Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Bell Mobility Inc.,

complainant,

and

Communications, Energy and Paperworkers Union of Canada,

respondent.

Board File: 28361-C
Neutral Citation: 2011 CIRB 579
April 18, 2011

The Canada Industrial Relations Board (the Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. John Bowman and David P. Olsen, Members.

Counsel of Record

Mr. Israel Chafetz, Q.C., and Ms. Mireille Bergeron, for Bell Mobility Inc.;
Mr. Jesse M. Nyman, for the Communications, Energy and Paperworkers Union of Canada.

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 September 8, 2010, the Board received from Bell Mobility Inc. (BMI) an unfair labour practice (ULP) complaint against the Communications, Energy and Paperworkers Union of Canada (CEP).

[3] In that complaint, BMI alleged that the CEP had engaged in a form of coercion and intimidation in violation of section 96 of the *Code* by allegedly failing to collect $5.00 from certain employees who had signed its membership cards.

[4] BMI's complaint had included an appendix with the names of 10 employees, but asked the Board for direction prior to giving the appendix to the CEP.

[5] The CEP requested the appendix from BMI's complaint in order to allow it to file its response to the ULP.

[6] By letter dated February 21, 2011, the Board requested that BMI provide the CEP with the appendix to its complaint and set up a time schedule for the completion of pleadings.

[7] The Board has now considered the parties' submissions.

[8] The Board has concluded, even assuming BMI's allegations to be true, which the CEP expressly denied, that the facts as disclosed do not constitute a violation of section 96 of the *Code*.

[9] The Board has nonetheless ensured that an Industrial Relations Officer (IRO) considered BMI's concerns when conducting the required confidential investigation into membership evidence. The

Board will be considering that investigation as part of its process in a related certification application.

[10] This decision sets out the Board's reasons.

II–Facts and Arguments

[11] In BMI's September 8, 2010 complaint, it alleged that at least 10 employees signed cards without paying the CEP the requisite $5.00 membership fee.

[12] BMI filed its complaint before the CEP had filed any certification application with the Board.

[13] On September 13, 2010, the Board received from the CEP a ULP complaint (file 28365-C). That ULP alleged, *inter alia*, that certain BMI actions had had a chilling effect on its organizing drive.

[14] The CEP filed a certification application on October 7, 2010 (file 28412-C). That certification application also contained a request for automatic certification pursuant to section 99.1 of the *Code*.

[15] This decision deals only with BMI's ULP complaint. Nonetheless, the existence of the CEP's certification application and its own ULP complaint provide context.

[16] BMI argued at paragraph 10 of its ULP how the alleged membership issues constituted coercion and intimidation under section 96 of the *Code*:

> (10) It is a coercive act for a trade union to engage in a knowingly improper organizing strategy for the purpose of becoming the bargaining agent. It is coercive and intimidating to allow an aura of support to permeate a group of employees knowing that support is bogus. Engaging in such acts puts into question the entire organization campaign as employees may be signing on the false pretense that others have properly signed cards in support which in fact is wrong.

[17] In the CEP's March 7, 2011 response, it argued, *inter alia*, that BMI's complaint did not raise a *prima facie* case, and that BMI did not have standing to bring the complaint.

[18] The CEP argued that the complaint failed to plead any facts which would support BMI's conclusions. For example, no facts were pleaded that anyone on behalf of the CEP who solicited a card told employees about its level of support. Similarly, the CEP alleged the complaint contained no information about any employee's perceived level of support for the CEP.

[19] The CEP argued further that it is not "intimidation or coercion" for a trade union to convey the idea to employees that it has substantial support, even if it does not.

[20] The CEP did not concede that this occurred, but raised the point solely for the sake of argument.

[21] The CEP argued further at paragraph 26 of its response that intimidation and coercion require some type of threat or force:

> 26. The CEP submits that intimidation or coercion requires a loss of the element of free choice. It effectively requires an action that is designed to force someone to do something they otherwise would not and that has the effect of compelling the person to do so. It requires a threat or some force.

[22] The CEP argued that the complaint contained no allegations that any employee did or would suffer consequences if they signed or refused to sign a membership card.

[23] The CEP noted that section 31(1)(b) of the *Canada Industrial Relations Board Regulations, 2001* (the *Regulations*) is not a provision that can be the subject of a complaint under section 97 of the *Code*.

[24] More fundamentally, the CEP argued that BMI had no standing to file a complaint on behalf of other persons, namely employees, concerning the CEP's membership evidence. It also noted that no employee had authorized BMI to bring the complaint on his or her behalf.

[25] In its March 17, 2011 reply, BMI reiterated its concerns about the CEP's membership evidence and stated, *inter alia*, at paragraph 8:

> ... It is coercive in respect to the employee being solicited. It gives a false impression of support for the Union without the necessary financial commitment. It is deceptive as the CIRB relies on the membership

> cards. It is an improper tactic in furtherance of an application for certification. The fact that we found 10 cards in a group of 1400 raises the question how many more invalid cards exist. ...

III–Issues

[26] BMI's complaint raises two issues:

A. Do BMI's allegations establish a violation of section 96?

B. How should the Board treat BMI's concerns regarding membership evidence?

IV–Relevant *Code* Sections

[27] Section 97(1) of the *Code* establishes those sections for which a ULP complaint may be filed with the Board:

> 97.(1) Subject to subsections (2) to (5), any person or organization may make a complaint in writing to the Board that
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> (*a*) an employer, a person acting on behalf of an employer, a trade union, a person acting on behalf of a trade union or an employee has contravened or failed to comply with subsection 24(4) or 34(6) or section 37, 47.3, 50, 69, 87.5 or 87.6, subsection 87.7(2) or section 94 or 95; or
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> (*b*) any person has failed to comply with section 96.

[28] Section 96 of the *Code* contains a general prohibition concerning intimidation or coercion:

> 96. No person shall seek by intimidation or coercion to compel a person to become or refrain from becoming or to cease to be a member of a trade union.

[29] In the *Regulations*, section 31(1) concerns the membership evidence the Board may accept in a certification application:

> 31.(1) In any application relating to bargaining rights, the Board may accept as evidence of membership in a trade union evidence that a person
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> (*a*) has signed an application for membership in the trade union; and
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> (*b*) has paid at least five dollars to the trade union for or within the six-month period immediately before the date on which the application was filed.

[30] Section 35 of the *Regulations* concerns the confidentiality of membership evidence:

> 35. The Board shall not disclose to anyone evidence that could reveal membership in a trade union, opposition to the certification of a trade union or the wish of any employee to be represented by or not to be represented by a trade union, unless the disclosure would be in furtherance of the objectives of the *Code*.

V–Analysis and Decision

A–Do BMI's allegations establish a violation of section 96?

[31] Upon a review of the parties' submissions, it is clear to the Board that the dispute is more one about alleged irregularities in membership evidence, as opposed to a situation involving intimidation or coercion.

[32] The Board has not been convinced by BMI's submissions that, even if the Board were to accept them to be true, that they would constitute intimidation or coercion for the purposes of section 96 of the *Code*.

[33] The alleged actions might be relevant to the Board's consideration of the certification application in file 28412-C, but the Board agrees with the CEP that the alleged irregular membership evidence does not constitute, in and of itself, intimidation or coercion.

[34] The Board agrees that there is no specific allegation about how an employee had been intimidated or coerced. Even if there were, an allegation that an employee might have been misled during an organizing campaign, a suggestion that the CEP expressly denied, does not constitute intimidation or coercion under section 96 of the *Code*.

[35] In *TD Canada Trust* v. *United Steel*, 2007 FCA 285, the Board had considered more particularised allegations of intimidation or coercion than exist in the instant case. The Federal Court of Appeal stated the following about the Board's investigation of the allegations and conclusion:

> [2] Two issues of natural justice that were raised by counsel for TD and counsel for the seven employees deserve consideration. The first contention was that the investigation undertaken on behalf of the Board into allegations of intimidation and coercion by union representatives was insufficient and procedurally unfair, amounting to a failure to investigate. In my view, this ground cannot succeed.
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> [3] The intimidation allegations made by the employees complained about unannounced evening visits by union representatives to their homes. These visitors were persistent and sometimes stayed beyond their welcome. The investigator found this conduct not to be serious enough to amount to intimidation or coercion. While perhaps not as thorough an investigation as the applicants would have liked, the investigator did interview three of the seven complainants before reporting to the Board, partially in confidence, as is customary to protect the employees. None of the complainants alleged that they signed membership cards as a result of any intimidation, although the only one who did sign indicated that afterwards she was sorry she did so. There was no allegation of violence or threats of violence. There was merely persistent, perhaps overly enthusiastic largely unsuccessful attempts at persuasion. The Board is entitled to considerable deference in procedural matters. (*Telus Communications* v. *Telecommunications Workers Union*, [2005] F.C.J. No. 1253) It is largely the master of its own procedure, which should not be examined under a microscope. There is no basis for finding any denial of natural justice on this ground.

[36] The Board has also considered the decision from the Ontario Labour Relations Board (OLRB) in *Atlas Specialty Steels*, [1991] OLRB Reports June 728, and agrees that intimidation and coercion require more than campaign promises:

> [12] The meaning of "intimidation or coercion" within the context of section 70 has been considered in a large number of prior Board decisions... In order for there to be even an arguable case for a breach of section 70, there must be intimidation or coercion of a sort which seeks to compel a person, amongst other things, to refrain from exercising any of the rights they might enjoy under the Act. There must be some force or threatened force, whether of a physical or non-physical nature. ...

[37] The Board agrees with the sentiments expressed by the OLRB and finds that, even accepting BMI's allegations, there is no evidence of intimidation or coercion in this case.

[38] As a result, the Board dismisses BMI's section 96 complaint.

B–How should the Board treat BMI's concerns regarding membership evidence?

[39] In their submissions, both parties relied on to the Board's reconsideration decision in *TD Canada Trust in the City of Greater Sudbury, Ontario*, 2006 CIRB 363 (*TD 363*). This was one of the two decisions before the Court in *TD Canada Trust* v. *United Steel*, *supra*. The current situation is somewhat similar, though not identical, to that which existed in TD 363. In TD 363, the Board initially commented on its practice of considering employee interventions related to employee

wishes:

> [72] One of the bases for the reconsideration application is the failure by the original panel to provide copies of the employees' interventions to the other parties. Pursuant to section 35 of the Regulations, the Board is required to keep employee wishes confidential. That section provides as follows:
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> > 35. The Board shall not disclose to anyone evidence that could reveal membership in a trade union, opposition to the certification of a trade union or the wish of any employee to be represented by or not to be represented by a trade union, unless the disclosure would be in furtherance of the objectives of the *Code*.
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> [73] Because the interventions filed addressed the wishes of the employees, in keeping with section 35 of the Regulations, the Board did not disclose the employees' letters to the union or the employer. The confidentiality extended to the wishes of employees or their membership in a trade union is primarily intended to prevent harassment or reprisals. There are also other well-established labour relations reasons for not revealing such information. For example, the knowledge of only borderline majority support for a trade union could have detrimental effects on collective bargaining, particularly in the context of a first collective agreement. Consequently, the Board has consistently denied requests to provide evidence of union membership (see *Maritime-Ontario Freight Lines Limited* v. *Teamsters Local Union 938*, no. A-574-00, November 2, 2001 (F.C.A.); *Réseau de Télévision Quatre Saisons Inc.* (1990), 79 di 195; and 90 CLLC 16,047 (CLRB no. 779); and *K.D. Marine Transport Ltd.* (1982), 51 di 130; and 83 CLLC 16,009 (CLRB no. 400)).
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> [74] The reconsideration panel is satisfied that the initial panel did consider the interventions filed by certain employees in its deliberations. ...

[40] The Board then commented on its general practice when issues are raised about the validity of membership evidence:

> [89] The Board's general practice in circumstances where questions arise as to the validity of the membership evidence or the manner in which it is obtained, is for the Board's investigating officer to conduct an investigation of the specific allegations. The officer may also contact a random sample of other employees to test the voluntary nature of the remainder of the membership evidence. This investigation is done on a confidential basis, usually by way of interviews with individual employees, and the results are reported to the Board by way of a confidential report, in accordance with the Board's *Regulations* (see *IMS Marine Surveyors Ltd.*, *supra*).
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> [90] The level or extent of the investigating officer's investigation is discretionary and may vary depending upon the circumstances. It will depend on a variety of factors, such as the nature and extent of the allegations, the size of the proposed bargaining unit and the availability and willingness of employees to be interviewed. Ultimately, it rests with the panel seized with the matter to determine whether further investigation is required and, if it is satisfied that the membership evidence is reliable, such evidence may be used to determine the true wishes of the employees.

[41] The Board also commented on an employer's role, which is relevant given the CEP's suggestion that BMI has no standing to question the membership evidence:

> [97] The employer points out that in *IMS Marine Surveyors Ltd.*, *supra*, the employer had filed a separate complaint and no employees had complained on their own. These factors, argues TD, distinguish the present case from that case. It submits that these distinctions are significant and should have caused the original panel to give greater consideration to the concerns and allegations raised by the employer. In the employer's view, the Board's reliance on the *IMS Marine Surveyors Ltd.*, *supra*, decision, without making the necessary distinctions, amounted to an error of law or policy.
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> [98] The essence of the original panel's comments to which the employer objects is that complaints of intimidation and coercion by the union in its organizing campaign should be raised by employees themselves and not by an employer. The *IMS Marine Surveyors Ltd.*, *supra*, decision was cited by the original panel as an authority for that proposition. The reconsideration panel would agree that, as a general rule, it is certainly preferable to have complaints of intimidation and coercion raised by those who have suffered directly from such alleged tactics. This would allow for the employer to remain neutral and outside of the main area of contention over employee wishes in cases where such evidence is in issue. We would also agree that such allegations should not be raised by an employer simply as a tactic to defeat or to stall the certification process. However, the reconsideration panel is of the view that such a proposition should not be interpreted so strictly as to suggest that employers are never entitled to raise such concerns in the context of an application for certification. The employer argues that the original panel's statement shows that it failed to properly distinguish the case in *IMS Marine Surveyors Ltd.*, *supra*, from the matter it had to consider. The reconsideration panel does not agree with this assessment. The opinion expressed by the original panel was made in *obiter* and did not affect the overall determination of the certification application by the Board. <u>As described above, a review of the confidential report in the original file shows that, although the original panel expressed its view as to the appropriate manner for bringing such allegations forward, it nevertheless did not prevent the Board from conducting an investigation into the very allegations raised by the employer. In the present case, as discussed above, the Board considered and investigated the allegations raised by the employer, through its practice of confidential interviews with affected employees, and satisfied itself that there was insufficient evidence to support a finding of intimidation or coercion that would call into question the reliability of the membership evidence submitted. The Board then, having already considered and disposed of the allegations, expressed its view as to what it considered a more appropriate manner for raising such allegations.</u>
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> (emphasis added)

[42] Unlike in several provinces, the *Code* does not require a mandatory vote for all certifications. Provided there is majority support, the Board will usually certify a bargaining agent based on membership evidence alone:

> 28. Where the Board
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> (*a*) has received from a trade union an application for certification as the bargaining agent for a unit,
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> (*b*) has determined the unit that constitutes a unit appropriate for collective bargaining, and
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> (*c*) is satisfied that, as of the date of the filing of the application or of such other date as the Board considers appropriate, a majority of the employees in the unit wish to have the trade union represent them as their bargaining agent,
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> <u>the Board shall, subject to this Part, certify the trade union</u> making the application as the bargaining agent for the bargaining unit.
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> (emphasis added)

[43] The Board retains the discretion under section 29(1) to hold a vote in situations where it deems it necessary. This demonstrates the importance for the Board and its personnel to ensure the veracity of card-based membership evidence. In situations where membership evidence is greater than 35%, but less than 50% in the appropriate bargaining unit, the Board must hold a vote:

> 29. (1) The Board may, in any case, for the purpose of satisfying itself as to whether employees in a unit wish to have a particular trade union represent them as their bargaining agent, order that a representation vote be taken among the employees in the unit.
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> ...
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> (2) Where a trade union applies for certification as the bargaining agent for a unit in respect of which no other trade union is the bargaining agent, and the Board is satisfied that not less than thirty-five per cent and not more than fifty per cent of the employees in the unit are members of the trade union, the Board shall order that a representation vote be taken among the employees in the unit.
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> (emphasis added)

[44] As explained in *TD Canada Trust* v. *United Steel*, *supra*, the Board examines on a confidential basis the circumstances surrounding alleged irregularities in membership evidence. As mentioned, the Board's Industrial Relations Officer (IRO) has carried out an in-depth confidential investigation in this case.

[45] The Board will consider that investigation into the CEP's membership evidence, as part of its deliberations for the CEP's certification application in file 28412-C.

VI–Conclusion

[46] The Board has considered BMI's ULP complaint and has decided that the allegations it raised, even if true, would not amount to intimidation or coercion under section 96 of the *Code*. That complaint is dismissed.

[47]The Board will consider the parties' submissions in this file and the IRO's confidential report about the CEP's membership evidence when deciding the CEP's certification application (file 28412-C).

[48] The Board has already scheduled a hearing in the CEP's ULP complaint (file 28365-C).

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

Graham J. Clarke
Vice-Chairperson

John Bowman
Member

David P. Olsen
Member