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## Reasons for decision

Mr. Lewis Rathgeber,

*complainant,*

*and*

Canadian National Railway Company,

*respondent.*

Board File: 27872-C

Neutral Citation: 2010 CIRB **536**

August 11, 2010

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The Canada Industrial Relations Board (the Board or CIRB) was composed of Mr. Graham J. Clarke, Vice-Chairperson, sitting alone pursuant to section 156 of the *Canada Labour Code (Part II - Occupational Health and Safety)* (the *Code*).

### **Parties' Representatives of Record**

Mr. Lewis Rathgeber, on his own behalf, assisted by Mr. Michael Wheten; and  
Mr. Simon-Pierre Paquette, for Canadian National Railway Company.

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 and the parties' comments during the case management conference (CMC) are sufficient for it to determine this complaint without an oral hearing.

## **I - Nature of the Complaint**

[1] On December 11, 2009 the Board received from Mr. Lewis Rathgeber (Mr. Rathgeber) a complaint under Part II of the *Code*.

[2] Mr. Rathgeber alleged that his employer, the Canadian National Railway Company (CN), had failed to pay him for certain duties he performed as the Co-Chairperson of the Health and Safety Committee set up pursuant to Part II of the *Code*.

[3] Mr. Rathgeber's complaint to the Board elaborated on his issue:

My name is Lewis Rathgeber and I am the labour co-chairperson of the Melville H&S committee under the Canadian National Railway. My issues are non payment of H&S duties as per the Canada Labour Code. This issue was presented to the CNR and then to the HRSDC and now I am told it is a CIRB issue. As per any time limit issues I would believe that I have been in line with all account the waiting period for anyone to deal with this.

My current claims are for pay for Jan and Feb 2009 for 55 hours and March to May 2009 for 22 hours. I would also appreciate the board allowing me to add an additional 8 hours for the forwarding of this issue to both the HRSDC and the CIRB. Total claim would be  $55 + 22 + 8 = 85$  hours all at engineer rates. I might add that the assistant superintendent now Gerald Guest did not respond to the March to May claim at all.

[*sic*]

[4] CN questioned the timeliness of Mr. Rathgeber's complaint and argued the Board's jurisdiction was limited to reprisals taken under Part II and did not extend to interpreting issues such as when members of a Health and Safety Committee should be remunerated for the work they do, or the quantum of such remuneration.

[5] The Board held a CMC on June 30, 2010 at which the parties were candid when clarifying the issues that separated them.

[6] The Board has decided to dismiss Mr. Rathgeber's complaint on the basis that the parties agreed that no retaliation or discipline ever took place. In the Board's respectful view, it appears that Human Resources and Skills Development Canada (HRSDC) ought to have dealt with Mr. Rathgeber's complaint for the compliance issues he raised, rather than declining jurisdiction and

advising Mr. Rathgeber to file a reprisal complaint with the Board.

## **II - Facts**

[7] Mr. Rathgeber is a locomotive engineer working at CN's Melville, Saskatchewan terminal. His trade union, the Teamsters Canada Rail Conference (TCRC) nominated him to be the union Co-Chair of the Health and Safety Committee.

[8] Mr. Rathgeber believes he ought to be compensated for certain Health and Safety Committee-related work he performed at home on his own time. CN took the position that it would only pay for employees to attend Health and Safety Committee meetings and for worksite inspections.

[9] During the CMC, Mr. Rathgeber corrected an impression that CN had taken from his complaint. Mr. Rathgeber only claimed payment for certain hours worked; he was not claiming payment for anything related to the use of his home computer, computer ink cartridge and other materials.

[10] On May 21, 2009, after Mr. Rathgeber and CN did not resolve the issue, Mr. Rathgeber contacted HRSDC.

[11] HRSDC outlined the internal steps for him to take with CN before filing a formal complaint under section 127.1(8) of the *Code*.

[12] On September 17, 2009, when the matter was not resolved under section 127.1's internal steps, Mr. Rathgeber filed a formal complaint with HRSDC.

[13] Mr. Rathgeber described his specific issues on HRSDC's "Complaint Registration" form:

Alleged Violation of 135.1 (10, 11) 135.6 and any other I may have missed.  
No pay for H+S committee duties done at Home only paid for meeting day and inspection Day!

[sic]

[14] On November 6, 2009, HRSDC advised Mr. Rathgeber that it did not have jurisdiction to investigate his complaint:

This letter is further to your complaint dated September 17, 2009 which was received in this office on September 17, 2009 against Canadian National Railway Company. We have reviewed your complaint, and have determined that the Labour Program does not have jurisdiction to investigate your complaint, as the subject matter of your complaint falls within the purview of section 133 of the *Canada Labour Code*, Part II.

Please note that the *Code* has established a **time limit for you to register your complaint of 90 days** from the date on which you knew or in the Board's view you ought to have known, of the action or circumstances giving rise to your complaint. We therefore suggest that you immediately forward your complaint to the Canada Industrial Relations Board (CIRB), who has the power to investigate your complaint, unless you will be referring your complaint to arbitration or adjudication.

[contact information for CIRB western satellite and regional offices provided]

The Labour Program of Human Resources and Skills Development Canada can, therefore, take no further action on your behalf.

[sic] [underlining added]

[15] Mr. Rathgeber followed HRSDC's instructions and faxed his materials to this Board and alleged a violation of sections 133 and 147 of the *Code*.

[16] CN responded first that Mr. Rathgeber had not respected the 90-day delay found at section 133(2) of the *Code*:

133.(2) The complaint shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.

[17] In CN's view, the issues to which Mr. Rathgeber referred arose from January to May 2009. However, he only filed his complaint with the Board on December 11, 2009.

[18] CN further argued that it has no obligation under Part II of the *Code* to pay employees for Health and Safety work that they performed on their own time at home, nor for work not authorized to be done by the Health and Safety Committee. Moreover, CN argued that there was no evidence of any retaliation or discipline arising from CN's policy of paying for employees' attendance at Health and

Safety Committee meetings as well as site inspections.

[19] During the CMC, Mr. Rathgeber candidly admitted that he has never alleged that any reprisal or discipline took place over the difference of opinion he had with CN. The only reason he filed a complaint with this Board was because of HRSDC's letter claiming it had no jurisdiction and their suggestion that he take his matter to this Board.

### **III - Analysis and Decision**

[20] The Board is somewhat bewildered, as was Mr. Wheten during the CMC, how the current matter ended up becoming a section 133 complaint. Part II of the *Code* has distinct regimes and each decision-maker has the responsibility to answer the questions which arise within its area of competence.

#### *A - The Board's Jurisdiction*

[21] Under Part II of the *Code*, the Board adjudicates complaints alleging that an employer has taken disciplinary or other action against employees for allegedly exercising their rights under the *Code*.

[22] Sections 133, 134 and 147 establish the regime. The Board examines whether a reprisal took place in much the same way as it handles unfair labour practice complaints under Part I of the *Code*:

#### Complaint to Board

133.(1) An employee, or a person designated by the employee for the purpose, who alleges that an employer has taken action against the employee in contravention of section 147 may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.

(2) The complaint shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.

(3) A complaint in respect of the exercise of a right under section 128 or 129 may not be made under this section unless the employee has complied with subsection 128(6) or a health and safety officer has been notified under subsection 128(13), as the case may be, in relation to the matter that is the subject-matter of the complaint.

(4) Notwithstanding any law or agreement to the contrary, a complaint made under this section may not be referred by an employee to arbitration or adjudication.

(5) On receipt of a complaint made under this section, the Board may assist the parties to the complaint to settle the complaint and shall, if it decides not to so assist the parties or the complaint is not settled within a period considered by the Board to be reasonable in the circumstances, hear and determine the complaint.

(6) A complaint made under this section in respect of the exercise of a right under section 128 or 129 is itself evidence that the contravention actually occurred and, if a party to the complaint proceedings alleges that the contravention did not occur, the burden of proof is on that party.

134. If, under subsection 133(5), the Board determines that an employer has contravened section 147, the Board may, by order, require the employer to cease contravening that section and may, if applicable, by order, require the employer to

(a) permit any employee who has been affected by the contravention to return to the duties of their employment;

(b) reinstate any former employee affected by the contravention;

(c) pay to any employee or former employee affected by the contravention compensation not exceeding the sum that, in the Board's opinion, is equivalent to the remuneration that would, but for the contravention, have been paid by the employer to the employee or former employee; and

(d) rescind any disciplinary action taken in respect of, and pay compensation to any employee affected by, the contravention, not exceeding the sum that, in the Board's opinion, is equivalent to any financial or other penalty imposed on the employee by the employer.

...

#### Disciplinary Action

147. No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee

(a) has testified or is about to testify in a proceeding taken or an inquiry held under this Part;

(b) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or

(c) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.

[23] The text of section 147, and its heading "Disciplinary Action", confirm the conditions underlying the Board's regime. There must be some form of disciplinary action or retaliation.

[24] In *Tony Aker*, 2009 CIRB 474, the Board described its current Part II jurisdiction and how it applies to two distinct areas. Firstly, the Board examines whether a reprisal took place as a result of a complainant's exercise of the right to refuse unsafe work under section 128 of the *Code*. Section 133(6) of the *Code* creates a reverse onus provision in this specific reprisal situation.

[25] Secondly, the Board also examines alleged reprisals under Part II for other situations described in section 147 which do not involve the right to refuse unsafe work. However, there is no reverse onus provision for this general protection against reprisals.

[26] In *Air Canada*, 2007 CIRB 394, the Board dealt with a complaint concerning the operation of Health and Safety Committees and explained the limits of its jurisdiction:

[59] Part II of the Code does not give the Board any jurisdiction over either the administration or enforcement of any of the provisions relating to the operation of health and safety committees. The present wording of Part II does not give this Board jurisdiction to address the myriad of matters relating to the administration and operation of these committees, that are found in both unionized and non-unionized workplaces. Part II does not give the Board jurisdiction, for example, to determine the amount of training, the level of resources, or the amount of time away from their regular duties that should be provided to committee members at the hundreds, if not thousands, of workplaces falling under federal jurisdiction. Similarly, it does not give this Board jurisdiction to set the regular rate of pay of employees who perform health and safety work.

[60] The only jurisdiction the Board has under Part II of the Code is to hear complaints alleging that an employer has punished an employee for exercising the rights spelled out in section 147 of the Code.

...

(emphasis added)

[27] In *George Court*, 2010 CIRB 498, the Board compared its jurisdiction with that of a Health and Safety Officer:

[79] In *Tony Aker*, 2009 CIRB 474, the Board analyzed how a single incident could produce complaints in different fora. In *Tony Aker, supra*, an employee's termination resulted in a reprisal complaint to the Board, a complaint of a Part II contravention to a Safety Officer and an unjust dismissal complaint under Part III of the *Code*.

[80] The Board's jurisdiction under Part II is limited to reprisals: see sections 133 and 147. The *Code* grants a Safety Officer the general authority to investigate contraventions of all other provisions of Part II of the *Code* and issue remedial directives: see, *inter alia*, sections 127.1 and 145(1).

[28] In this case, given the parties' agreement that no reprisal or disciplinary action took place, the Board cannot uphold Mr. Rathgeber's complaint.

[29] That is not to say that an issue arising under section 135.1, if accompanied by a reprisal, could not find its way to the Board. However, the Board would concentrate solely on the reprisal as opposed to interpreting the parties' rights and responsibilities under section 135.1 of the *Code*.

[30] While the above finding concludes this matter, the Board questions why HRSDC suggested it had no jurisdiction to examine Mr. Rathgeber's complaint of non-compliance. HRSDC may not agree with Mr. Rathgeber's position, but the *Code* gives it the responsibility to decide whether Mr. Rathgeber's complaint has any merit.

### *B - The "Other" Part II Regime*

[31] Part II of the *Code* encourages parties to resolve their safety disputes themselves. It has been described as an "Internal Responsibility System". If there is a suggestion of a "contravention", then the employee must initially bring that matter up with a supervisor. Section 127.1 of the *Code* sets out the escalating procedure to follow:

127.1 (1) An employee who believes on reasonable grounds that there has been a contravention of this Part or that there is likely to be an accident or injury to health arising out of, linked with or occurring in the course of employment shall, before exercising any other recourse available under this Part, except the rights conferred by sections 128, 129 and 132, make a complaint to the employee's supervisor.

(2) The employee and the supervisor shall try to resolve the complaint between themselves as soon as possible.

(3) The employee or the supervisor may refer an unresolved complaint to a chairperson of the work place committee or to the health and safety representative to be investigated jointly

(a) by an employee member and an employer member of the work place committee; or

(b) by the health and safety representative and a person designated by the employer.

(4) The persons who investigate the complaint shall inform the employee and the employer in writing, in the form and manner prescribed if any is prescribed, of the results of the investigation.

(5) The persons who investigate a complaint may make recommendations to the employer with respect to the situation that gave rise to the complaint, whether or not they conclude that the complaint is justified.

(6) If the persons who investigate the complaint conclude that the complaint is justified, the employer, on being informed of the results of the investigation, shall in writing and without delay inform the persons who investigated the complaint of how and when the employer will resolve the matter, and the employer shall resolve the matter accordingly.

(7) If the persons who investigate the complaint conclude that a danger exists as described in subsection 128(1), the employer shall, on receipt of a written notice, ensure that no employee use or operate the machine or thing, work in the place or perform the activity that constituted the danger until the situation is rectified.

(8) The employee or employer may refer a complaint that there has been a contravention of this Part to a health and safety officer in the following circumstances:



- (a) where the employer does not agree with the results of the investigation;
- (b) where the employer has failed to inform the persons who investigated the complaint of how and when the employer intends to resolve the matter or has failed to take action to resolve the matter; or
- (c) where the persons who investigated the complaint do not agree between themselves as to whether the complaint is justified.

(9) The health and safety officer shall investigate, or cause another health and safety officer to investigate, the complaint referred to the officer under subsection (8).

(10) On completion of the investigation, the health and safety officer

- (a) may issue directions to an employer or employee under subsection 145(1);
- (b) may, if in the officer's opinion it is appropriate, recommend that the employee and employer resolve the matter between themselves; or
- (c) shall, if the officer concludes that a danger exists as described in subsection 128(1), issue directions under subsection 145(2).

(11) For greater certainty, nothing in this section limits a health and safety officer's authority under section 145.

[32] If the internal system does not lead to a resolution, then section 127.1(8) sets out how an employee or employer may refer a complaint to a Health and Safety Officer. This is what Mr. Rathgeber did when he completed HRSDC's "Complaint Registration" form and alleged CN had not complied with section 135.1 of the *Code*.

[33] The essential point is to distinguish between reprisals over which the CIRB has jurisdiction and compliance issues that fall within a Health and Safety Officer's jurisdiction. An appeal procedure exists from Health and Safety Officer decisions (section 145.1), but this does not involve the CIRB in any way.

[34] Section 145(1) sets out some of the powers of a Health and Safety Officer, including the ability to issue directions if a contravention of Part II has occurred:

- 145.(1) A health and safety officer who is of the opinion that a provision of this Part is being contravened or has recently been contravened may direct the employer or employee concerned, or both, to
- (a) terminate the contravention within the time that the officer may specify; and
  - (b) take steps, as specified by the officer and within the time that the officer may specify, to ensure that the contravention does not continue or re-occur.

[35] A Health and Safety Officer may examine Mr. Rathgeber's complaint and determine that there is no contravention of section 135.1 and thus not issue a direction. But that is different from advising

a complainant like Mr. Rathgeber that HRSDC has no jurisdiction even to consider the issue and that the proper recourse is to the CIRB.

[36] To summarize, Health and Safety Officers deal initially with allegations of Part II contraventions. The Board only deals with reprisals with its limited regime created by sections 133 and 147. One matter could involve both a compliance issue and a reprisal complaint as described in *Tony Aker, supra*. However, the Board has no authority to police alleged Part II substantive contraventions. It is up to HRSDC to determine whether a contravention has taken place.

[37] The Board has considerable sympathy for Mr. Rathgeber's frustration with the process. Fortunately, Mr. Rathgeber advised during the CMC that CN and he had arrived at an understanding for his current and future Health and Safety Committee work. He would, however, like an answer to the Part II contravention he raised formally with HRSDC on September 17, 2009.

[38] For the reasons expressed in this decision, the Board must dismiss Mr. Rathgeber's complaint given that there is no allegation that CN engaged in any reprisal or disciplinary action.

Graham J. Clarke  
Vice-Chairperson