Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

André Lévesque,

complainant,

and

Trentway-Wagar Inc. & 3329003 Canada Inc.,

respondents.

Board File: 28321-C
Neutral Citation: 2011 CIRB **562**
January 10, 2011

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

Counsel of Record

Mr. Daniel Charest, for Mr. André Lévesque;
Mr. Philippe-André Tessier, for Trentway-Wagar Inc. and 3229003 Canada Inc.

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

I–Nature of the Complaint

[1] 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 complaint without an oral hearing.

[2] On August 10, 2010, Mr. André Lévesque (Mr. Lévesque) filed an unfair labour practice (ULP) complaint alleging that Trentway-Wagar Inc./3229003 Canada Inc. (TWI) had violated the *Code* by preventing him from carrying out his duties as the President of the Syndicat des travailleuses et travailleurs de Coach Canada - CSN (CSN).

[3] TWI took the position that it had terminated Mr. Lévesque's employment and thus he had no right to be on its property, even to assist bargaining unit members with their affairs. That termination, as well as a host of other ULP complaints involving Mr. Lévesque, are currently before the Board. The Board has already heard significant evidence, and will resume its oral hearing in January, 2011.

[4] The Board has decided to uphold Mr. Lévesque's complaint and orders that he be allowed to carry out his duties as President of the Local.

II–Facts

[5] The history of the CSN's certification at TWI has been described in several recent decisions including *3329003 Canada Inc. and Trentway-Wagar Inc.*, 2010 CIRB 493; and *Trentway-Wagar Inc.*, 2010 CIRB 550.

[6] Mr. Lévesque was instrumental in the CSN's certification campaign. The Board certified the CSN on October 14, 2009 (order no. 9727-U). In November, 2009, the members of the bargaining unit elected Mr. Lévesque as their President. Despite the various ULP complaints between Mr. Lévesque and TWI, he continued to represent members of the bargaining unit.

[7] However, in August, 2010, TWI took the position that Mr. Lévesque would no longer be allowed on its property. TWI took the position that only active employees could represent bargaining unit members.

[8] TWI argued that it had no legal obligation to allow a non-employee to represent bargaining unit members on its premises. TWI pleaded: "In light of the fact that persons that are not employees are not permitted on the premises of the Respondents, the Complainant was therefore validly refused access to the premises".

[9] There was no suggestion in the parties' pleadings that Mr. Lévesque had acted in any way inappropriately on TWI's premises when he attended to represent bargaining unit members. TWI seemingly decided it was no longer obligated to allow Mr. Lévesque, a former employee who is contesting his termination before the Board, to carry out his union duties.

III–Analysis and Decision

[10] The Board is not required to hold an oral hearing in every case:

> 16.1 The Board may decide any matter before it without holding an oral hearing.

[11] The Board is entitled to treat the parties' pleadings as evidence and decide the case accordingly: *NAV Canada* v. *International Brotherhood of Electrical Workers, Local 2228*, 2001 FCA 30:

> [11] The scheme of the legislation and Regulations indicates that the Board will decide on the basis of the material filed unless it decides to hold an oral hearing or specifically requests additional evidence. No authority was provided to the Court for the proposition that the Board cannot do so, or that in order to treat the material filed as evidence, the Board must give notice to the parties of this intention.

[12] This principle applies equally to ULP complaints: *Federal Express Canada Ltd.*, 2010 CIRB 519. While the odds of holding an oral hearing in a ULP complaint may be higher, since significant factual or credibility issues often exist, ULP cases can still be decided on the pleadings alone.

[13] Because an oral hearing is not required in every case, the parties have an obligation to provide the Board with full submissions, not only about the facts, but also about the applicable legal principles: *Canadian National Railway Company*, 2009 CIRB 461. The Board will consider the pleadings when deciding whether to hold an oral hearing. In this case, nothing pleaded persuaded the Board that an oral hearing would serve any purpose.

[14] Based on the parties' submissions, the Board must decide whether an employer can prevent a union President from representing his members following his termination of employment.

[15] Neither party referred with any precision to the applicable *Code* provisions, other than a general reference to sections 94 and 97. It is not apparent to the Board whether the CSN is relying on section 94(1) or section 94(3) or both.

[16] This is not an academic issue given section 98(4) of the *Code* which reverses the burden of proof for some, but not all, ULPs:

> 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.

[17] Regardless of which subsection of section 94 is in issue, the Board has determined that a refusal to allow a union President to represent his members, in the absence of any allegation whatsoever that that right has somehow been abused or misused, interferes inappropriately with a new bargaining agent's activities.

[18] The negative effect of employees being denied access to the assistance of their elected President far outweighs the right, in other circumstances, of an employer to prohibit non-employees from entering its premises. This is especially the case where Mr. Lévesque's status remains an ongoing issue before the Board.

[19] The *Code* expressly preserves "employee" status for individuals when there are disputes before the Board:

> 3. (2) No person ceases to be an employee within the meaning of this Part by reason only of their ceasing to work as the result of a lockout or strike or by reason only of their dismissal contrary to this Part.

[20] A strict view of who is an "employee" under Civil or Common Law principles must be attenuated with reference to labour law principles.

[21] More importantly, a bargaining agent is particularly vulnerable immediately following certification. The *Code* contains various provisions to ensure the respect of its rights and obligations.

[22] For example, during the time it takes to negotiate a first collective agreement, section 36.1 of the *Code* provides a just cause protection for bargaining unit members:

> 36.1 (1) During the period that begins on the date of certification and ends on the date on which a first collective agreement is entered into, the employer must not dismiss or discipline an employee in the affected bargaining unit without just cause.
>
> (2) Where a disagreement relating to the dismissal or discipline of an employee during the period referred to in subsection (1) arises between the employer and the bargaining agent,
>
> (a) the bargaining agent may submit the disagreement to an arbitrator for final settlement as if it were a difference; and
>
> (b) sections 57 to 66 apply, with the modifications that the circumstances require, to the disagreement.

[23] Bargaining unit members need the assistance of their elected President, or a delegate, when they exercise their newly acquired rights under the *Code*.

[24] The *Code* also protects the bargaining agent by prohibiting undue interference in its legitimate activities:

> 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;

[25] This Board's predecessor has already dealt with a similar situation and found that union representatives do not have to be employees to assist bargaining unit members:

> We agree wholeheartedly with those statements and more specifically that section 94(1)(a) is **directed at the protection of the entity** rather than individual basic freedoms under section 8(1). These provisions do not contemplate that union administration or that the representation of employees by a trade union will be restricted to employees under the Code. The reality of the trade union movement is that a great number of union representatives are employees of the trade union rather than employees in bargaining units employed by employers under the Code. In this case we view Messrs. Metcalfe and Vandonk as elected union representatives of the trade union as an entity which is protected by section 94(1)(a) of the Code rather than employees who are exercising their rights and basic freedoms under section 8(1) to participate in the lawful activities of the trade union of their choice. It is not necessary to be employees to receive the protection offered trade union representation by section 94(1)(a)...
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> (*Canada Post Corporation* (1989), 79 di 122; and 7 CLRBR (2d) 245 (CLRB no. 772); pages 127-128 and page 250; emphasis in original)

[26] TWI put forward no evidence that Mr. Lévesque ever acted unprofessionally; he simply sought to represent his members as the elected President of the union. TWI's sudden decision to deny him access, despite allowing it previously, on the premise that he was no longer an employee, constitutes clear interference in the new bargaining agent's activities.

[27] The Board accordingly allows Mr. Lévesque's complaint.

[28] The Board hereby orders that TWI allow Mr. Lévesque to represent bargaining unit members. This decision is premised on the fact, which was not contested, that Mr. Lévesque will continue to conduct himself in a respectful and professional manner when conducting his representational duties on TWI's property.

[29] If the parties require a formal Board order, they are jointly to prepare a draft order for the Board's consideration.

[30] The Board will shortly resume its oral hearing into Mr. Lévesque's other ULP matters, unless the parties resolve those matters in the interim.

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

Graham J. Clarke
Vice-Chairperson

Patrick J. Heinke
Member

Daniel Charbonneau
Member