Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada),

complainant,

and

Canadian National Railway Company,

respondent.

Board File: 27311-C
Neutral Citation: 2010 CIRB 501
March 16, 2010

The Canada Industrial Relations Board (Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. André Lecavalier and Daniel Charbonneau, Members. A hearing was held on February 2-4, 2010, in Edmonton, Alberta.

Appearances

Mr. Robert Fitzgerald, National Representative, assisted by Mr. Barry Kennedy, for the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada); and

Mr. Simon-Pierre Paquette, assisted by Mr. Louie Timoteo, for the Canadian National Railway Company.

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

I - Nature of the Complaints

[1] On February 9, 2009, the Board received two related unfair labour practice complaints from the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (CAW) against the Canadian National Railway Company (CN).

[2] The CAW alleged that the denial of union leave to Mr. John Dowell, a Local Chairperson in Edmonton, violated sections 94(3)(a), (b) and (e) of the *Canada Labour Code* (*Part I - Industrial Relations*) (the *Code*).

[3] The CAW further alleged that the concurrent abolition of the positions of Senior Operations Clerks (SOC), of which Mr. Dowell was one, also constituted an unfair labour practice.

[4] The CAW also argued that CN violated section 94(1)(a) of the *Code* by abolishing the Edmonton SOC positions. The CAW argued that CN's alleged actions have caused bargaining unit members to lose confidence in its ability to represent them.

[5] The CAW referred the Board to its pending section 18 application in Board file no. 26569-C, wherein the CAW contests CN's alleged removal of bargaining unit work from a clerical bargaining unit.

[6] The panel, which is not seized of that other file, understood from the parties that in file no. 26569-C, the CAW has asked the Board to determine whether certain positions at CN fall within the scope of the CAW's existing clerical bargaining unit. That file also seeks a significant updating of the current description of the clerical bargaining unit.

[7] The CAW's complaints in the instant case did not raise section 18 of the *Code* or make any request to interpret the scope of the CAW's clerical bargaining unit.

[8] By way of remedy, the CAW requested, *inter alia*, that CN reinstate the abolished SOC positions at the Walker Yard in Edmonton and that no further work be removed from bargaining unit positions falling within the Board's existing certification until the Board has dealt with the section 18 application in file no. 26569-C.

II - Facts

[9] CN operates the Walker Diesel Shop in Edmonton. Its Locomotive Rebuild Centre (LRC) repairs CN's locomotives.

[10] CN and the CAW are bound by what the parties described as "Collective Agreement 5.1". This collective agreement covers labourers, storekeepers and LMUs (labour moving units). Two clerical positions are included and, at the material times, the SOC positions.

[11] The SOCs performed various duties, including a significant amount of data entry into the shop's various information technology systems. They also tracked all "power" (locomotives) on the shop tracks in a separate system. SOCs called taxis for all inbound transportation crews and DTLs (direct trucks to locomotives) for fueling. The SOCs also directed other bargaining unit members regarding their work priorities.

[12] The Board heard evidence from three witnesses: Mr. Robert Emond, Mr. John Dowell and Mr. Barry Kennedy.

[13] Mr. Emond has been employed at CN since 1982. For the last 2.5 years, he has been the Shop Manager at the Walker Diesel Shop. He is responsible for all of the shop's operations, including its budget and dealings with local union representatives. During Mr. Emond's time as Shop Manager, he had participated in one Joint Conference meeting.

[14] The term "Joint Conference" describes the meetings that the CAW and CN hold periodically to review grievances. While grievances can proceed to arbitration without first passing through a Joint Conference, the parties prefer to meet and explore informal settlement of pending grievances.

[15] Mr. John Dowell was the Local Chairperson for the Edmonton bargaining unit for approximately 16 years. Recently, he became the Local's President. His seniority at CN dates from March 1982.

[16] The final witness was Mr. Barry Kennedy, who at the relevant time was the Regional Representative, CAW Council 4000 for Western Canada. Mr. Kennedy was usually the main CAW representative at Joint Conferences held in Edmonton.

[17] While in final argument the parties suggested that some witnesses were more credible than others, or had better memories, the Board found all three witnesses to be forthright and candid in their testimony. There were clearly differences in their recollections of certain events, but the Board does not attribute this to anything other than the challenges of recollecting from memory events that occurred in the past. The Board found all three witnesses to be credible and honest.

[18] The CAW's unfair labour practice complaints revolve around two incidents. The first incident can be described as the "Union Leave" incident and the second the "Abolition of the SOC Positions" incident.

A - Union Leave Incident

[19] The parties' collective agreement contains various provisions regarding leaves of absence. In particular, articles 17.3 and 17.4 read as follows:

> 17.3 **Local Chairpersons** or authorized committee members shall, upon request, be granted free transportation in accordance with pass regulations, and **leave of absence without pay for the investigation, consideration and adjustment of grievances**.
>
> 17.4 **Employees** shall, upon request, be granted free transportation in accordance with pass regulations and leave of absence without pay to attend local Union general meetings or other Union meetings. **Such leave of absence will be granted only when it will not interfere with the Company's business nor put the Company to additional expenses**.
>
> (emphasis added)

[20] CN and the CAW had arranged to hold a three-day Joint Conference in January 2009. Mr. Emond understood that he would be attending the Joint Conference along with another CN representative, Mr. Barry Laidlaw. From Mr. Emond's evidence, this would have been the second Joint Conference he attended since assuming his current position.

[21] In his capacity as Local Chairperson, Mr. Dowell requested union leave. In Mr. Dowell's view, article 17.3 of the collective agreement gave him an automatic entitlement to union leave. Mr. Dowell would be attending the same Joint Conference as Mr. Emond.

[22] The evidence was inconsistent in terms of Mr. Emond's knowledge about Mr. Dowell's request. In the written pleadings, the CAW had alleged that Mr. Dowell first spoke to Mr. Emond on or about January 16, 2009 to request union leave pursuant to article 17.3 of the collective agreement. Those submissions argued that Mr. Emond knew all along that Mr. Dowell would be attending the same Joint Conference.

[23] Mr. Emond, on the other hand, as set out in CN's written submissions, claimed he did not know that Mr. Dowell's request was related to the same Joint Conference.

[24] When Mr. Dowell testified at the hearing, he described how, on or about January 13, 2009, he had asked Mr. Doug Bonner, a clerk who reported to Mr. Emond, whether he could have union leave to attend the upcoming Joint Conference. Mr. Dowell testified that Mr. Bonner said that leave would be granted, as it had been in the past for grievance matters.

[25] Mr. Dowell testified that he assumed that Mr. Bonner must have received the appropriate authorization from Mr. Emond to grant the leave.

[26] According to Mr. Dowell, at some time closer to the Joint Conference date, Mr. Bonner advised him that the union leave had been refused because of CN's recent ban on overtime and a shortage of available SOCs to fill in for him.

[27] Mr. Emond and Mr. Dowell do agree that they had discussions about the latter's request for leave. Mr. Emond indicated he spoke to Mr. Dowell on or about January 19, 2009, and explained that operations needs prevented the granting of the leave.

[28] Mr. Emond did suggest to Mr. Dowell that, if he could change shifts with another SOC, he would grant the leave, provided it caused no increased cost to CN.

[29] After the initial discussion on January 19, wherein Mr. Emond had confirmed to Mr. Dowell that the leave was denied, the two of them spoke again on January 20, 2009. By this time, each of them knew that their attendance at the Joint Conference, originally scheduled for January 20, had been moved to January 21, again at 2:00 p.m.

[30] During this January 20 discussion, Mr. Dowell mentioned to Mr. Emond that his meeting had been changed to the January 21. According to Mr. Emond's testimony, it was only at this point in time that Mr. Emond realized that Mr. Dowell was asking specifically for union leave to attend the same Joint Conference.

[31] Mr. Emond suggested moving their Joint Conference meeting to early in the morning right after Mr. Dowell's shift would have ended. Mr. Dowell worked a 12-hour shift from 6:00 p.m. to 6:00 a.m. on a four-day rotation. Mr. Dowell declined that option.

[32] The Board can fully understand why Mr. Dowell would not have wanted to attend a Joint Conference meeting immediately following a 12-hour overnight shift.

[33] On January 21, 2009, the CAW filed a grievance regarding CN's refusal to grant Mr. Dowell union leave under article 17.3 of the collective agreement.

B - Abolition of the SOC Positions Incident

[34] The CAW alleged that the abolition of the SOC positions directly retaliated for Mr. Dowell filing his grievance over the denial of union leave.

[35] The Board heard evidence that there had been a shortage of individuals available to fill the SOC positions. Although the SOCs were paid more than other members of the bargaining unit, Mr. Emond testified that the stress of the job and the challenge of telling other members of the bargaining unit what to do, prevented the position from being popular.

[36] The CAW countered in its evidence that CN had never issued a bulletin pursuant to articles 12 and 16.5 of the collective agreement in an attempt to staff the open SOC positions. There is no dispute between the parties that there was never a grievance filed with regard to a failure to bulletin the SOC positions.

[37] Mr. Emond testified that CN instructed him to eliminate the SOC positions because of a significant amount of overtime being used. The day after the filing of Mr. Dowell's union leave grievance, Mr. Emond raised with certain bargaining unit members the possibility of changing the SOC positions. The initial conversation Mr. Emond had with Mr. Dowell, who he approached first, concerned changing the SOC positions into supervisory positions.

[38] Mr. Emond testified that that idea was soon rejected and CN instead decided to abolish the SOC positions by giving a four-day notice under article 13.2 of the collective agreement:

> 13.2 In instances of staff reduction, four working days' advance notice will be given to regularly assigned employees whose positions are to be abolished, except in the event of a strike or work stoppage by employees in the railway industry, in which case a shorter notice may be given. The Local Chairperson will be supplied with a copy of any notice in writing.

[39] Mr. Emond explained CN's reasons for the four-day notice and the abolition of the SOC positions. Besides the amount of overtime, Mr. Emond described the staffing shortage for SOCs as well as a reduction of work related to the recent recession. He accordingly separated the SOC positions into their constituent parts, such that some of the clerical work was redistributed to other clerks. Some of the work involving giving directions to other employees was redistributed to CN managers.

[40] Mr. Emond described as well that a large portion of the SOC functions, which involved data entry, was eliminated because they replaced the disparate information technologies with smarter

systems that communicated better with each other. In Mr. Emond's estimation, the data entry function decreased dramatically.

[41] In order to avoid any SOC layoffs, CN relocated all of the SOCs based on their seniority. They also had their pay red-circled. None of the SOCs were laid off after they took over other positions in the CAW's bargaining unit.

[42] The CAW noted that there was a later four-day notice issued under article13.2 of the collective agreement, which led to some employees with the least seniority in the bargaining unit being laid off. It was clear to the Board that those layoffs did not impact the individuals who originally held the SOC positions, although clearly the total number of employees in the bargaining unit would be lower after that second four-day notice was given and implemented.

[43] The CAW suggested throughout the hearing that the abolition of the SOC positions should have been subject to the technological change provisions in article 8 of the collective agreement. However, no grievance was ever filed on this point.

III - Analysis and Decision

A - Burden of Proof

[44] Section 98(4) of the *Code* states as follows:

> 98.(4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of any employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party.

[45] This provision was amended significantly in 1978 in reaction to the decision in *Central Broadcasting Co. Ltd.* v. *Canada Labour Relations Board et al.*, [1977] 2 S.C.R. 112, where the Supreme Court of Canada had found that an earlier version of the section did not reverse the burden of proof.

[46] Since the amendment, it is now clear that the employer bears the burden of proof for the unfair labour practices set out in section 94(3) of the *Code*. The complaint itself constitutes evidence of a *Code* violation.

[47] The presumption will apply to sections 94(3)(a), (b) and (e) of the *Code* on which the CAW relies:

> 94.(3) No employer or person acting on behalf of an employer shall
>
> (a) refuse to employ or to continue to employ or suspect, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person
>
> (i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,
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> (ii) has been expelled or suspended from membership in a trade union for a reason other than a failure to pay the periodic dues, assessments and initiation fees uniformly required to be paid by all members of the trade union as a condition of acquiring or retaining membership in the trade union,
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> (iii) has testified or otherwise participated or may testify or otherwise participate in a proceeding under this Part,
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> (iv) has made or is about to make a disclosure that the person may be required to make in a proceeding under this Part,
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> (v) has made an application or filed a complaint under this Part, or
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> (vi) has participated in a strike that is not prohibited by this Part or exercised any right under this Part;
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> (b) impose any condition in a contract of employment that restrains, or has the effect of restraining, an employee from exercising any right conferred on them by this Part;
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> ...
>
> (e) seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a financial or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of a trade union or to refrain from
>
> (i) testifying or otherwise participating in a proceeding under this Part,
> (ii) making a disclosure that the person may be required to make in a proceeding under this Part, or
> (iii) making an application or filing a complaint under this Part.

[48] The reversed burden does not apply to section 94(1)(a) of the *Code* regarding employer interference in a union:

> 94.(1) No employer or person acting on behalf of an employer shall
>
> (a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union.

[49] CN presented its evidence first at the Edmonton hearing as is often the case when part of a case involves the reverse onus provision at section 98(4) of the *Code*.

B - Did CN violate sections 94(3)(a) and (b) and/or (e) of the *Code* when it refused union leave to Mr. Dowell and later abolished the SOC positions?

[50] The Board is satisfied in the circumstances of this case that CN has met its burden of proof under section 98(4) of the *Code*. The denial of union leave to Mr. Dowell and the later abolition of the SOC positions were singular events raising differing interpretations of the parties' collective agreement rather than unfair labour practices.

[51] The Board earlier reproduced some of the collective agreement's leave of absence provisions. Mr. Dowell and the CAW argued that CN had no option but to grant him union leave when he requested it pursuant to article 17.3. CN argued, conversely, that Mr. Emond did not know Mr. Dowell was requesting the leave to deal with grievances because he had not mentioned the Joint Conference until very late in the leave request process.

[52] CN further argued that Mr. Dowell was not scheduled to be at work at 2:00 p.m. on January 20 or 21 and, thus, it had no obligation to provide the union leave.

[53] The Board did note that Mr. Dowell may have received conflicting messages from Mr. Bonner and Mr. Emond. While Mr. Dowell assumed that Mr. Bonner had mentioned to Mr. Emond that the leave request was to attend the Joint Conference, there was no evidence that this was the case. Indeed, Mr. Dowell's testimony about Mr. Bonner's involvement suggested that both Mr. Emond and Mr. Dowell were acting in good faith with respect to the leave request. The information Mr. Dowell had provided to Mr. Bonner had simply not made it to Mr. Emond.

[54] Similarly, the fact that Mr. Emond had attended only one previous Joint Conference suggested to the Board that his relatively recent experience in his new position prevented him from assuming, as Mr. Dowell and Mr. Kennedy would have, that it was self-evident the Local Chairperson would attend the Joint Conference. There was no evidence contradicting Mr. Emond's testimony that he did not know of Mr. Dowell's attendance until the eve of the Joint Conference.

[55] Mr. Dowell filed a grievance with regard to the denial of union leave. The Board understands that the matter has proceeded through all of the grievance steps in the collective agreement, but has yet to be referred to arbitration. There is evidently an issue to be decided with regard to how the union leave provision should operate in the case of Mr. Dowell. The CAW pointed out that article 17.3 of the collective agreement was not subject to CN's business needs, contrary to the more general leave available under article 17.4.

[56] That interpretation debate between the parties about the collective agreement is a matter for an arbitrator to determine rather than for the Board.

[57] The Board has also not found that Mr. Emond's initial discussion of SOC changes on January 22, and the later abolition of the positions, was a retaliation for Mr. Dowell filing his union leave grievance on January 21, 2009. CN met its burden by explaining the reasons why it decided to reorganize part of its workforce.

[58] The Board expresses no opinion on CN's right under the collective agreement to reorganize positions like those of the SOCs. This issue may be relevant to the CAW's section 18 application in file no. 26569-C, a matter that is not before this panel.

[59] The testimony of both Mr. Emond and Mr. Dowell demonstrated that the two men have had, and continue to have, a cordial working relationship. That positive work relationship is not consistent with an intention to retaliate against Mr. Dowell for grieving about his collective agreement rights. The abolition of the SOC positions will be discussed in greater detail in the next section.

[60] CN has satisfied the Board that the denial of union leave, Mr. Dowell's grievance and the later changes to the SOC positions were not related actions tainted with anti-union animus.

C - Did the abolition of the SOC positions violate section 94(1)(a) of the *Code*?

[61] As stated above, the presumption in section 98(4) of the *Code* does not apply to this provision. A violation of this provision can occur without any finding of anti-union animus.

[62] The CAW argued that it currently has a section 18 application pending before the Board for similar scenarios where it alleged CN unilaterally removed work from the bargaining unit.

[63] In the CAW's view, such actions by CN undermine the bargaining agent in the eyes of its members.

[64] The Board agrees that there are clearly some significant labour relations issues separating CN and the CAW in this area. However, in the Board's view, those disputes relate to significantly differing interpretations of various provisions of the collective agreement.

[65] For example, the CAW argued that CN ought to have issued a bulletin to staff the SOC positions pursuant to article 16.5 (and article 12 it would appear) of the collective agreement. If a proper bulletin had gone forward, then, the CAW argued, there would not have been a shortage of SOCs. The SOC shortage represented one of the factors CN relied on when it decided to abolish the positions.

[66] However, the CAW never filed a grievance under article 16.5 of the collective agreement regarding the need for a bulletin.

[67] The CAW also argued that CN did not have the ability to remove bargaining unit work and give it to managers. This puts directly into play article 2.2 of the collective agreement:

> 2.2 Supervisors, non-scheduled employees, or employees in other bargaining units shall not engage, normally, in work currently and traditionally performed by members of this bargaining unit.

[68] It seems again to the Board that the proper interpretation of article 2.2 of the collective agreement is a matter for an arbitrator. While that provision is designed to protect bargaining unit

work, it does require that the work in question be "traditionally performed" by members of the bargaining unit. It would appear that CN's evidence regarding the fact that managers may have done some of the SOC work in the past is aimed at relying on the wording "traditionally performed".

[69] The Board is reticent to venture into collective agreement interpretation issues, given that there may be longstanding practices between the parties that impact how any single provision should be interpreted. In addition, this role over collective agreement interpretation belongs to a labour arbitrator.

[70] The Board is of the same view concerning the CAW's argument that the four-day notice CN provided under article13.2 of the collective agreement was inappropriate and that instead a 120-day notice ought to have been provided pursuant to the technological change provisions in the collective agreement at article 8.

[71] The Board believes that the validity of the four-day notice is for an arbitrator with a developed expertise in interpreting this particular collective agreement to decide, especially considering the expedited arbitration system to which these parties subscribe.

IV - Conclusion

[72] The Board is of the view that CN has met its burden of proof of demonstrating that the actions it took at its facility in Edmonton were not tainted by anti-union animus, but were taken for operational reasons. Whether these operational reasons respected the parties' collective agreement is not for the Board to determine.

[73] The Board was also not convinced that the differences between the parties over the obligations imposed by the collective agreement amounted to interference as that term is used in section 94(1)(a) of the *Code*.

[74] The panel in this case was not seized with a section 18 application comparable to the one the CAW filed earlier in file no. 26569-C. The Board expresses no opinion on that application. This decision is limited solely to the CAW's unfair labour practice complaints.

[75] The Board rejects the complaints.

[76]This is a unanimous Board decision.

Graham J. Clarke
Vice-Chairperson

André Lecavalier
Member

Daniel Charbonneau
Member