Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Teamsters Canada Rail Conference,

applicant,

and

Canadian National Railway Company,

employer.

Board File: 27454-C
Neutral Citation: 2009 CIRB **461**
July 8, 2009

The Canada Industrial Relations Board (the Board) was composed of Mr. Graham J. Clarke, Ms. Judith F. MacPherson, Q.C. and Ms. Louise Fecteau, Vice-Chairpersons.

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. Having reviewed all of the material on file, the Board is satisfied that the documentation before it is sufficient for it to determine this application without an oral hearing.

Counsel of record

Mr. James L. Shields, for Teamsters Canada Rail Conference;
Ms. Johanne Cavé, for Canadian National Railway Company.

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

I - Nature of the application

[1] On April 20, 2009, the Board received a reconsideration application from the Teamsters Canada Rail Conference (TCRC) regarding the decision in *Canadian National Railway Company*, 2009 CIRB 446 (CN 446).

[2] The TCRC alleged that the Board in CN 446 added a new condition precedent for a bargaining unit review available under section 18.1 of the *Code*. In addition, the TCRC argued that the Board violated natural justice when it decided the case based solely on the TCRC's application, without giving a second opportunity to the employer, the Canadian National Railway Company (CN), to file its response. CN had raised a preliminary issue and purported to reserve its right to file a response on the merits of the TCRC's application. In the decision under review, the Board rejected the preliminary matter and decided the case on the merits.

[3] CN did not raise any natural justice concerns and contested the TCRC's reconsideration application.

II - Issues

[4] The TCRC raised two issues:

1. Did the Board commit an error of law and policy in its interpretation and application of section 18.1 of the *Code*?; and
2. Did the Board violate a principle of natural justice when it decided the case based upon the contents of the TCRC's original application, without providing a second opportunity for CN to file its response?

III - Analysis and Decision

[5] The TCRC filed its reconsideration application pursuant to section 18 of the *Code* and section 44 of the *Canada Industrial Relations Board Regulations, 2001* (the *Regulations*):

> 18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application.
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> 44. The circumstances under which an application shall be made to the Board exercising its power of reconsideration under section 18 of the *Code* include the following:
>
> (a) the existence of facts that were not brought to the attention of the Board, that, had they been known before the Board rendered the decision or order under reconsideration, would likely have caused the Board to arrive at a different conclusion;
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> **(b) any error of law or policy that casts serious doubt on the interpretation of the *Code* by the Board;**
>
> **(c) a failure of the Board to respect a principle of natural justice; and**
>
> (d) a decision made by a Registrar under section 3.
>
> (emphasis added)

[6] The Board's recent decision in *Ted Kies*, 2008 CIRB 413 reviewed in detail the limited reconsideration process under the *Code*.

1. Did the Board commit an error of law and policy in its interpretation and application of section 18.1 of the *Code*?

[7] The Board will not repeat in detail the facts in CN 446.

[8] In CN 446, the Board considered whether to conduct a bargaining unit review pursuant to section 18.1(1) of the *Code*:

> 18.1 (1) On application by the employer or a bargaining agent, the Board may review the structure of the bargaining units **if it is satisfied that the bargaining units are no longer appropriate for collective bargaining.**
>
> (emphasis added)

[9] The TCRC argued at paragraphs 21, 22, 23 and 24 of its reconsideration application that the Board in CN 446 read into section 18.1(1) a new requirement that did not exist in the *Code* when it decided the bargaining units were not inappropriate for collective bargaining:

> 21. Based on the submissions before it, the original panel determined that it was not satisfied that the separate running trades bargaining units were no longer appropriate.
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> - Original Decision at paragraph 18
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> 22. In its reasons, the original panel concluded that because the TCRC has not yet entered into meaningful collective bargaining for the CTY bargaining unit, "there is therefore no evidence available to persuade the Board that the existing bargaining unit structure is no longer appropriate for collective bargaining."
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> - Original Decision at paragraph 24
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> 23. The original panel has read into subsection 18.1(1) the requirement that the parties must have meaningfully attempted and failed to negotiate a collective agreement before there can be a finding that the bargaining units are no longer appropriate. Indeed, it suggested that there could be no evidence available to persuade it to come to a conclusion that the bargaining units were no longer appropriate in the absence of an attempt at collective bargaining.
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> 24. The TCRC respectfully submits that the condition precedent imposed by the original panel is simply not reflected in the language of the *Code*, nor has such a high threshold been established through the Board's jurisprudence.
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> 25. On the contrary, in *Canadian Broadcasting Corporation*, [2003] CIRB no 218, reconsideration application dismissed, a majority of the panel determined that there is no requirement that industrial relations must have broken down or that bargaining units must no longer be viable before the Board can find the bargaining units inappropriate.

[10] We have not been persuaded the Board in CN 446 added a new condition precedent to section 18.1(1) of the *Code*.

[11] The Board's case law demonstrates that it can examine when considering section 18.1(1) of the *Code*, as but one factor among many, the parties' collective bargaining situation over a period of time. This factor may assist the Board in determining whether the bargaining units are no longer appropriate for collective bargaining.

[12] In CN 446, the Board wrote the following at paragraphs 22 and 24:

> [22] The Board notes that the parties have not yet engaged in negotiations with respect to the CTY bargaining unit, and that bargaining in respect of the locomotive engineers' unit has barely begun. The employer suggests that the motive behind this section 18.1 application is the union's desire to achieve a common expiry date for the collective agreements applicable to the two bargaining units.
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> ...
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> [24] Whether the union's motives are those alleged by the employer or not, the fact remains that since the TCRC became the bargaining agent for both units, the union and the employer have yet to enter into meaningful collective bargaining with respect to either of the bargaining units that are the subject of this application. There is therefore no evidence available to persuade the Board that the existing bargaining unit structure is no longer appropriate for collective bargaining

[13] The Board in CN 446 did not suggest that the TCRC had to engage in collective bargaining or else there was no evidence that would convince it to hold a bargaining unit review. Rather, the Board noted that, given the TCRC's recent certification to represent one of the bargaining units in question, there was no collective bargaining history between the TCRC and CN for this particular unit that could assist the Board.

[14] The history of collective bargaining negotiations is just one factor that the Board may take into consideration when exercising its discretion under section 18.1(1). The Board in CN 446 took into account numerous factors the TCRC pleaded in support of its application.

[15] The Board on reconsideration will not substitute its discretion for that already exercised in CN 446. Rather, it will only intervene if the TCRC demonstrated an error of law or policy took place. We have not been persuaded of this despite TCRC's counsel's comprehensive legal submissions.

2. Did the Board violate a principle of natural justice when it decided the case based upon the contents of the TCRC's original application, without providing a second opportunity for CN to file its response?

[16] The TCRC also alleged that the Board in CN 446 failed to respect a principle of natural justice when it considered only the TCRC's original application.

[17] The Board had received no response from CN to the TCRC's application. CN had purported to reserve its right to file a reponse to the TCRC's original application when it wrote the Board about a preliminary issue.

[18] The Board in CN 446 explained its practice at paragraph 13 of its decision:

> [13] The parties are well aware of section 16.1 of the *Code*, which permits the Board to decide any matter before it without holding an oral hearing. Accordingly, the Board expects parties to put forward their entire case at the time that the complainant or applicant files its complaint or application and the respondent files its written response. Parties who purport to "reserve the right" to file further submissions do so at their own peril, as there is no such right once the period for filing a response and reply to the application or complaint has expired. The Board may proceed to determine the matter on the basis of the record before it as soon as the deadline for submissions has passed.

[19] After reviewing the material submitted, the Board denied CN's preliminary request, and then considered the TCRC's application on the merits.

[20] The TCRC submitted at paragraphs 34 and 35 of its reconsideration application that the Board's process in this regard violated natural justice:

> 34. An essential element of the concept of natural justice is the right to have the opportunity to be heard and to fully present one's case. The parties ought to have been afforded the opportunity to put forward their arguments, and to have those arguments heard and considered.
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> 35. In the circumstances of the present case, the original panel failed to consider the parties' full submissions, given that the Respondent raised a preliminary matter and requested that the Board summarily dismiss the Application. The Applicant TCRC replied only to the Respondent's preliminary matter.

[21] The Board recognizes that the parties' pleadings in a matter require a significant amount of preparatory work. Since the Board is not required to hold an oral hearing given section 16.1 of the *Code*, this long-standing detailed application process allows it to deal more expeditiously with the cases that come before it.

[22] The effect of the Board's decision in CN 446 allowed the TCRC to have its application considered essentially uncontested. The Board in CN 446 analyzed the application but, in its discretion, decided that it was insufficient to meet the threshold for a bargaining unit review set out in section 18.1(1).

[23] The Board in CN 446 did not change the applicable threshold. It is clear, and CN 446 refers to this fact explicitly, that inappropriateness must exist under section 18.1(1) for a review. It is not sufficient to demonstrate that another potential regrouping of bargaining units exists.

[24] The Board was therefore not required to chase CN for its submissions. Rather, if a party purports to reserve for a later time its right to make submissions, and thereby fails to file its response in accordance with the Board's *Regulations*, then the Board will decide the case based on the materials before it.

[25] The Board has been examining ways to speed up its process in order to better serve the labour relations community. For example, it has started to use a *prima facie* case analysis for duty of fair representation complaints. The onus on complainants is to establish a *prima facie* case, failing which the Board will reject the matter without asking the respondent trade union and the employer to spend valuable time and resources responding.

[26] Similarly, the Board will also not delay deciding a certification application in situations where an employer has failed to respond.

[27] In CN 446, the Board applied a similar process and felt that it was able to determine whether to conduct a bargaining unit review under section 18.1(1) of the *Code* by examining only the TCRC's application. That application did not convince it to review the bargaining structure.

[28] For the above reasons, the reconsideration application is dismissed.

Graham J. Clarke
Vice-Chairperson

Judith F. MacPherson, Q.C.
Vice-Chairperson

Louise Fecteau
Vice-Chairperson