Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Guy Plante,

complainant,

and

Trentway-Wagar Inc. and 3329003 Canada Inc.,

respondents.

Board Files: 28040-C, 28086-C, 28090-C
Neutral Citation: 2011 CIRB 582
April 21, 2011

The Canada Industrial Relations Board (the Board) was composed of Mr. Graham J. Clarke, Vice- Chairperson, and Messrs. André Lecavalier and Daniel Charbonneau, Members. Hearings were held in Montréal, Quebec, from February 9-11, 2011.

Appearances

Mr. Daniel Charest, for Mr. Guy Plante;
Ms. Louise Baillargeon and Mr. Philippe-André Tessier, for Trentway-Wagar Inc. and 3329003 Canada Inc.

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

I–Nature of the Complaints

[1] The Board was seized of three unfair labour practice (ULP) complaints filed by Mr. Guy Plante (Mr. Plante) under section 94 of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*). Mr. Plante was an employee of Trentway-Wagar Inc. (TWI) up until his termination on April 15, 2010. TWI operates an interprovincial bus transportation undertaking.

[2] On March 25, 2010, the Board received Mr. Plante's first ULP, which contested a 14-day suspension he had received for allegedly refusing work in March, 2010.

[3] On April 17, 2010, Mr. Plante filed a second ULP which contested his April 15, 2010 termination.

[4] On April 19, 2010, the Board received from Mr. Plante a third ULP which contested a one-day suspension he had received for January 25, 2010, also for an alleged work refusal.

[5] Mr. Plante alleged that his discipline resulted from his involvement with the Syndicat des travailleuses et travailleurs de Coach Canada - CSN (CSN). TWI, by contrast, argued that Mr. Plante had committed serious offences, given his position in the transportation industry, when he refused work from TWI's dispatch. In TWI's view, if coach drivers like Mr. Plante did not book time off in accordance with well-established procedures, then they were expected to be available when dispatch contacted them with their next driving assignment.

[6] TWI bore the burden of proof of demonstrating that its discipline of Mr. Plante arose for reasons other than his union activities. Mr. Plante had been involved in the CSN's organizing efforts and was its Secretary-Treasurer.

[7] The Board has concluded that TWI did not meet the burden imposed on it by the *Code*. Mr. Plante's union activities played a part in TWI's discipline. However, this conclusion does not mean that Mr. Plante's own conduct was blameless.

II–Facts

[8] Mr. Plante's ULP complaints are just the latest cases related to the CSN's June 22, 2009 certification application.

[9] A full description of events related to the CSN's organizing campaign at TWI can be found in *3329003 Canada Inc. and Trentway-Wagar Inc.*, 2010 CIRB 493 (RD 493), and *Trentway-Wagar Inc.*, 2010 CIRB 550.

[10] On October 14, 2009, the Board certified the CSN for a bargaining unit at TWI. A sale of business under the *Code* had occurred between 3329003 Canada Inc. and TWI following the CSN's filing of its certification application. For ease of reference, TWI alone will be referred to as Mr. Plante's employer.

[11] Despite the Board's certification of the CSN as bargaining agent, TWI decided to start deducting union dues from the employees in the CSN's bargaining unit, but remitted them to the Amalgamated Transit Union, Local 1624 (ATU). TWI also decided to start applying the ATU's collective agreement to the employees in the CSN's bargaining unit.

[12] These actions, among others, obliged the Board in RD 493 to issue an interim order confirming the CSN's status as the certified bargaining agent. RD 493 also required TWI and the ATU to refund the union dues that had been taken from the employees in the CSN's unit.

A–First Incident–Sunday, January 24, 2010 (Airport)

[13] Mr. Plante, who usually drove buses on charters for TWI, applied for other TWI work at the Montréal-Pierre Elliott Trudeau International Airport (Trudeau). The driving work at Trudeau generally involves driving shuttle buses between parking lots and the airport terminal.

[14] TWI trained Mr. Plante for one day and paid him. Mr. Plante worked his only airport shift on January 21, 2010.

[15] On Sunday, January 24, 2010, at approximately 18:30, a TWI dispatcher had a conversation with Mr. Plante about his upcoming assignment for Tuesday, January 26, 2010. Following their conversation, she wrote up this incident report:

> I called to confirm Guy on C8019 for Tuesday, he told me that he was nt going to do airport and he told whoever to scratch him off the list. I explained to Guy that he was dispatched corectly, he said again that he wasnt going to do Airport. I told him that it was going to be a work refusal, he started to complain about having trouble since he has had to deal with us I explained that was something he would have to talk to his management about but right now he is refusing work. He said fine ...
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> [*sic*]

[16] Mr. Plante testified that after he had done his airport shift on January 21, 2010, and after TWI attempted to assign him on a more permanent basis to the Trudeau work, he spoke with the manager of TWI's operations at Trudeau, Mr. Richard Lebeau. Mr. Plante claimed he had only signed up to do relief driving work, as opposed to a permanent assignment at Trudeau.

[17] Mr. Plante suggested that Mr. Lebeau had agreed to take him off the permanent assignment. That assignment was ultimately given to another employee.

[18] In cross-examination, Mr. Plante admitted that his ULP complaint never mentioned any conversations with Mr. Lebeau. He further agreed that during a meeting on January 25, 2010 to discuss the incident with the Montreal General Manager, Mr. Daniel Thibault, he had never mentioned any conversation with Mr. Lebeau.

[19] Mr. Plante also testified that Mr. Lebeau had told him that he would get back to him on his request.

[20] TWI, and specifically Mr. Thibault, met with Mr. Plante on January 25, 2010, to discuss the January 24 incident. At this meeting, Mr. Thibault informed Mr. Plante that he could be represented by the ATU representatives who were present. Representatives from the CSN were only allowed to

attend as observers.

[21] Also on January 25, 2010, the CSN sent Mr. Thibault a letter containing a list of the CSN's executive and representatives. That letter indicated that Mr. Plante was a member of the executive and held the position of Secretary-Treasurer.

[22] While the CSN's letter naming its representatives and TWI's investigation meeting with Mr. Plante about the airport incident both occurred on January 25, 2010, the Board is satisfied that the two events were not related.

[23] TWI described its process when disciplining employees. If there is a work refusal, then Step 1 is to pull the employee out of service. Step 2 involves obtaining the employee's version of events. Step 3 involves a discussion among TWI managers, usually, if it involves a Montreal employee, involving Mr. Thibault, Mr. Terry Huizenga and Mr. John Crowley. Step 4 involves the decision on penalty, if any. Step 5 involves advising the employee formally of the sanction.

[24] TWI's witnesses testified that three work refusals would result in termination of employment.

B–Second incident, March 9, 2010 (Taking Son Shopping)

[25] On Tuesday, March 9, 2010, at approximately 14:55, a TWI dispatcher, Mr. Andrew Welch, called Mr. Plante to give him his assigned work for March 10, 2010. Mr. Plante refused the work, a position that obliged Mr. Welch to draft an incident report:

> I called Guy to inform him of this piece of work for Wednesday[.] He refused the work stating he had to take his son shopping on Wednesday. I checked with Terry and then told Guy that he was a full time driver and is showing available for the 10th and this would be considered a work refusal. He said that was fine and would not be working.

[26] Mr. Welch knew from past conversations that Mr. Plante was helping to take care of his ill mother. Mr. Plante had advised Mr. Welch of this situation at some earlier time after Mr. Thibault suggested he do so.

[27] Mr. Plante testified that Mr. Welch had been abrupt when Mr. Plante said that he had to take his son shopping and had put Mr. Plante on hold in order to speak with Mr. Huizenga. Mr. Plante indicated that Mr. Welch's abruptness prevented him from adding that he also had to take care of certain tasks relating to his mother.

[28] On or about March 16, 2010, Mr. Thibault met with Mr. Plante in the company of his CSN representatives. Mr. Plante explained his March 9, 2010 refusal by indicating that he had family obligations, specifically involving his mother.

[29] Mr. Plante later called Peterborough about the March 16, 2010 meeting. Dispatch transferred him to Mr. Huizenga. Mr. Huizenga told Mr. Plante that he had been fired. Mr. Plante asked to have the reasons explained to him in French. Mr. Huizenga then contacted Mr. Thibault, who came on the line and confirmed to Mr. Plante that he had been fired.

[30] Mr. Thibault learned shortly thereafter that in fact the penalty had been reduced to a 14-day suspension. Mr. Thibault left Mr. Plante a phone message on March 16, 2010 confirming that he would be suspended from March 10-25, 2010.

C–Third incident - April, 2010 (Work Refusal and Client Complaint)

[31] Another TWI dispatcher, Ms. Dawn Wilmshurst, testified about two conversations she had with Mr. Plante in April, 2010.

[32] On Saturday, April 10, 2010, she testified she had phoned Mr. Plante about his April 12, 2010 work assignment. Mr. Plante indicated that he was not available. Ms. Wilmshurst reminded him of the procedure he should follow in order to avoid an allegation he was refusing to work. Ms. Wilmshurst assigned the April 12 work to another driver and did not prepare an incident report.

[33] Ms. Wilmshurst testified that Mr. Plante was familiar with the procedure for booking time off. He had followed it in the past without incident.

[34] On Monday, April 12, 2010, at 12:15 a.m., Ms. Wilmshurst spoke to Mr. Plante again, this time about his assignment for Tuesday, April 13.

[35] Mr. Plante, who had told her on April 10 he was not free for both April 12 and April 13, said that he could not work due to family business. Ms. Wilmshurst drafted the following incident report:

> I spoke with Guy on 100410 Guy was showing as an available driver for 120410. Guy said that he was unable to work on the 12th because his mother was in the hospital and he had to see some nursing homes and speak to a social worker to begin transitioning his mother into a nursing home. I asked him if he had spoken to Terry Huizinga or Daniel Thibault to request this day off, he said that he had not.
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> I spoke to Guy again on 120410 to confirm him on his work for 130410. Guy advised that he had "family business" and could not work on 130410. I again advised that Guy did not have an approved day off. I again asked Guy if he had spoke to Terry or Dan regarding this day off? Guy advised that he had not. Guy advised that he had not signed the days off sheets, I reminded him that if he does not sign the days off sheets he cannot be guaranteed a day off. Guy advised that "I'm not signing anything anymore".
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> [*sic*]

[36] On April 15, 2010, Mr. Thibault met with Mr. Plante and gave him a termination letter. That letter was dated April 13. Mr. Plante was accompanied by the CSN's local President.

[37] Mr. Thibault testified that he had not been involved in the discussions regarding the penalty for Mr. Plante. Mr. Thibault had not met with Mr. Plante to discuss the circumstances surrounding the April, 2010 work refusal incident. The termination letter also referenced a client complaint about Mr. Plante's alleged actions in April, 2010 when driving a charter from Montréal into Ontario.

[38] Mr. Thibault, when asked in cross-examination why he had not met with Mr. Plante to get his version of events, suggested that Mr. Plante could have given his explanation of the situation at the meeting they had on April 15. Mr. Plante, along with a CSN representative, had taken the termination letter and abruptly left the April 15 meeting.

[39] Mr. Thibault indicated that, other than a short e-mail from the client setting out the complaint involving Mr. Plante, there had been no further investigation of the events.

[40] Mr. Plante denied anything unacceptable had occurred when he gave his version of events, for

the first time, at the Board's hearing.

III–Law

A–Reverse Onus Provision: Section 98(4):

[41] The ULP complaints made reference, *inter alia*, to section 94(3) of the *Code*:

> 94.(3) No employer or person acting on behalf of an employer shall
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> (*a*) refuse to employ or to continue to employ or suspend, 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 ...

[42] The complaints did not otherwise set out which specific subsections of section 94 of the *Code* were in issue.

[43] The parties did not dispute that the ULP complaints raised section 94(3) and that TWI therefore bore the burden of proof pursuant to section 98(4) of the *Code*.

> 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 an 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.

[44] In *Federal Express Canada Ltd.*, 2010 CIRB 519, the Board recently discussed a respondent employer's obligation when dealing with the reverse onus provision:

> [38] Under the reverse onus provision at section 98(4), the Board considers the respondent employer's explanation of the situation. The Board must be satisfied that no anti-union animus motivated the employer's actions. A respondent's burden under section 98(4) was recently summarized at paragraph 97 in *Rousseau (Re)* 2007 CIRB 393:
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> > ...the burden is on the employer to refute, on a balance of probabilities, the allegations giving rise to the complaint, namely that it was aware of the complainant's union activities and that those activities were a factor in its decision to terminate his employment.

> [39] The burden of proof on a balance of probabilities remains constant; it does not increase in difficulty based upon the severity of the issues at stake in the case. The Supreme Court of Canada, in *F.H.* v. *McDougall*, [2008] S.C.C. 53 recently confirmed the civil case standard:
>
> > [49] In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.
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> [40] Similarly, the burden remains with the respondent employer. It does not shift to the complainant. However, evidence from the complainant is often crucial in allowing the Board to examine the context and decide whether the employer has met its burden.
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> [41] There will seldom be direct evidence of anti-union animus. Rather, the Board must decide, based on the overall context, whether anti-union animus played even a small part in an employer's actions.

[45] The Board agrees with TWI's reference to Mr. Justice Adams' summary in *Canadian Labour Law*, 2nd Edition, Volume 2 (Aurora: Canada Law Book, 2010) of the general practice for these types of unfair labour practice complaints:

> 10.130 Canadian statutory provisions, barring discharge or other discriminatory treatment "because" or "for the reason that" employees are engaged in legitimate union activities, have been interpreted by courts as requiring scrutiny to see if "membership in a trade union was present to the mind of the employer in his decision to dismiss, either as a main reason or one incidental to it, or as one of many reasons regardless of priority" for the dismissal. Improper motive does not have to be the dominant motive. Since employers are not likely to confess to an anti-union animus, tribunals have to rely on circumstantial evidence to draw inferences about employer motivation. These considerations may include evidence of the manner of the discharge and the credibility of witnesses, as well as "the existence of trade union activity and the employer's knowledge of it, unusual or atypical conduct by the employer following upon his knowledge of trade union activity, previous anti-union conduct and any other 'peculiarities'", such as discipline disproportionate to the offence alleged.
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> (emphasis added)

[46] The Board considered the circumstantial evidence in this case and drew inferences whether Mr. Plante's union activities played a role in TWI's decision. The Board agrees with TWI's proposition that involvement in union activities does not prevent an employee from being held responsible for the consequences of his or her actions:

> Although Sandhu was clearly involved in union activity, to the knowledge of the employer, that union activity, in and of itself, does not serve to protect him from dismissal or discipline where such action is proven, by the employer, to have been taken without taint of anti-union animus. Employees cannot use the umbrella of the unfair labour practice provisions of the *Code* to protect themselves against disciplinary measures which are the result of their own misconduct ...

(*D.H.L. International Express Ltd.* (1995), 99 di 126; and 28 CLRBR (2d) 297 (CLRB no. 1147), pages 132; and 303–304)

B–Disclosure of Expected Evidence

[47] The *Canada Industrial Board's Regulations, 2001* (*Regulations),* at section 27(1)(b) require parties to provide witness will-say statements:

> 27.(1) A party that intends to present evidence must file with the Board six copies of the following:
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> ...
>
> (*b*) a list of witnesses expected to be called that includes their names, addresses and occupations, along with a summary of the information expected to be provided on issues raised in the application, response or reply.
>
> (emphasis added)

[48] The *Regulations* set out the possible consequences if a party fails to comply:

> 27.(4) If a party does not comply with subsections (1), (2) or (3), the Board may refuse to consider any document or hear any witness tendered at the hearing.

[49] This case demonstrated certain procedural challenges which occur when both parties do not prepare will-say statements. A one-sentence will-say statement indicating the witness will testify about events raised in the pleadings does not meet the *Regulations*' requirements.

[50] In this case, for the airport incident, Mr. Plante alleged that Mr. Lebeau had advised him that he would no longer be assigned Trudeau work.

[51] TWI decided not to call Mr. Lebeau in reply and was content with Mr. Plante's evidence in cross-examination to the effect that Mr. Lebeau said he would check Mr. Plante's request with Mr. Thibault.

[52] TWI, in its argument, suggested that Mr. Plante had never raised previously any conversation with Mr. Lebeau, whether in his January 25, 2010 interview, his ULP complaint or a will-say statement.

[53] The Board has adopted an explicit policy of both documentary and evidentiary pre-hearing production. This encourages the parties to explore possible resolutions after putting all their cards on the table. It also allows the Board to prepare thoroughly for its oral hearings.

[54] There is a labour law practice, unique to Quebec, which allows a party that has the burden of proof to call the complainant or grievor as its first witness. Unlike in the Common Law provinces, the party with the burden of proof is not bound by the complainant's testimony. But it does provide a form of discovery of the other side's facts.

[55] The Board has respected this long-standing Quebec practice in the past. The complainant was not called first in this case. However, even if he had been, that process is not a substitute for complying with the Board's *Regulations* concerning will-say statements for each and every witness.

[56] The *Regulations* are designed to avoid evidentiary surprises. This not only ensures a fair hearing, but also allows the Board to conduct its oral hearings efficiently and avoid time-wasting adjournments.

IV–Analysis and Decision

[57] The Board has concluded that, although Mr. Plante was not always acting in TWI's or his own best interest, anti-union animus played a part in TWI's apparent rush to terminate him. Some of TWI's own actions provoked some of Mr. Plante's ill-considered responses.

[58] It was TWI which chose to ignore the Board's certification order and start deducting dues from the CSN's bargaining unit members and remitting them to the ATU. It was TWI, when meeting with Mr. Plante about the alleged Trudeau work refusal, that told Mr. Plante his CSN colleagues could attend only as observers and that Mr. Plante would have to use the services of ATU representatives.

[59] While these actions do not give Mr. Plante's *carte blanche* to ignore his employment responsibilities, they do add some context to the state of the situation at that time.

[60] The circumstantial evidence demonstrated that TWI was in a particular hurry to terminate Mr. Plante. TWI is a unionized employer and has longstanding collective bargaining relationship in Ontario with the ATU.

[61] Given TWI's level of experience, the rush to terminate Mr. Plante, despite Mr. Plante's ill-advised acts, deviated not only from TWI's norms, but also from those generally seen in labour relations.

[62] For the one-day suspension, the Board is satisfied that Mr. Plante may not have been as helpful as he could have been when contacted by TWI dispatch. Nonetheless, Mr. Plante appears to have discussed the situation at Trudeau with Mr. Lebeau. The parties do not dispute a conversation took place. Mr. Plante understood that he had taken the Trudeau position solely in order to be a relief driver. He did not want to be a regularly assigned driver to Trudeau since he usually drove charters for TWI.

[63] Mr. Lebeau was not called to dispute the essence of his conversations with Mr. Plante or the original airport posting.

[64] For the second incident, the Board is satisfied that Mr. Plante had ample time to mention his mother's needs to Mr. Welch if he had desired to do so. The Board found Mr. Welch to be a credible, forthright witness. He was never cross-examined about allegedly giving insufficient time to Mr. Plante to fully explain why he could not work on the assigned day.

[65] Indeed, Mr. Welch, who knew of Mr. Plante's mother's illness, and had even written a note about it into the dispatch system, had come back onto the phone to advise Mr. Plante that the shopping explanation would be a work refusal. The Board finds it highly unlikely that Mr. Plante would not have mentioned his mother, if he had wanted to, in the face of such a position. Moreover,

it is difficult to understand that Mr. Plante would have first mentioned shopping with his son, if he also had duties related to his ill mother.

[66] However, despite Mr. Plante's questionable conduct, TWI failed to follow the disciplinary procedure that it said it applied to work refusals.

[67] TWI seemed to be in a hurry to terminate Mr. Plante for this second alleged work refusal. TWI is an experienced unionized employer that regularly works with trade unions. Its decision to advise Mr. Plante, the CSN's Secretary-Treasurer,z that he was terminated, only to change that evaluation a mere few hours thereafter, is the type of conduct that raises questions for the Board as it weighs the circumstantial evidence.

[68] The Board can only conclude that TWI had initially decided to terminate Mr. Plante after the second refusal, despite its standard process that applied a three-strike rule for work refusals. The later reduction in the penalty does not impact the Board's conclusion that Mr. Plante's CSN position was a factor being considered.

[69] Most importantly for the Board, TWI's rush to get rid of Mr. Plante with regard to the final alleged work refusal and client complaint prevented TWI from meeting its burden under the *Code*.

[70] The Board accepted the testimony of Ms. Wilmshurst that she had advised Mr. Plante on April 10, 2010 that he should contact either Mr. Huizenga or Mr. Thibault if he could not work. Exceptionally, she did not assign him to his scheduled April 12 work after that conversation. When she phoned him on April 12, 2010 to confirm the April 13 work, Mr. Plante still had not contacted anyone or asked to have that day off. He just said he could not work.

[71] Despite Mr. Plante's provocative behaviour, TWI totally failed to follow its own discipline process.

[72] First of all, Mr. Thibault never spoke with Mr. Plante to get his version of events. The Board

accepts that TWI's investigation might not have had to be extensive, if it had done one, given the facts. However, TWI's own process called for such a meeting.

[73] But it is far beyond labour relations norms that a unionized employer would not want to meet with an employee in order to investigate the circumstances of a vague customer complaint. Indeed, the client complaint was limited to an e-mail; there was no follow-up by TWI about the alleged events. The client complaint information was simply included in the termination letter.

[74] The first time Mr. Plante ever gave his version of events was at the Board's hearing.

[75] The Board also had trouble accepting Mr. Thibault's suggestion that Mr. Plante received a fair opportunity to give his explanation during the April 15, 2010 meeting at which TWI gave him his termination letter. That letter was dated April 13, 2010, just one day after the events. A lack of interest in any employee explanation is the type of circumstantial evidence that suggests to the Board the decision was tainted, at least in part, by anti-union animus.

V–Conclusion

[76] Based on the above, the Board has decided that TWI did not meet the burden imposed by section 98(4) of the *Code*. It failed to demonstrate that its discipline of Mr. Plante was not tainted in some way by the fact that he was an active member of the CSN and on its executive.

[77] The rush to terminate Mr. Plante, even if he was not blameless, was so expeditious that the Board could come to no other conclusion, but that his involvement with the CSN played a part in the decision to terminate him.

[78] The Board therefore orders TWI to reinstate Mr. Plante in his employment within 10 days of receipt of this decision.

[79] The parties will have 30 days to agree on compensation owing to Mr. Plante, pursuant to sections 99(1)(*c*)(ii) and 99(2) of the *Code*. Mr. Plante's conduct is one factor relevant to this

determination, as the Board has commented upon in numerous past decisions. The Board's Industrial Relations Officer remains available to assist the parties.

[80] Should the parties not agree, they will have 21 days following the above 30-day period to provide the Board with their written submissions about appropriate compensation. The Board will then establish the amount.

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

Graham J. Clarke
Vice-Chairperson

André Lecavalier
Member

Daniel Charbonneau
Member