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Reasons for decision

Syndicat des travailleuses et travailleurs de Coach
Canada - CSN,

applicant,

and

Amalgamated Transit Union, Local 1624;
Trentway-Wagar Inc.; 3329003 Canada Inc.,

respondents.

Board File: 27831-C

Neutral Citation: 2010 CIRB 493
February 16, 2010

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

Counsel of Record

Mr. Philippe-André Tessier, for Trentway-Wagar Inc. and 3329003 Canada Inc.;

Ms. Cynthia D. Watson, for the Amalgamated Transit Union, Local 1624; and

Mr. Benoît Laurin, for the Syndicat des travailleuses et travailleurs de Coach Canada - CSN.

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.

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

I - Nature of the Application

[1] On November 25, 2009, the Board received from the Syndicat des travailleuses et travailleurs de Coach Canada - CSN (CSN) a request for an interim 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] The interim relief the CSN requested included a Board order requiring the respondents to respect an October 14, 2009 certification order in the CSN's favour (order no. 9727-U). The CSN further requested a cease and desist order relating to the deduction of union dues from members of its bargaining unit on behalf of a different bargaining agent.

[3] The request for an interim order accompanied the CSN's unfair labour practice complaint alleging violations of sections 94(1)(a), 95(a), 95(b) and 50(a) of the *Code* (file no. 27832-C).

[4] The respondents are 3329003 Canada Inc., Trentway-Wagar Inc. and the Amalgamated Transit Union, Local 1624 (ATU).

[5] There are several other files involving these parties currently before the Board. These include a request for a single employer declaration (file no. 27623-C), a sale of business application (file no. 27814-C), and the unfair labour practice complaints. After the close of written pleadings,

the Board held a case management conference on January 19, 2010, to examine how best to deal with the multiple files.

[6] The Board has decided to grant the CSN's request for interim relief in order to reaffirm the status quo, pending the determination on the merits of the other files. These are the Board's reasons.

II – Facts

[7] On June 22, 2009, the CSN filed a certification application for a bargaining unit at 3329003 Canada Inc. That numbered company operated a business known also as Autocar Connaisseur Inc., which was engaged in interprovincial transportation.

[8] The numbered company, as well as Trentway-Wagar Inc. (Employers), objected to the Board proceeding with the CSN's certification application. In the Employers' view, Trentway-Wagar had assumed almost complete control of the numbered company and they were being operated as a single employer. Trentway-Wagar Inc. and 3329003 Canada Inc. filed an application for a single employer declaration with the Board on July 8, 2009 (file no. 27623-C).

[9] The Employers argued, as did the ATU, that the existence of a single employer meant that an ATU bargaining unit for Trentway-Wagar in Ontario automatically applied to the unrepresented Montréal employees the CSN sought to represent.

[10] The Employers and the ATU requested that the Board defer deciding the CSN's certification application until such time as it concurrently determined the single employer issue.

[11] On October 14, 2009, by order no. 9727-U, the Board certified the CSN to represent the bargaining unit at 3329003 Canada Inc.

[12] No party filed a formal request for reconsideration under section 18 of the *Code* and section 44 of the *Canada Industrial Relations Board Regulations, 2001* (the *Regulations*) with regard to the CSN's certification. However, the ATU did file a judicial review application with the Federal Court of Appeal, a proceeding that remains pending.

[13] On or about November 13, 2009, the CSN sent a notice to bargain to 3329003 Canada Inc. The CSN also asked in a separate letter on that same date for union dues to be deducted from employees in the CSN's bargaining unit and remitted to the CSN.

[14] 3329003 Canada Inc. declined to bargain given the pending matters before the Board, including the request for a single employer declaration as well as a new request by the CSN for a declaration of a sale of business. That sale of business application related to changes that had occurred to 3329003 Canada Inc. in the fall of 2009 (file no. 27814-C).

[15] On or about November 19, 2009, the CSN learned that 3329003 Canada Inc. and/or Trentway-Wagar Inc. would be deducting union dues from the Montréal employees and remitting them to the ATU.

[16] The Employers did not dispute that union dues had in fact been deducted from the Montréal employees and remitted to the ATU as set out at paragraph 16 of their December 10, 2009 response to the CSN's request for an interim order:

16. All exhibits mentioned in paragraphs 16, 17, 18 and 19 are acknowledged as having been received by both Respondents, 3329003 Canada Inc. and Trentway Wagar Inc. However, knowingly, Le Syndicat des travailleuses et travailleurs de Coach Canada / CSN persisted and sent a notice of negotiation to these same Respondents whilst the corporate entity, 3329003 Canada Inc., no longer had employees in its employ. **Since there were no viable avenues available, in view of the fact that the CIRB appeared to have prematurely rendered a certification order, Respondent, Trentway-Wagar Inc., informed, through its General Manager, Daniel Thibault, all concerned employees that it would comply with the ATU request and deduct from the gross wages of said employees union dues and remit them to ATU; ...**

(emphasis added)

[17] The Employers argued that 3329003 Canada Inc. had been subsumed in Trentway-Wagar Inc. and that the ATU's Ontario bargaining unit had started to apply to the Montréal employees. As a result, it deducted union dues allegedly in accordance with the ATU's Ontario collective agreement.

[18] The Employers also asked in their response to the CSN's complaint that the Board stay its order 9727-U certifying the CSN pending the hearing by the Federal Court of Appeal of the judicial review application and/or review, rescind, amend, alter or vary order 9727-U after hearing the rest of the files.

[19] The ATU took the position that because its certificate from the Board was not geographically limited, that it is the exclusive bargaining agent for all employees of Trentway-Wagar Inc. The ATU wrote at paragraphs 8-11 of its December 11, 2009 submission:

8. Similarly, the ATU cannot be guilty of an unfair labour practice or other breach of the *Code* by virtue of accepting union dues on behalf of employees who properly fall within their longstanding bargaining unit pursuant to a pre-existing Board Certificate;

9. In the alternative, and in any event, Trentway-Wagar merged with Autocar Connoisseur [*sic*] (3329003 Canada Inc) in 2007. As a result, pursuant to the statutory provisions of s.44 of the *Canada Labour Code*, the ATU automatically continued as exclusive bargaining agent;

10. In the further alternative, and in any event, 3329003 Canada Inc. ceased operations altogether by October 1, 1009, prior to any Certificate issuing to the Applicant, CSN. As Trentway-Wagar was the employer of any former 3329003 Canada Inc. employees, the ATU was and is the exclusive bargaining agent pursuant to its pre-existing Board Certificate. A subsequently issued Certificate cannot undermine such pre-existing bargaining rights;

11. In fact, the Applicant, CSN acknowledged that the employees in question are employees of Trentway-Wagar (hence its s. 44 Application under the *Code*). All employees of Trentway-Wagar fall within the pre-existing ATU exclusive bargaining unit, and the ATU constitutes the exclusive bargaining agent for such. Even at its highest, the Applicant's claim must fail as the employees in question were transferred prior to the date of the Certificate issued to CSN; ...

[20] The CSN argued that the Employers and the ATU have refused to respect the Board's October 14, 2009 certification order by deducting union dues from employees in the CSN's bargaining unit and remitting them to the ATU.

[21] The CSN also alleges, *inter alia*, that the Employers and the ATU have negotiated conditions of employment for employees falling within the CSN's bargaining unit.

III – Interim Orders

[22] For ease of reference section 19.1 reads as follows:

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.

[23] In *Transpro Freight Systems Ltd.*, 2008 CIRB 422 (*Transpro*) the Board reviewed its jurisdiction to issue interim orders. The *Code* does not provide the same amount of guidance that the *Ontario Labour Relations Act, 1995* provides to the Ontario Labour Relations Board in terms of how and when it can issue interim relief.

[24] Rather, the Legislator preferred to grant the Board a wide discretion in section 19.1.

[25] The Board in *Transpro* reviewed some of the “objectives” in Part I of the *Code* such as the encouragement of free collective bargaining and the freedom of association.

[26] Every employee has the basic freedom to join a trade union. The *Code* does require, however, that a trade union demonstrate majority support in an appropriate bargaining unit in order to gain access to the *Code*'s rights and privileges. The Board grants such access when it certifies a trade union for a particular bargaining unit.

[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.

IV – Analysis and Decision

[28] It is clear that the Employers and the ATU believe that the Board erred fundamentally when it certified the CSN for a bargaining unit of previously unrepresented Montréal employees working for 3329003 Canada Inc. The Employers and the ATU continue to contend that 3329003 Canada Inc. was already part of Trentway-Wagar Inc. and that, by virtue of that fact, the ATU's Ontario certification started to apply to the Montréal employees. Therefore, the Employers and the ATU allege the Board was unable to certify the CSN for a previously-represented bargaining unit.

[29] The Employers and the ATU did not file an application for reconsideration pursuant to section 18 of the *Code* and section 44 of the *Regulations*. While the Employers in their response to the complaint did make reference to section 18 and asked the Board for a stay of its certification order, the Industrial Relations Officer clarified in correspondence dated January 8, 2010 that no formal request for reconsideration had been filed by any party following the Board's decision on October 14, 2009 to certify the CSN. The 21-day delay for any such application has now passed.

[30] There is a pending judicial review application contesting the Board's decision to certify the CSN. However, as is clear from the Board's case law, the Board will not stay its decisions merely because a judicial review application has been filed: *Société Radio-Canada*, 2002 CIRB 193. Similarly, the Federal Court of Appeal hesitates to stay Board proceedings given the importance of having labour relations matters heard expeditiously: *Teamsters Local Union 847 v. Canadian Airport Workers Union*, 2009 FCA 44.

[31] The Board will also not stay one of its orders at the request of a party which has refused to respect the order, rather than contest it by way of regular legal channels.

[32] The Board has certified the CSN to represent the formerly unrepresented Montréal employees who were working for 3329003 Canada Inc. at the time of the certification application.

[33] The Board will be holding a hearing to allow the Employers and the ATU to argue their case with regard to the existence of a single employer as well as to comment on the CSN's sale of business application.

[34] The Board reminds the parties that it has always remained in charge of the scope of any certification orders it issues. Under section 18 of the *Code*, a party can request the Board to interpret the scope of its certificate. Neither the Employers nor the ATU ever filed an application with regard to the scope of the ATU's Ontario certification.

[35] If the Board were to issue a single employer or a sale of business declaration after hearing the cases on the merits, then the *Code* allows the parties to request that the Board review the applicable bargaining units: see section 45 of the *Code*. The review would be covered by section 18.1 of the *Code* which sets out the bargaining unit review process. The Board could decide to merge bargaining units and determine a single bargaining agent, but is not obliged to do so.

[36] The CSN has convinced the Board that the Employers and the ATU have decided to conduct themselves as if the ATU's bargaining unit already applied to the Montréal employees, despite the Board's certification order in favour of the CSN and despite the fact that no determination has yet been made in the other related and still-pending files.

[37] Given the Board's certification order in favour of the CSN, the Board reiterates and confirms that the CSN remains the bargaining agent for the Montréal employees of 3329003 Canada Inc. until such time as either the Board modifies the status quo in future decisions or the Federal Court of Appeal directs the Board to do so.

[38] In the interim, the Employers and the ATU must respect the Board's existing decisions and orders, including the CSN's October 14, 2009 certification.

[39] Accordingly, the Board:

1. Confirms that the CSN is and remains the certified bargaining agent for the employees of 3329003 Canada Inc., in accordance with the Board's certification order dated October 14, 2009;
2. Orders that the Employers reimburse forthwith to all Montréal employees from whom they deducted ATU union dues, any amounts taken, plus interest;
3. Orders that the ATU return forthwith all funds it received from the Employers which were deducted as union dues from the employees in the CSN's bargaining unit;
4. Confirms that 3329003 Canada Inc. remains obliged to collectively bargain with the CSN, until such time as the status quo changes, either by order of the Board or by the Federal Court of Appeal; and
6. Orders that the Employers provide a copy of this decision to all members of the CSN's bargaining unit within five (5) days of the date of this decision, and confirm this fact to the Board and the other parties in writing.

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

Graham J. Clarke
Vice-Chairperson

Daniel Charbonneau
Member

André Lecavalier
Member