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Reasons for decision

Mr. Shawn Cahoon,

complainant,

and

Canadian National Railway Company,

respondent.

Board File: 27858-C

Neutral Citation: 2010 CIRB 548

November 9, 2010

The Canada Industrial Relations Board (the Board) 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).

Section 16.1 of the *Canada Labour Code (Part I - Industrial Relations)* 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 preliminary objection.

Parties' Representatives of Record

Mr. James L. Shields, for Mr. Cahoon;

Mr. Simon-Pierre Paquette, for Canadian National Railway Company.

I–Nature of the Objection

[1] The respondent employer, Canadian National Railway Company (CN), has asked the Board to dismiss a Part II safety complaint filed by Mr. Shawn Cahoon (Mr. Cahoon).

[2] Mr. Cahoon filed a complaint under section 133 of the *Code* alleging that CN’s termination of his employment constituted a violation of section 147:

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.

...

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.

[3] The Board has scheduled a hearing in Winnipeg, Manitoba, for November 17-18, 2010.

[4] Mr. Cahoon also contested his termination under the collective agreement between CN and his bargaining agent, the Teamsters Canada Rail Conference (TCRC). That matter has already been decided by the Canadian Railway Office of Arbitration & Dispute Resolution.

[5] On May 17, 2010, arbitrator Michel G. Picher determined that CN “did not have just cause for any discipline against Mr. Cahoon, as he did not engage in insubordination or disrespectful conduct” (page 8). Arbitrator Picher reinstated Mr. Cahoon with full compensation.

[6] CN argued that the Board should refuse to hear this safety case primarily on the basis that Arbitrator Picher's decision has rendered the matter moot. The parties filed extensive submissions, the last of which the Board received from CN on November 4, 2010.

[7] The Board has decided to reject the preliminary objection. The Board has expedited these reasons in order to assist the parties in either resolving or preparing fully for this case.

II—Analysis and Decision

[8] The Board has considered the parties' submissions. The matter will proceed for the following reasons.

[9] Firstly, Arbitrator Picher was dealing with a grievance under the collective agreement. He determined that CN had not demonstrated it had just cause to terminate Mr. Cahoon. His jurisdiction and reasoning flow from the specific collective agreement between CN and the TCRC. That decision was not a decision under Part II of the *Code*.

[10] Secondly, the Board in Part I of the *Code* has the power to refuse to determine a complaint that could be referred by the complainant to arbitration:

98. (3) The Board may refuse to determine any complaint made pursuant to section 97 in respect of a matter that, in the opinion of the Board, could be referred by the complainant pursuant to a collective agreement to an arbitrator or arbitration board.

[11] Part II of the *Code*, however, contains section 133(4) which prevents an employee from referring a safety complaint to arbitration:

133. (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.

[12] The *Code* prevents Mr. Cahoon from having his Part II complaint determined by arbitration or adjudication. He retains carriage of his safety complaint and can require a decision on the merits of the dispute.

[13] Thirdly, since Mr. Cahoon could not refer his complaint to arbitration or adjudication, and Arbitrator Picher only determined a grievance under a collective agreement, there has been no decision on Mr. Cahoon's allegation that CN retaliated against him for his alleged attempt to assert his Part II safety rights.

[14] Fourthly, while there can be no double compensation for the same event, the Board has the power to issue a declaration regarding a breach of Part II of the *Code*. Section 134 sets out some specific remedies the Board may award if it first finds a *Code* violation:

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.

[15] In addition, section 156 of the *Code* incorporates into Part II matters certain provisions from Part I:

156. (1) Despite subsection 14(1), the Chairperson or a Vice-Chairperson of the Board, or a member of the Board appointed under paragraph 9(2)(e), may dispose of any complaint made to the Board under this Part and, in relation to any complaint so made, that person

(a) has all the powers, rights and privileges that are conferred on the Board by this Act other than the power to make regulations under section 15; and

(b) is subject to all the obligations and limitations that are imposed on the Board by this Act.

(2) The provisions of Part I respecting orders and decisions of and proceedings before the Board under that Part apply in respect of all orders and decisions of and proceedings before the Board or any member thereof under this Part.

(emphasis added)

[16] For example, section 99(2) of the *Code* provides the Board with a broad remedial jurisdiction:

99. (2) For the purpose of ensuring the fulfilment of the objectives of this Part, the Board may, in respect of any contravention of or failure to comply with any provision to which subsection (1) applies and in addition to or in lieu of any other order that the Board is authorized to make under that subsection, by order, require an employer or a trade union to do or refrain from doing any thing that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of those objectives.

(emphasis added)

[17] In summary, Mr. Cahoon has filed a Part II complaint; its merits have not yet been adjudicated. The matter is not moot. This Board has the sole authority to determine Mr. Cahoon's Part II complaint.

[18] CN's concern about possible inconsistent findings of fact can be dealt with during the hearing. Legal principles, such as those relating to issue estoppel, have developed over time to deal with such challenges. That will be a matter for the parties to address during the presentation of their case.

[19] The preliminary objection is dismissed. While the Board encourages the parties to achieve a settlement themselves, in the event they are unable to do so, this matter will proceed as scheduled in Winnipeg on November 17-18, 2010.

Graham J. Clarke
Vice-Chairperson