example, the Ontario Labour Relations Board under its legislation:

> [41] Unlike section 98 of Ontario's *Labour Relations Act*, 1995, which provides significant guidance to the Ontario Labour Relations Board on when and how it can issue interim relief, the *Code* preferred giving this Board the wide discretion found in section 19.1.

[21] The *Code*'s objectives are paramount when considering a request for an interim order. In *Transpro 422*, the Board examined some of the *Code*'s key objectives under Part I:

> [42] What are the "objectives" of Part I of the *Code* as that term is used in section 19.1?
>
> [43] The Preamble to the *Code* helps identify some of Part I's objectives such as the encouragement of free collective bargaining and the freedom of association:
>
> > WHEREAS there is a long tradition in Canada of labour legislation and policy designed for the promotion of the common well-being through the encouragement of free collective bargaining and the constructive settlement of disputes;
> >
> > AND WHEREAS Canadian workers, trade unions and employers recognize and support freedom of association and free collective bargaining as the bases of effective industrial relations for the determination of good working conditions and sound labour-management relations;
> >
> > AND WHEREAS the Government of Canada has ratified Convention No. 87 of the International Labour Organization concerning Freedom of Association and Protection of the Right to Organize and has assumed international reporting responsibilities in this regard;

> AND WHEREAS the Parliament of Canada desires to continue and extend its support to labour and management in their cooperative efforts to develop good relations and constructive collective bargaining practices, and deems the development of good industrial relations to be in the best interests of Canada in ensuring a just share of the fruits of progress to all;
>
> NOW THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows: ...

[44] Section 8 of the *Code* confirms every employee's basic freedom to join a trade union. Employers have a similar right to join an employers' organization:

> 8.(1) Every employee is free to join the trade union of their choice and to participate in its lawful activities.
>
> (2) Every employer is free to join the employers' organization of their choice and to participate in its lawful activities.

[45] While the *Code* encourages free collective bargaining and the freedom of association, it also requires that a trade union have majority support in an appropriate bargaining unit in order to gain access to the rights and privileges the *Code* grants a certified bargaining agent:

> 28. Where the Board
>
> (a) has received from a trade union an application for certification as the bargaining agent for a unit,
>
> (b) has determined the unit that constitutes a unit appropriate for collective bargaining, and
>
> (c) is satisfied that, as of the date of the filing of the application or of such other date as the Board considers appropriate, a majority of the employees in the unit wish to have the trade union represent them as their bargaining agent, the Board shall, subject to this Part, certify the trade union making the application as the bargaining agent for the bargaining unit.

[46] An employer is not obliged to remain silent during an organizing campaign and can express a personal point of view. But another clear objective of the *Code* is to prevent employers from using coercion, intimidation, threats, promises or undue influence when employees are considering their basic freedoms as set out in section 8. Section 94(2)(c) recognizes an employer's limited freedom of speech, but also emphasizes its limits:

> 94.(2) An employer is deemed not to contravene subsection (1) by reason only that they
>
> ...
>
> c) express a personal point of view, so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

[47] The extensive unfair labour practices set out at section 94, and the Board's remedial powers at sections 99 and 99.1, reinforce a key objective of the *Code* that employers cannot

> penalize employees, such as through termination, layoff, discipline or other intimidation, for examining and exercising their basic freedoms under the *Code*.
>
> [48] The Board has not developed a definitive test for an application under section 19.1. The Board must be very careful in exercising its interim power. The Board appreciates, where material facts are in dispute, that issuing an order could have the unintended consequence of giving a privilege or an advantage to one party. Each party argued that either granting an order, or declining to do so, would give the other an unfair advantage.
>
> [49] In the Board's view, doing nothing where interim relief is justified prejudices a party which finds itself on an uneven playing field, while awaiting a hearing and a decision on the merits of its case.

[22] In *Transpro 422*, the Board issued an interim order as a result of an employer's intimidation of and threats to a trade union's organizers.

[23] In a different context, the Board in *Seaspan International Ltd.*, 2010 CIRB 513 (*Seaspan 513*) also issued an interim order when an employer's actions threatened to upset a balance between two rival bargaining agents during a sensitive time period under the *Code*.

[24] In *3329003 Canada Inc. and Trentway-Wagar Inc.*, 2010 CIRB 493 (*Trentway-Wagar 493*), the Board issued an interim order when a trade union and an employer had jointly ignored a certification order issued to a different trade union.

[25] However, in other situations, the Board has declined to issue interim relief. In *Canadian Freightways, a division of TFI Transport 7 L.P.*, 2014 CIRB 722 (*Canadian Freightways 722*), the certified bargaining agent asked the Board to order the employer to recall laid-off employees. The contested layoffs were also the subject of certain Board ULP complaints and a grievance before a labour arbitrator.

[26] The Board, having regard to the objectives of the *Code*, decided not to issue interim relief:

> [24] While the Board did issue interim relief in *Transpro 422*, *supra*, and *Trentway 493*, *supra*, those cases also cautioned that interim relief should not be issued if it would give one party an advantage to the detriment of the other.
>
> [25] In the instant case, the Board is satisfied that the objectives of the *Code* are already being met through a combination of grievances under the collective agreement, a process also governed by Part I of the *Code*, and the upcoming oral hearings into all of COPE's allegations.
>
> [26] In the Board's view, those processes, which could lead to significant remedial orders, are sufficient to ensure the objectives of Part I of the *Code* are fulfilled. Moreover, the number of employees impacted by the contested measures represent a relatively small percentage of the employees in the bargaining unit.

[27] The Board will consider these precedents in analyzing the current application.

## IV. Analysis and Decision

[28] The applicable legal principles for ULP complaints are well-known.

[29] There is no presumption that any termination of a union official, whether during initial organizing or after certification, automatically justifies an interim reinstatement order. Discipline can be imposed on any employee, including a union official, as noted in *Plante*, 2011 CIRB 582 (*Plante 582*):

> [45] The Board agrees with TWI's reference to Mr. Justice Adams' summary in *Canadian Labour Law*, 2nd Edition, Volume 2 (Aurora: Canada Law Book, 2010) of the general practice for these types of unfair labour practice complaints:
>
> > 10.130 Canadian statutory provisions, barring discharge or other discriminatory treatment "because" or "for the reason that" employees are engaged in legitimate union activities, have been interpreted by courts as requiring scrutiny to see if "membership in a trade union was present to the mind of the employer in his decision to dismiss, either as a main reason or one incidental to it, or as one of many reasons regardless of priority" for the dismissal. Improper motive does not have to be the dominant motive. **Since employers are not likely to confess to an anti-union animus, tribunals have to rely on circumstantial evidence to draw inferences about employer motivation. These considerations may include evidence of the manner of the discharge and the credibility of witnesses, as well as "the existence of trade union activity and the employer's knowledge of it, unusual or atypical conduct by the employer following upon his knowledge of trade union activity, previous anti-union conduct and any other 'peculiarities'", such as discipline disproportionate to the offence alleged.**
> >
> > (emphasis added)
>
> [46] The Board considered the circumstantial evidence in this case and drew inferences whether Mr. Plante's union activities played a role in TWI's decision. The Board agrees with TWI's proposition that involvement in union activities does not prevent an employee from being held responsible for the consequences of his or her actions:
>
> > Although Sandhu was clearly involved in union activity, to the knowledge of the employer, that union activity, in and of itself, does not serve to protect him from dismissal or discipline where such action is proven, by the employer, to have been taken without taint of anti-union animus. Employees cannot use the umbrella of the unfair labour practice provisions of the *Code* to protect themselves against disciplinary measures which are the result of their own misconduct ...
>
> (*D.H.L. International Express Ltd.* (1995), 99 di 126; and 28 CLRBR (2d) 297 (CLRB no. 1147), pages 132; and 303–304)

[30] However, the Board has made it clear, in myriad decisions, that employer discipline cannot result, in whole or in part, from an official's union activities.

[31] In *Plante 582*, the Board reinstated Mr. Plante after concluding that his union activities were a factor in the decision to terminate him:

> [76] Based on the above, the Board has decided that TWI did not meet the burden imposed by section 98(4) of the *Code*. It failed to demonstrate that its discipline of Mr. Plante was not tainted in some way by the fact that he was an active member of the CSN and on its executive.
>
> [77] The rush to terminate Mr. Plante, even if he was not blameless, was so expeditious that the Board could come to no other conclusion, but that his involvement with the CSN played a part in the decision to terminate him.
>
> [78] The Board therefore orders TWI to reinstate Mr. Plante in his employment within 10 days of receipt of this decision.

[32] In *Acadian Coach Lines LP*, 2012 CIRB 654 (*Acadian Coach Lines 654)*, the Board reinstated a terminated union President, since his manner of performing his legitimate union activities had been a factor in his termination:

> [106] Acadian insisted that Mr. Carr exercise his duties according to their process. Mr. Carr's failure to agree with, or follow, this process led to both warnings and discipline. However, unless Mr. Carr's union activities crossed the line of protected activities as described earlier, Acadian's decision to discipline him for these activities violated the *Code*.
>
> ...
>
> [109] Acadian also took exception to Mr. Carr's other union-related actions. For example, they had issues with his involvement with the EUB and his writing directly to Mr. Bigeault. Indeed, Mr. Carr's final October 13, 2011 letter to Mr. Bigeault, in which he criticized Acadian's bargaining team, and asked for someone from the outside to assist with the negotiations, seemed to be the final act, at least chronologically, prior to his termination.
>
> [110] The question here is not whether Mr. Carr could take these actions. Indeed, trade unions often file applications with outside agencies for matters relating to their labour relations. Similarly, appeals to third parties, which also occurred in *Samson*, *supra,* have been going on for decades, in the hope of gaining a bargaining advantage. In some sets of negotiations, both employers and trade unions have bargained quite publicly, including by publishing newspaper advertisements and maintaining public websites.
>
> [111] These campaigns may also include some unflattering characterizations of those on the other side of the bargaining table.
>
> [112] It was up to Acadian to demonstrate to the Board that these otherwise normal actions lost the protection of the *Code*. Given the jurisprudence, Acadian failed to meet this burden.

[33] In *Trentway-Wagar 493*, the Board described its concerns about the impact on the parties from issuing or, alternatively, failing to issue, interim orders:

> [27] The Board is wary of issuing prematurely interim orders which could have the unintended consequence of giving one party a privilege or an advantage to the detriment of another. However, doing nothing, where interim relief is justified, can easily prejudice a party which finds itself on an uneven playing field while it waits for the Board to hold a hearing and issue a decision on the merits of its application or complaint.

[34] In the Board's view, the circumstances of this case militate against issuing an interim order.

[35] Only the *viva voce* evidence and the parties' arguments will allow the Board to determine whether the investigation into the videos was a pretext, as suggested by the WPFAA.

[36] WestJet will bear the burden of proof.

[37] Currently, a stand-off exists. The WPFAA argued that Mr. Kufuor-Boakye was a well-known union organizer, a fact WestJet does not contest, and that WestJet went to the significant lengths it did in the hope of having an opportunity to discipline and/or terminate a union supporter.

[38] By contrast, WestJet has set out the numerous steps to which it went in order to find out who had posted the allegedly defamatory videos. It alleged that the evidence demonstrated that Mr. Kufuor-Boakye was the person who posted the videos. Mr. Kufuor-Boakye denied any involvement during the investigation meeting, other than indicating he had viewed one of the videos online.

[39] This scenario involving conflicting facts, which is reminiscent of those in *Plante* 582 and *Acadian Coach Lines 654*, militates against interim reinstatement and requires an expedited hearing into the merits of the ULP complaint.

[40] The Board is well aware of the impact that discipline imposed for improper motives could have on a trade union, particularly at the organizing stage. As a result, in addition to the *Code*'s reversal of the burden of proof onto the employer's shoulders under s. 98(4), the Board applies its expedited process to these important ULP complaints.

[41] As demonstrated by *Plante 582* and *Acadian Coach Lines 654*, the Board can issue significant remedial orders for union officials in order to address employer violations of the *Code*. For repeated *Code* violations, those remedies can be quite significant: *Intek Communications Inc.*, 2013 CIRB 683.

[42] For the current case, the ULP complaint must be heard on the merits. Based on the current facts, the Board might be prejudging the matter were it to issue interim relief in the current situation. Each side has put forward serious positions which can only be resolved with an expedited hearing.

[43] For these reasons, the Board declines to issue an interim reinstatement order.

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

_____
Graham J. Clarke
Vice-Chairperson

_____
Richard Brabander
Member

_____
Daniel Charbonneau
Member